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SUPREME COURT NO. 97486-1

NO. 77912-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STACY EMANUAL GOODWIN,

Petitioner.

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

The Honorable Matthew Williams, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Stacy Emanual Goodwin, the appellant below, seeks review of the appended Court of Appeals decision in State v. Goodwin, noted at ___ Wn. App. 2d ___, 2019 WL 1897667, No. 77912-5-I, (Apr. 29, 2019) (Appendix A), following denial of his motion for reconsideration on June 25, 2019 (Appendix B).

B. ISSUE PRESENTED FOR REVIEW

A prosecutor's improper argument made after an opinion was published prohibiting the same argument constitutes flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). Is review appropriate under RAP 13.4(b)(2) where the prosecutor repeatedly argued a theory of constructive knowledge previously held to be improper in State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015)?

C. STATEMENT OF THE CASE

The state charged Stacy Emanual Goodwin with one count of possession of a stolen vehicle. CP 28.

The charge arose from allegations that Goodwin drove a vehicle that was previously reported as stolen and, after driving past Officer Schott

Barfield, parked the vehicle and left on foot. 1RP[1] 248-55. Goodwin was subsequently arrested and charged with possession of a stolen vehicle. 1RP 283; CP 1-5.

The sole issue at trial was whether Goodwin knew that the vehicle was stolen. 1RP 389, 402. The registered owner of the vehicle, Shelby Williams, testified that she discovered her vehicle was stolen on April 22, 2017 and that she did not give anyone else permission to possess her vehicle. 1RP 238-39, 240-41. In support of its position that Goodwin knew the car had been stolen, the state presented the testimony of Officer Barfield and Officer Adele O'Rourke. 1RP 245-74, 286-305.

Officer Barfield testified that on April 25, 2017 an individual called 911 to report that an unoccupied vehicle was running in the parking lot of an apartment complex. 1RP 248-49. Officer Barfield ran the plates of the vehicle and it returned as being stolen. 1RP 253. Waiting to see who would return to the vehicle, Officer Barfield waited and soon saw Goodwin. 1RP 276. Officer Barfield testified that Goodwin was driving the vehicle and that Goodwin saw him and made the first available tum. 1RP 253. After losing sight of the vehicle, Officer Barfield again saw Goodwin outside of the vehicle running toward a bus. 1RP 255. Officer

[1] Consistent with briefing in the Court of Appeals, Goodwin refers to the verbatim reports of proceedings as follows: 1RP—consecutively paginated transcripts of December 11, 2017, December 12, 2017, December 13, 2017, December 14, 2017, and December 18, 2017; 2RP—January 3, 2018.

Barfield made contact with Goodwin on foot and ordered him to sit down. 1RP 282. Goodwin told Officer Barfield that an individual told him the vehicle was stolen and Goodwin discussed returning the vehicle to the police. 1RP 256. Officer Barfield arrested Goodwin. 1RP 283.

Officer O'Rourke testified that Officer Barfield called her to the scene to investigate a possible stolen vehicle. 1RP 288. She contacted the registered owner of the vehicle who gave her permission to search. 1RP 290. Officer O'Rourke recovered a shaved key from the ignition and property belonging to Goodwin inside the vehicle. 1RP 291-92.

During closing argument, the prosecutor discussed direct and circumstantial evidence in relation to whether the state had met its burden of establishing beyond a reasonable doubt that Goodwin possessed knowledge that the vehicle in question was stolen, and touched on the permissive inference of actual knowledge from a finding of constructive knowledge allowed by Jury Instruction No. 10. 1RP 387-97. She argued, "It is not reasonable to expect that a person who knows he is in a stolen car will walk up to the officer and be like, 'Hey, I'm committing this crime' . . . and that would be direct evidence . . . It may happen, but it's not necessarily reasonable to expect for that to happen." 1RP 389. She continued, "It is reasonable, though, to look at circumstantial evidence about what a person in this position knew or should have known, and that

is when we come to instruction No. 10." 1RP 389. "Whatever I say that is in contradiction to [Jury Instruction No. 10]," she continued, "ignore me and refer to it." 1RP 389.

In discussing the permissive inference included in the second paragraph of Jury Instruction No. 10, the prosecutor stated:

> So if a person in a reasonable position should have known that, hey, I think this is a stolen car, I don't think this car belongs to whoever [sic] gave it to me; here's [sic] the reasons why . . . if a reasonable person in that position would have known, should have known, then you are permitted to find that the knowledge element has been met.

1RP 390.

The jury returned a guilty verdict. CP 64. The trial court imposed a standard range sentence of 43 months in custody. CP 75. Goodwin timely appealed. CP 80-88.

On appeal, Goodwin argued that he was denied a fair trial due to prosecutorial misconduct in closing argument. CP 80-88; Br. of Appellant at 5-11. Specifically, Goodwin argued that the prosecutor's argument that a finding of constructive knowledge satisfied its burden to prove the knowledge element of the crime charged constituted flagrant and ill-intentioned misconduct. Br. of Appellant at 5-11.

In omitting in its argument that the knowledge element of the crime charged required proof beyond a reasonable doubt of Goodwin's

actual, subjective knowledge of the stolen nature of the vehicle and urging the jury to consider what a reasonable person in Goodwin's situation "should have known," the prosecutor misstated the law on multiple occasions. Br. of Appellant at 7. The jury was instructed as to knowledge using the language of WPIC 10.2. Br. of Appellant at 7. The second paragraph of that instruction lays out a permissible inference regarding the knowledge element: If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact. Br. of Appellant at 7. In other words, the state's burden to prove the defendant's actual knowledge beyond a reasonable doubt remains constant; however, if the jury finds that a reasonable person in the defendant's position would have had knowledge, the jury may infer that the defendant actually had knowledge. Br. of Appellant at 7.

While such an inference is therefore permitted by WPIC 10.2, it is permitted only to the extent that the jury may use the reasonable person standard to find that the defendant actually had knowledge—not to subject the defendant to liability under a theory of constructive knowledge by substituting that standard for any subjective knowledge of the defendant's. Br. of Appellant at 8.

Goodwin pointed out that courts have recognized that a juror could understandably misinterpret Washington's culpability statute to allow a finding of knowledge if an ordinary person in the same situation would or should have known. Br. of Appellant at 8-9; Allen, 182 Wn.2d at 374; State v. Shipp, 93 Wn. 2d 510, 514, 610 P.2d 1322 (1980). The prosecutor obscured this subtle distinction by repeatedly urging jurors to find that the knowledge element had been met if they thought Goodwin should have known that the vehicle in question was stolen. Br. of Appellant at 9.

Goodwin argued that Washington authority provides that when "case law and professional standards . . . clearly warned against the conduct," the misconduct qualifies as flagrant and ill-intentioned. Br. of Appellant at 9; In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012); see also State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (holding prosecutorial arguments flagrant and ill-intentioned where same arguments were previously held to be improper in published opinion). Allen was available to the prosecutor and it clearly warns against misstating this aspect of the culpability statute, noting that it can be easily misinterpreted by jurors.

As a result of this misconduct, Goodwin argued, a juror who may have doubted Goodwin's actual knowledge that the car was stolen could have felt that the knowledge element was satisfied because a reasonable

person in Goodwin’s position should have known that it was. Br. of Appellant at 10. Prejudice is especially likely where the misstatements concerned the key issue of the case and concerned a legal concept easily misunderstood by jurors. Br. of Appellant at 10. The misstatement of law was repeated multiple times. Br. of Appellant at 10. The repeated misstatements of law regarding an already confusing legal concept directly before jurors deliberated created a substantial likelihood that the misconduct affected the jury’s verdict. Br. of Appellant at 10.

The prosecutor’s arguments obscured what the jury was permitted to consider in determining whether the state had met its burden of proving Goodwin's knowledge beyond a reasonable doubt, violating Goodwin's right to a fair trial. Br. of Appellant at 10. A curative instruction would not have neutralized the prejudicial, misleading effect of repeated misstatements of the law. Br. of Appellant at 10-11. Therefore, Goodwin argued that the prosecutor’s misconduct merits reversal and a new trial. Br. of Appellant at 11.

The Court of Appeals held that while some of the prosecutor’s statements in closing were improper, Goodwin had not established that the misstatements of law were prejudicial because the prosecutor also correctly stated the law at one point, the prosecutor told jurors to refer to the applicable jury instruction and disregard anything she said that was

contrary to it, and that the prosecutor made other arguments besides the improper argument at issue here. Appendix A at 3-4. The Court also distinguished State v. Allen by noting that the same improper argument was repeated throughout closing and rebuttal, that Allen had objected to the improper argument, and that the record had revealed that the jury was actually influenced by the argument. Appendix A at 5; 182 Wn.2d at 375-78.

Goodwin moved for reconsideration, noting that the opinion did not address Goodwin's argument that the prosecutor's improper argument was flagrant and ill-intentioned because the argument itself had been previously held to be improper in a published opinion. The Court called on the state to answer Goodwin's motion.

In its answer, the state argued that the improper argument in closing was less pervasive and egregious than in Allen and other cases cited by Goodwin, State v. Glassman, 175 Wn.2d 696, 286 P.3d 673 (2012), and State v. Fleming, 83 Wn. App. 209, 921 P.3d 1076 (1996). The state also argued that the misconduct that occurred in Fleming and Glassman concerned legal concepts that were clearer, and that "[c]losing argument as to 'knowledge' in a circumstantial case is much more nuanced and potentially murky."

The Court of Appeals denied Goodwin's motion for reconsideration. Appendix B.

D. ARGUMENT IN SUPPORT OF REVIEW

THE COURT OF APPEALS DECISION CONFLICTS WITH MISCONDUCT PRINCIPLES AT ISSUE IN *STATE v. FLEMING*

A prosecutor's improper argument made after an opinion is published prohibiting the same argument constitutes flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) ("We note that this improper argument was made over two years after the opinion in *Casteneda Perez*, *supra*.[2] We therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial."). The Court of Appeals opinion concedes that the prosecutor's references to what a person in Goodwin's position "should have known" were improper because they suggested the jury could subject Goodwin to culpability under a constructive knowledge standard, an argument prohibited in Allen. Appendix A at 3. However, the decision fails to find that the prosecutor's misconduct constitutes flagrant and ill-intentioned misconduct. Appendix A at 3. In so doing, the decision arrives at a different result than State v. Fleming despite analogous facts.

[2] State v. Casteneda Perez, 61 Wn. App. 354, 810 P.2d 74 (1991).

While the decision does not address this inconsistency specifically, the state's response to appellant's motion for reconsideration argues that Fleming is distinguishable from the case at hand on the grounds that the misconduct in Fleming was "prolific and egregious and occurred about legal concepts that were more clear. . . . Closing argument as to 'knowledge' in a circumstantial case is much more nuanced and potentially murky."

Here, the prosecutor's improper argument in fact was repeated and egregious: in repeatedly interpreting the knowledge instruction to allow a finding of knowledge if an ordinary person "should have known," a defendant could be subjected to liability under a theory of constructive knowledge, which is unconstitutional. Allen, 182 Wn.2d at 374. The fact that this concept is "more nuanced" and "potentially murky", which the state somehow argues makes the misconduct less egregious, is particularly troublesome—it is much more likely that a juror could understandably misinterpret the law along with the prosecutor's improper argument, rendering it unlikely that a curative instruction would have neutralized the prejudicial, misleading effect of repeated statements of law. Allen, 182 Wn.2d at 374.

The Court of Appeals pointed out that while improper arguments were made in closing, the prosecutor also correctly stated the law and instructed jurors to ignore her if she contradicted the knowledge instruction.

Appendix at 3-4. But a prosecutor's improper argument is "not cured by . . . lengthy, legitimate arguments," and correctly referencing a jury instruction cannot give the state carte blanche to repeatedly misstate the law, especially where the concept she is explaining is "murky." Fleming, 83 Wn. App. at 216.

As the state's repeated improper argument was previously held to be improper in a published decision and referenced a concept easily misinterpreted that could subject a defendant to liability under an unconstitutional theory of constructive knowledge, the Court of Appeals decision conflicts with the misconduct principles at issue in Fleming and merits review under RAP 13.4(b)(2).

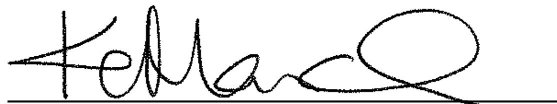
E. CONCLUSION

The prosecutor's improper argument in closing was previously prohibited by a published opinion, rendering that argument flagrant and ill-intentioned under Fleming, and the decision of the Court of Appeals affirming Goodwin's conviction is therefore in conflict with a published decision of the Court of Appeals. Goodwin asks this Court to grant review and reverse the Court of Appeals.

DATED this 25th day of July, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

FILED
4/29/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	No. 77912-5-I
v.	DIVISION ONE
STACY EMANUAL GOODWIN, Appellant.	UNPUBLISHED OPINION
	FILED: April 29, 2019

SMITH, J. — Stacy Emanual Goodwin appeals his conviction for possession of a stolen vehicle. He argues that the prosecutor committed reversible misconduct by misstating the law during closing argument. He also argues that the trial court erred in calculating his offender score because the court (1) counted three prior convictions separately without conducting a "same criminal conduct" analysis and (2) counted offenses that had "washed out." We hold that Goodwin has not established that the prosecutor's misstatements of law were prejudicial, and that Goodwin waived the right to a "same criminal conduct" analysis by affirmatively acknowledging the sentencing range below. We decline to reach the merits of Goodwin's "wash out" argument because it involves matters outside the record. Therefore, we affirm.

FACTS

The State charged Goodwin with possession of a stolen vehicle after an officer observed Goodwin driving a Honda that had been reported stolen. The sole contested issue at trial was whether Goodwin knew the Honda was stolen.

To this end, the prosecutor made the following remarks during closing argument regarding the standard for determining Goodwin's knowledge:

> It is not reasonable to expect that a person who knows he is in a stolen car will walk up to the officer and be like, "Hey, I'm committing this crime. I'm in a stolen car, just so you know," but there is -- and that would be direct evidence; right, of somebody saying, "Yeah, I'm in a stolen car." It may happen, but it's not necessarily reasonable to expect for that to happen.
>
> It is reasonable, though, to look at circumstantial evidence about what a person in this position knew *or should have known*, and that is when we come to instruction No. 10.
>
> The judge read it to you. I ask you to refer to that, please. Whatever I say that is in contradiction to that, ignore me and refer to it.
>
> To paraphrase, one knows of a circumstance or result when one is aware of that. That's one way. So that's sort of the big paragraph. The second paragraph is if a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted, not required -- you are not required to do this, but you are permitted to find that he or she acted with knowledge of that fact.
>
> So if a person in a reasonable position *should have known* that, hey, I think this is a stolen car, I don't think this car belongs to whoever gave it to me; here's the reasons why, if a person in that position, if a reasonable person in that position would have known, *should have known*, then you are permitted to find that the knowledge element has been met.

(Emphasis added.) Defense counsel did not object to the prosecutor's argument. A jury convicted Goodwin as charged, and the trial court sentenced Goodwin to 43 months of confinement based on an offender score of 9. Goodwin appeals.

ANALYSIS

Prosecutorial Misconduct

Goodwin argues that the prosecutor committed reversible misconduct by misstating the law during closing argument. Because Goodwin has not established that the misstatements of law were prejudicial, we disagree.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). "A prosecuting attorney commits misconduct by misstating the law." State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). But "[i]f the defendant did not object, he is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." State v. Whitaker, 6 Wn. App. 2d 1, 15-16, 429 P.3d 512 (2018). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting Thorgerson, 172 Wn.2d at 455).

Here, the prosecutor's references to what a person in Goodwin's position "should have known" were improper because they suggested the jury could subject Goodwin to culpability under a constructive knowledge standard. See Allen, 182 Wn.2d at 374 (explaining that Washington's culpability statute requires a finding of actual knowledge and that an interpretation that subjects a defendant to liability under a theory of constructive knowledge is unconstitutional).

But in the context of the prosecutor's entire argument, the references to "should have known," though improper, were not prejudicial. First, during the

same part of her argument, the prosecutor admonished the jury to refer to the actual instruction and that "[w]hatever I say that is in contradiction to that, ignore me and refer to [the instruction]." Second, the prosecutor correctly stated the law during the portion of her argument in which she indicated she was paraphrasing the instruction. Specifically, she correctly explained that "if a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted, not required . . . to find that he or she acted with knowledge of that fact." Third, the bulk of the prosecutor's closing argument was focused on attacking Goodwin's credibility and highlighting evidence suggesting that Goodwin *actually* knew the car was stolen—not on arguing that he *should* have known the car was stolen. For example, the prosecutor reminded the jury that Goodwin himself testified that someone had told him that the car was stolen. The prosecutor also emphasized the circumstantial evidence of Goodwin's actual knowledge, including that after he drove past a police officer, Goodwin proceeded in a big loop, parked and exited the car, and ran toward a bus stop, leaving the car running. Finally, the prosecutor's improper statements could readily have been cured by an instruction to the jury reminding it that a finding of actual knowledge is required for culpability. But no such instruction was requested. For these reasons, Goodwin has not met his burden to demonstrate that the prosecutor's improper statements were prejudicial. Cf. State v. Blizzard, 195 Wn. App. 717, 733, 381 P.3d 1241 (2016) ("A defendant who waits until appeal to raise misconduct arguments bears a heavy burden."), review denied, 187 Wn.2d 1012 (2017).

Goodwin argues that the prosecutor's improper statements were flagrant and ill intentioned and that "[a] curative instruction would not have neutralized the prejudicial, misleading effect of repeated misstatements of the law." He relies in large part on Allen to support his arguments. But Allen is distinguishable. There, the court recounted "numerous instances" where the prosecutor misstated the knowledge standard, including: (1) at least five times during closing, (2) in a slide show that repeatedly included a "should have known" standard, and (3) during rebuttal, where "the prosecuting attorney continued to misstate the knowledge standard" and displayed "a slide show that contained four slides titled 'Defendant Should Have Known.'" Allen, 182 Wn.2d at 376-77. Additionally, in Allen, the record revealed that the jury was influenced by the prosecutor's improper statements of the law—a factor that our Supreme Court indicated was "perhaps most important to [its] analysis." Allen, 182 Wn.2d at 378.

Here, Goodwin does not point to anything in the record revealing that the jury was influenced by the prosecutor's improper statements of the law, nor were those statements repeated throughout the prosecutor's closing and rebuttal or displayed visually as they were in Allen. Moreover, in Allen, the defendant objected to the prosecutor's improper statements. Therefore, on appeal, the Allen court asked only "whether there was a substantial likelihood that the misconduct affected the jury verdict." Allen, 182 Wn.2d at 375. But here, because Goodwin did not object, we apply a heightened standard, which, as discussed, Goodwin has not satisfied. Allen does not require reversal.

Offender Score Calculation

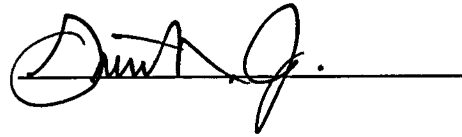
In a statement of additional grounds for review, Goodwin raises two issues regarding the calculation of his offender score. Neither merits review.

First, Goodwin argues that the trial court erred in calculating his offender score by counting three prior convictions separately without conducting a "same criminal conduct" analysis. But the trial court is not required, without invitation, to conduct a "same criminal conduct" analysis where the defendant affirmatively acknowledges his offender score. State v. Nitsch, 100 Wn. App. 512, 521-22, 997 P.2d 1000 (2000). Here, Goodwin asked at sentencing "for a 50-month sentence, *the middle of the range sentence*." (Emphasis added.) In other words, Goodwin affirmatively acknowledged through counsel that a sentencing range of 43 to 57 months—and therefore the offender score on which this range was based—was correct. Therefore, he has waived the right to argue otherwise on appeal. Cf. Nitsch, 100 Wn. App. at 522 (holding that defendant waived "same criminal conduct" argument where he implicitly acknowledged his offender score by affirmatively alleging a standard range calculated based on that score).

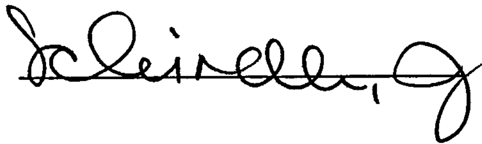
Goodwin next argues that the trial court improperly included, in his offender score, prior convictions that had "washed out." Under RCW 9.94A.525(2)(b)-(c) certain prior felony convictions "wash out" and are not counted in the offender score "if *since the last date of release from confinement . . . pursuant to a felony conviction*" the offender has spent a requisite number of years in the community "without committing any crime that subsequently results in a conviction." (Emphasis added.) But this record contains no information regarding Goodwin's

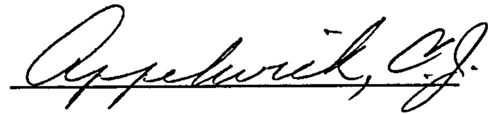
last date of release from confinement for a felony conviction.[1] Therefore, we decline to reach Goodwin's argument on its merits. See State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995) (reviewing court will not consider matters outside trial record on direct appeal; personal restraint petition is proper vehicle for bringing those matters before the court).

We affirm.



WE CONCUR:





[1] Indeed, the only information in the record regarding "wash out" is defense counsel's suggestion at sentencing that Goodwin's prior convictions *would have washed out* if not for subsequent convictions in 2009, 2010, and 2011.

APPENDIX B

FILED
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Court of Appeals
Division I
State of Washington

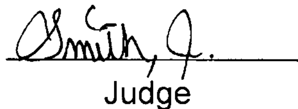
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. STACY EMANUAL GOODWIN, Appellant.	No. 77912-5-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Stacy Goodwin, has filed a motion for reconsideration of the opinion filed on April 29, 2019. Respondent, State of Washington, has filed an answer to appellant's motion. The court has determined that appellant's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:



Judge

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

July 25, 2019 - 3:26 PM

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