69618-1

69618-1

NO. 69618-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES SWANSON,

Appellant.

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

The Honorable George Appel, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a fair trial when the prosecutor misrepresented the law in closing argument.

2. Appellant was denied his right to a fair trial when the court overruled defense counsel's objection to the prosecutor's misstatement of the law.

Issues Pertaining to Assignments of Error

1. Appellant was charged with indecent exposure. To be guilty of indecent exposure, the exposure must be made intentionally. The defense argued the evidence suggested appellant did not intend to be seen, and the state therefore failed to prove an intentional exposure as required under the law. In rebuttal closing argument, the prosecutor accused the defense of misstating the law and argued the state was required to prove only that appellant intended the act that constituted the exposure (i.e. masturbation), not that he intended for it to be seen. Did the prosecutor misstate the law and thereby deprive appellant of his right to a fair trial?

2. Did the trial court err in overruling defense counsel's objection to the prosecutor's rebuttal closing argument and thereby

increase the likelihood the jury was affected by the prosecutor's misconduct?

B. STATEMENT OF THE CASE[1]

1. Procedural Facts

Following a jury trial in Snohomish County Superior Court, appellant James Swanson was convicted of indecent exposure,[2] reportedly committed with sexual motivation. CP 34-35. The state alleged Swanson exposed himself to a "bikini barrista" at a drive-through espresso stand on the morning of May 25, 2011. CP 82-83; RP 4-5. Swanson was sentenced to two months on the underlying offense and 12 months on the enhancement, in addition to three years of community supervision. CP 2-17. This appeal follows. CP 1.

2. Trial Testimony

On May 25, 2011, Cayden Boyovich was working the early shift as a bikini barrista at Cowgirls Espresso in Lynnwood. RP 48, 51. Her first customer pulled up that morning at 5:00 a.m.; it was

[1] "RP" refers the jury trial and sentencing hearing respectively held on October 15-16, and November 27, 2012, contained in one bound volume.

[2] Swanson stipulated he had a prior conviction for indecent exposure, which elevated the allegation to a felony charge. CP 55; RP 113; RCW 9A.88.010(2)(c). The jury was instructed to consider evidence of the prior conviction "only for the purpose of determining whether he has a prior conviction under RCW 9A.88.010." CP 44; see also RP 8.

still dark. RP 55, 76. Boyovich testified she typically could see inside vehicles at that time in the morning because there is a outside light on either side of the espresso stand where cars can pull up. RP 55.

Boyovich testified her first customer was driving a red Ford Ranger. According to Boyovich, the driver did not pull up normally, but parked further back from where most customers park. RP 56. Boyovich explained that when someone pulls up, his or her car window is usually aligned with the opening for the espresso stand window, which is two feet across.[3] RP 57. This driver was off the mark by a foot, however. RP 57.

Boyovich greeted the driver and he ordered an espresso drink. RP 59. Boyovich turned away to grab a cup but turned back toward the driver to start a conversation while she made the drink. RP 59. Boyovich testified the driver did not appear to want to talk. RP 59. Boyovich reportedly noticed the driver's shoulder move and glanced down into the car. She claimed she saw that the driver's pants were unzipped and he was masturbating with his right hand.

[3] While the window opening itself is two feet across, the espresso stand has a double window. Boyovich testified that as a result, she has a view to the outside of four feet across. RP 57.

RP 59-60. Boyovich continued to make the drink and pretended she did not see anything. RP 59-60.

According to Boyovich, the driver held a credit card in his other hand. RP 61. She exchanged the drink for the card, but it was an awkward exchange, as the truck was still parked back a ways. RP 63.

Boyovich testified that when she took the card, the driver was no longer masturbating but still exposed. RP 63-64. Boyovich swiped the card and handed it back to the driver on a clipboard with a charge slip for him to sign. RP 63. The name on the card was James Swanson. RP 67. When the truck pulled away, Boyovich took down the license plate number and called the police. RP 65.

Deputy Ian Huri responded to Cowgirls Espresso when he came on duty that morning at 6:00 a.m. RP 99. Boyovich gave Huri the name she obtained from the credit card. RP 100. The last name on the card, Swanson, was the same as the truck's registered owner, Catherine Swanson.[4] RP 102.

Huri returned to the precinct and created a photomontage that included Swanson's picture, which Huri obtained from local records. RP 104-105. When Huri showed the montage to

Boyovich later that day, she identified Swanson as the person driving the truck that morning. RP 70-72, 106. Boyovich also identified Swanson in court. RP 65.

Catherine Swanson testified that although technically, she owned the red Ford Ranger, it really belonged to her brother James; he was the one who paid for it and drove it. RP 112-13.

3. Jury Instructions and Closing Argument

The court provided the jury with the following relevant instructions.

> Instruction No. 7
>
> A person commits the crime of indecent exposure when he or she intentionally makes any open and obscene exposure of his or her person knowing that such conduct is likely to cause reasonable affront or alarm, and that the person had been previously convicted of Indecent Exposure under RCW 9A.88.010.

CP 45.

> Instruction No. 8
>
> To convict the defendant of the crime of Indecent Exposure, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 25th day of May, 2011, the defendant made an open and

[4] On his way to contact Boyovich, Huri ran the license plate Boyovich recorded and obtained the registered owner's name and address. RP 100.

> obscene exposure of the defendant's person to C.B.-G.;[5]
>
> (2) That the defendant acted intentionally;
>
> (3) That the defendant knew that such conduct was likely to cause reasonable affront or alarm;
>
> (4) That this act occurred in the State of Washington; and
>
> (5) That the defendant had been previously convicted of Indecent Exposure under RCW 9A.88.010.
>
> ...

CP 46.

In discussing elements (1) and (2) in the to-convict instruction – that defendant made an open and obscene exposure and that the defendant acted intentionally – the prosecutor argued the jury was required only to find that Swanson intended the act of masturbation:

> Number (2), "*That the defendant acted intentionally*." There's a definition that follows this that talks about intent. It says, "*A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime*," meaning that you don't have to intend a crime; you have to intend the act that turns out to be a crime.
>
> So if somebody is standing behind me and I accidentally hit them, that wouldn't be intentionally assaulting him, would it, because I didn't intend that. Now, if I intend to throw a punch at him and hit him, even if I think it's okay for some reason, that means I intended the act that constitutes a crime. It turns out

[5] On the day in question, Cayden Boyovich's last name was Bergsma Gaston. RP 47.

> it was a crime to punch him. That's why it's important to follow that definition.
>
> So in our case, the defendant acted intentionally. Unless you think he somehow mistook his penis for a can of spray paint and was just shaking it up, that one's pretty easy.

RP 123-24 (italics in original, underlined emphasis added).

Turning to element (3), the prosecutor argued "this one is much more important in terms of what is going on in his head: "*That the defendant knew that such conduct was likely to cause reasonable affront or alarm.*" RP 124 (italics in original). And according to the prosecutor, evidence Swanson was hiding was evidence of such knowledge:

> So even if he is hiding, which he wasn't, but if you wanted to believe that, why would he hide? Because he knows it would cause reasonable affront or alarm.

RP 124.

In contrast, defense counsel had a different interpretation of what is meant by acting intentionally as far as element (1) is concerned. As the defense argued, the jury must find not only that Swanson intended the act of masturbation but that he intended it to be seen:

> I just want to start by saying, now that you have heard the instructions, we all understand that it's not a crime to masturbate in your car. It's not a crime

> to masturbate in your car and someone walks by and sees you masturbating in your car, and if you didn't intend them to see you masturbating in your car. It's only a crime to masturbate in your car if you intend for someone there to see what you are doing and to – with the knowledge that they are going to be alarmed at the sight of it.

RP 130-31.

In support, the defense relied on the definitional instruction of indecent exposure:

> Specifically, "A person commits the crime of indecent exposure when he or she intentionally makes any open and obscene exposure of his or her person. . . ."
>
> The intention is that it be open; that it be seen by someone else. That's what the state has to prove beyond a reasonable doubt, that Mr. Swanson, in going through that Espresso drive-through, intended that barista to see what he was doing in his car.

RP 131.

As defense counsel argued, the evidence showed Swanson was trying to be clandestine:

> This is not an inherently intentional act. In fact, it's quite the opposite. The inference that you can draw, from the barista's testimony, is that he was trying to be clandestine. He was trying to hide. He was trying to make it so that she couldn't see him. How do we know that? Well, he didn't pull all the way up to the stand where normal customers come. He pulled back. She said that his car was back far enough that it was awkward for her to reach out her window and hand him the drink. He's [sic] hasn't pulled right up and said, "Hey, look at me, Barista, look at what I'm doing, Ha ha, doesn't that shake you up?" He has

> pulled back in a dark area where, presumably, if she is looking out her window, because his window is back, there's a dash, a steering column, a driver's side door. It doesn't matter whether or not she could see into the vehicle. She testified she could see in the vehicle. It's not in here, in order for there to be indecent exposure, the barista has to be able to see in the vehicle. The requirement is that the defendant, Mr. Swanson, has to intend for her to be able to see what he's doing inside the vehicle.

RP 131-32.

The defense further urged that if the jury believed Swanson was hiding, as discussed by the prosecutor in closing, it would have to acquit:

> Mr. Hunter [the prosecutor] in his remarks said, with regard to whether he knew it was going to cause a reasonable affront, well, maybe he was hiding, because he knew it was going to cause a reasonable affront. It can't be both ways. If he's hiding, it is not an intentional, open act. He is not intending for her to see it. So if he is hiding, you have to find him not guilty. The State hasn't met their burden.

RP 133.

And as defense counsel further pointed out, at no point did Boyovich give any indication that she could see what Swanson was doing. RP 133-34. Moreover, Swanson gave Boyovich his credit card, a further indication he did not believe Boyovich had seen anything. RP 134.

The prosecutor began his rebuttal by lambasting defense counsel's interpretation of the law:

> Most trials come down to the facts. This one, apparently, is going to come down to the law. What you just heard was a misstatement of the law. But you get to decide that, because you will have the original copy with you to take back there. There is a sentence in here that the defense has latched onto in trying to make you see it the way that it's not supposed to be seen.
>
> Instruction number 7 is kind of a summary of what indecent exposure is. It says, "A person commits the crime of indecent exposure when he or she intentionally makes any open and obscene exposure of his or her person..." blah blah blah. So the defense would have you believe that he has to intend that it be open and intend that it be obscene, apparently. But what this says is, he has to intend the exposure, and the exposure has to be open and obscene, which it was in this case, which is exactly why Instruction Number 8 is broken up much more specifically, and it's phrased in a different order. It makes crystal clear that the defendant had to make – it doesn't say anything about intend, it says "make" – an open and obscene exposure of his person to Cayden. And then number (2) is where the intent comes, where it says that he intended to act. That's why I spent the time earlier saying you don't have to intend it to be a crime; you have to intend the act that turns out to be a crime.

RP 137-38.

At this point, defense counsel objected. RP 138. The objection was overruled and the court indicated: "The jury will have

the instructions which I have given. Those are the instructions which apply." RP 138.

The prosecutor therefore continued:

> If you want to read them the way the defense suggests, you have that prerogative; but that's not what they say. If you think I'm wrong, then I'll expect a not guilty verdict. Read them yourselves. But don't focus on the first half of the sentence in Number 7 and ignore the context, the definitions and, specifically, Number 8, which is what you have to step through.

RP 138.

Once the parties and court were informed that the jury had reached a verdict, but before the verdict was taken, the court reconvened and defense counsel renewed her objection to the prosecutor's rebuttal argument. RP 143-44. Specifically, the defense asked the court to make a ruling as to the meaning of intent in RCW 9A.88.010 and issue a curative instruction if the court agreed with defense counsel's interpretation:

> If you agreed with me that that was a misstatement of the law, I think it would be appropriate to tell the jury that they have to find that he intended it to be an exposure, not just that he intended to masturbate and someone saw it.

RP 144. The court declined to take any action other than to bring the jury in for its verdict. RP 146-47.

C. ARGUMENT

SWANSON WAS DENIED A FAIR TRIAL DUE TO THE PROSECUTOR'S MISSTATEMENT OF THE LAW IN CLOSING ARGUMENT AND THE COURT'S ENDORSEMENT OF THAT MISSTATEMENT WHEN IT OVERRULED DEFENSE COUNSEL'S TIMELY OBJECTION.

Contrary to the prosecutor's argument, defense counsel did not misstate the law when she argued the jury must find Swanson intentionally exposed himself, i.e. intended to be seen, in order to convict him of indecent exposure. Based on the common sense grammatical reading of the statute, the legislative history and the case law, defense counsel's interpretation was correct. The prosecutor's argument instead that the jury must find only that Swanson intended the act that resulted in an open and obscene exposure was a misstatement of the law and constituted prosecutorial misconduct.

The trial court erred in overruling defense counsel's timely objection to the prosecutor's argument. In doing so, the court put its stamp of approval on the prosecutor's interpretation and thereby increased the likelihood the jurors were affected by the prosecutor's misconduct.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676.

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578.

The prosecutor may not misstate the law to the jury. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Here, the

prosecutor told the jury that it was not the State's burden under RCW 9A.88.010 to prove that Swanson intended to be seen, only that he intended the act that was ultimately seen. This was a misstatement of the law.

RCW 9A.88.010(1) provides in relevant part:

> A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm. The act of breastfeeding or expressing breast milk is not indecent exposure.

Common sense and a basic application of the rules of grammar demonstrate that the plain language of the law indicates the Legislature intended "intentionally" to modify both the transitive verb and the object of that verb. In other words, the plain language of the statute (and the to-convict instruction) required the State prove not only that Swanson intentionally made an exposure but also that he intended it to be open, i.e. not hidden, and obscene.

The prosecutor should have been well aware of the law's requirement because this reading of RCW 9A.88.010's language not only conforms to basic rules of grammar, but it is also well-supported by the legislative history and case law.

For example in Flores-Figueroa v. United States, 556 U.S. 646, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009), the United States Supreme Court interpreted a federal statute that included a similar sentence structure. At issue in Flores-Figueroa was 18 U.S.C. § 1028A(a)(1), which makes it a crime to "knowingly transfer[ ], possess[ ], or use[ ], without lawful authority, a means of identification of another person" during the commission of certain predicate offenses. Id. at 649.

Flores-Figueroa was a citizen of Mexico. In order to obtain work in the United States, he used an illegitimate social security card. At trial, Flores-Figueroa claimed the Government could not prove he knew the social security number he used was assigned to another person. In a similar vein as here, the Government there argued that "knowingly" did not modify "another person" and, therefore, it was not required to prove Flores-Figueroa knew the social security number belonged to another. Id. at 649-50.

The Supreme Court disagreed with the Government, holding that "the statute requires the Government to show that the defendant knew that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'" Id. at 647. It reasoned that, "[i]n ordinary

English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." Id. at 650 (emphasis added).

To illustrate, the Court explained:

> if a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy and that the toy belongs to his sibling. If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese.

Id. at 651. The Court went on to explain that, "the manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage." Id. at 652 (citations omitted).

Even though the Supreme Court was interpreting a federal statute and not Washington's indecent exposure statute, its interpretation was based on basic rules of grammar, common sense, and the ordinary interpretation given criminal statutes. As such, its reasoning is equally applicable to other statutes that similarly use terms, such as "knowingly" or "intentionally," as is the case here, to modify a transitory verb phrase. See, e.g. U.S. v.

Shim, 584 F.3d 39, (2nd Cir. 2009) (applying same reasoning when interpreting a statute making it a crime for a person to knowingly transport women in interstate commerce and holding that the Government must show both the defendant knew he was transporting a woman and knew he was transporting in interstate commerce). Hence, the reasoning applied in Flores-Figueroa strongly supports Swanson's position that the prosecutor's interpretation of the law was patently unreasonable.

This Court's decision in State v. Killingsworth, 166 Wn. App. 283, 269 P.3d 1064 (2012), also supports this conclusion. There, this Court reviewed a to-convict instruction under RCW 9A.82.050, which required the jury to find that the defendant "knowingly trafficked in stolen property." Id. at 289. Killingsworth claimed the instruction relieved the jury of its burden to prove that he knew the property in question was stolen because the term "knowingly" only modified the verb, not its object. Id. Applying an analysis remarkably similar to that used by the Supreme Court in Flores-Figueroa, this Court held "knowingly" modified both "trafficked" and "stolen," explaining the "most natural reading of the adverb 'knowingly,' ... is that that it modifies the verb phrase 'trafficked in stolen property.'" Id. (citing State v. J.M., 144 Wn.2d 472, 480-81,

28 P.3d 720 (2001)). This Court reasoned that any other reading of the language was unreasonable.

Applying the same reasoning and common sense approach as was applied by this Court in Killingsworth and the U.S. Supreme Court in Flores-Figueroa, the prosecutor's argument to the jury that the State had to prove only that Swanson intended the act constituting the exposure – not that he intended it to be *open* and obscene – was patently unreasonable and a clear misstatement of the law.

That this was a misstatement of the law is also supported by the case law and legislative history of the indecent exposure statute.

Previously, the indecency statute provided:

> (1) A person is guilty of public indecency if he makes any open and obscene exposure of his person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.
>
> (2) Public indecency is a misdemeanor unless such person exposes himself to a person under the age of fourteen years in which case indecency is a gross misdemeanor.

Former RCW 9A.88.010; Laws of 1975, 1st Ex. Sess. Ch. 260.

The meaning of the former statute was construed in State v. Sayler, 36 Wn. App. 230, 673 P.2d 870 (1983). In that case, Chris

Sayler lured two boys, ages 10 and 12, into the upstairs area of his garage and masturbated in front of them. He was convicted in District Court of indecency under former RCW 9A.88.010. On appellate review under RALJ, the Superior Court held the statute was ambiguous and must be given the meaning most favorable to Saylor. The state was therefore required to prove the offense occurred in a public place. Since it occurred in Saylor's garage, the state's proof was held insufficient by the Superior Court. Sayler, 36 Wn. App. at 231.

Division Two of this Court agreed the statute was ambiguous and that Sayler's interpretation was at least as reasonable as the state's, based in part on the statute's use of the word "public," "open" and "exposure:"

> We believe it is appropriate in interpreting a statute to use simple logic and to give ordinary English words their ordinary meaning. RCW 9A.88.010(1) defines the elements of the crime and (2) enhances the punishment if children are involved. Three ordinary words, underscored in the statutory text above, are significant in analyzing (1): "public," "open" and "exposure." Webster tells us that: "public" means "1: a place accessible or visible to all ..." "open" means "2a: completely free from concealment: exposed ...;" and "expose" means "2: to lay open to view:" Webster's Third New International Dictionary (Merriam 1969). Logic and a decent respect for both language and Legislature tell us that the latter would not in this context have used

> "open" as an adjective to "exposure" because the words are synonymous. Therefore, it is logical to assume that "open" is used in relation to, and in the same sense as, "public." Thus, the forbidden conduct is public conduct, and public, in the context, must refer to place.

Sayler, 36 Wn. App. at 236.

Following Sayler, however, the Legislature amended the statute to read:

> (1) A person is guilty of indecent exposure if he intentionally makes any open and obscene exposure of his person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.

Former RCW 9A.88.010. In the final bill report that accompanied the amendments to the statute, the House and Senate Committees on the Judiciary synopsized the impetus for the legislation.

> BACKGROUND:
>
> A 1983 Washington Court of Appeals decision held that, under the current statute, an exposure of one's person must occur in a public place to constitute the crime of public indecency. It remains doubtful whether an individual can be convicted of public indecency where the offense occurs in a private place.
>
> SUMMARY:
>
> The crime of public indecency is renamed as the crime of indecent exposure. For a person to be guilty of the crime of indecent exposure, the exposure must be made intentionally.

House and Senate Committees on Judiciary, Final Bill Report Senate Bill 6012, 50th Legislature (1987).

Thus, the Legislature removed the requirement that the exposure must occur in public. State v. Dubois, 58 Wn. App. 299, 303-304, 793 P.2d 439 (1990). But the Legislature restated its requirement that it be "open." See Dubois, 58 Wn. App. at 304. In doing so, it must have intended for "open" to mean something other than "public," such as its ordinary meaning, noted above: "completely free from concealment." Sayler, 36 Wn. App. at 236 (quoting Webster's Third New International Dictionary (Merriam 1969)). Indeed, this interpretation is reinforced by the summary of the bill, which states: "the exposure must be made intentionally." In short, it is clear the Legislature intended "intentionally" to modify not only the verb "makes" but the object of that verb: "an open and obscene exposure."

Indeed, that is how this Court has since interpreted the statute, stating:

> As previously noted, the gravamen of the crime is an intentional and "obscene exposure" in the presence of another that offends society's sense of "instinctive modesty, human decency, and common propriety." So long as an obscene exposure takes place when another is present and the offender knew the

> exposure likely would cause reasonable alarm, the crime has been committed.

State v. Vars, 157 Wn. App. 482, 237 P.3d 378 (2010) (emphasis added).

Defense counsel's argument therefore that the state was required to prove Swanson intended his exposure to be seen was well supported by the law and instructions given in his case. It was the prosecutor who misstated the law in arguing the state had no burden to prove such intent. This constituted misconduct effectively depriving the defense of its ability to argue its theory of the case.

There is a substantial likelihood the prosecutor's misconduct affected the verdict. The jury was instructed the lawyers' "remarks, statements and arguments are intended to help you understand the evidence and apply the law." CP 38. Significantly, the prosecutor provided the last word to the jurors on what the law meant. He boldly told them the instructions did not mean what the defense said they meant.

Unfortunately, the court overruled defense counsel's objection to the prosecutor's argument she had misstated the law. Accordingly, the likelihood the prosecutor's misconduct affected the

verdict was multiplied. See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (by overruling defense objection to improper argument, trial court "lent an aura of legitimacy to what was otherwise improper argument."); State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (overruling defense objection to improper argument "increases the likelihood that the misconduct affected the jury's verdict.").

This was not an open and shut case. The defense in closing argument pointed to persuasive evidence suggesting Swanson was trying to conceal his actions rather than intentionally expose them. Because of the prosecutor's improper argument, however, it is likely the jury concluded Swanson's intent was irrelevant, so long as he intended the act that constituted the exposure, as argued by the prosecutor. Because the prosecutor's argument, combined with the court's stamp of approval, deprived Swanson of his right to a fair trial, this Court should reverse his conviction.

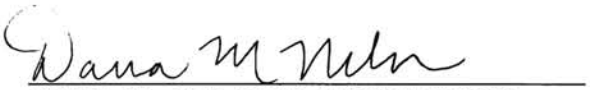
D. CONCLUSION

Because prosecutorial misconduct deprived Swanson of his right to a fair trial, this Court should reverse his conviction.

Dated this 13th day of May, 2013

Respectfully submitted

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69618-1-I
	)	
JAMES SWANSON,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF MAY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MAY 2013.

X Patrick Mayovsky