

NO. 69378-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL MCDONOUGH,

Appellant.

REC'D

APR 17 2013

King County Prosecutor
Appellate Unit

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

The Honorable Sharon Armstrong, Judge

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural History</u>	2
2. <u>Substantive Facts</u>	2
3. <u>Trial Errors</u>	5
(i). <u>Evidence Pertaining to Knife</u>	5
(ii). <u>Prosecutorial misconduct</u>	6
C. <u>ARGUMENT</u>	7
I. THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO INTRODUCE IRRELEVANT AND PREJUDICIAL KNIFE EVIDENCE OVER THE TIMELY OBJECTION OF THE DEFENSE.....	7
II. APPELLANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR IMPORPERLY APPEALED TO THE PASSIONS OF THE JURY.....	12
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Adkins v. Aluminum Co. of Am.</u> 110 Wn.2d 128, 750 P.2d 1257, 756 P.2d 142 (1988)	14
<u>State v. Borboa</u> 157 Wn.2d 108, 135 P.3d 469 (2006)	15, 16
<u>State v. Briejer</u> 172 Wn. App. 209, 289 P.3d 698 (2012)	8
<u>State v. Burkins</u> 94 Wn. App. 677, 973 P.2d 15 (1999)	8
<u>State v. Case</u> 49 Wn.2d 66, 298 P.2d 500 (1956)	13
<u>State v. Echevarria</u> 71 Wn. App. 595, 860 P.2d 420 (1993)	14
<u>State v. Evans</u> 163 Wn. App. 635, 260 P.3d 934 (2011)	13
<u>State v. Freeburg</u> 105 Wn. App. 492, 20 P.3d 984 (2001)	10
<u>State v. Huson</u> 73 Wn.2d 660, 440 P.2d 192 (1968)	14
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011)	13
<u>State v. Pierce</u> 169 Wn. App. 533, 280 P.3d 1158 (2012)	18, 20
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984)	13

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982)	10

FEDERAL CASES

<u>United States v. Kirvan</u> 997 F.2d 963 (1st Cir.1993).....	16
--	----

<u>United States v. Mooney</u> 315 F.3d 54 (1st Cir.2002)	14, 18
--	--------

OTHER JURISDICTIONS

<u>Chisholm v. State</u> 529 So.2d 635 (Fla.Dist.Ct.App.1988).....	16
---	----

<u>Gomez v. State</u> 751 So.2d 630 (Fla.Dist.Ct.App.1999).....	16
--	----

<u>Hayes v. State</u> 512 S.E.2d 294 (Ga.App.1999)	16
---	----

<u>State v. Carlson</u> 559 N.W.2d 802 (N.D.Ct.App.1997)	16
---	----

<u>State v. Thumm</u> 153 Idaho 533, 285 P.3d 348 (2012).....	16
--	----

RULES, STATUTES AND OTHER AUTHORITIES

1 J. Weinstein & M. Berger Evidence § 403 (1985)	10
---	----

ABA Standards for Criminal Justice (3d ed.1993)	14
---	----

ER 401	1, 8, 9, 12
--------------	-------------

TABLE OF AUTHORITIES (CONT'D)

	Page
ER403	1, 5, 9, 10, 12
ER 404	19

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it permitted the State to introduce irrelevant and prejudicial evidence over defense objection.

2. Appellant was denied a fair trial when the prosecutor engaged in improper and prejudicial conduct during closing argument.

Issues Pertaining to Assignments of Error

1. During the charged incident, appellant did not display a knife nor was there any evidence suggesting he used or intended to use the knife. Despite this, the prosecutor sought to introduce evidence that a knife was found on appellant at the time of arrest. Defense counsel objected under ER 401 and 403, but the objection was overruled. Was this reversible error?

2. The prosecutor improperly appealed to the jury's passions by engaging in an impermissible "golden rule" argument and improperly encouraging the jury to focus on community safety issues. Defense counsel made multiple objections, but the trial court overruled them. Was this reversible error?

B. STATEMENT OF THE CASE

1. Procedural History

On February 6, 2012, the King County prosecutor charged appellant Samuel McDonough with one count of indecent exposure with sexual motivation. CP 1-4. On September 4, 2012, the information was amended, and the prosecutor added one count of attempted burglary in the second degree. CP 6-7. A jury found McDonough guilty of indecent exposure with sexual motivation but not guilty of attempted burglary. CP 102-105. McDonough was sentence to 18 months incarceration. CP 107-118. He appeals. CP 119.

2. Substantive Facts

On February 2, 2012, Rachel Hunt and Demi Ryerson were working at Bigfoot Java, a drive-though/walk-up coffee stand in Issaquah. RP 204-206, 293. At approximately 8:30 a.m., McDonough walked up and ordered a coffee. RP 209, 212. McDonough paid for the coffee and asked to use a restroom. RP 212. Hunt informed him that the restroom inside the stand was for employees only. RP 212.

Hunt observed McDonough sit around outside the coffee stand for 20 to 30 minutes. RP 215. At one point, Hunt noticed

McDonough blowing kisses at her. RP 216. Ryerson then observed McDonough masturbating and alerted Hunt. RP 202, 300, 310. Hunt did not look to see and therefore did not personally observe anything indecent. RP 216, 220, 236, 24.

Hunt and Ryerson went to the back of the stand where their manager, Meisha Peffley, was filling out paper work. RP 247, 302. They told Peffley what was occurring. RP 302. Afterward, Peffley observed McDonough masturbating while staring at the employees. RP 250, 253. Peffley was scared and called 911. RP 254, 262.

While on the phone, the employees watched McDonough on video surveillance cameras. RP 224. At one point, they saw McDonough walk up to the window and, after seeing the girls were not there, go to the door at the back of the stand. RP 227. McDonough reportedly tried the doorknob, but it was locked, so he left. RP 227.

Police arrived shortly thereafter and arrested McDonough as he was walking away from the stand. RP 316-20, 324, 373. In response to police questioning, McDonough admitted he did something inappropriate, but he did not admit to indecent exposure. RP 321, 327, 331.

During a police interview, McDonough admitted to using drugs and being high on methamphetamines at that time. He talked about his inability to communicate well with women and his belief that ordinary social boundaries did not apply to him. McDonough also revealed his paranoid concerns and discussed his criminal history.¹ RP 376-413.

As indicated, at the time of the incident and during the interview, McDonough was high on methamphetamines. 3RP 382, 529. At trial, defense expert Dr. Steven Jurgens opined that this methamphetamine-induced intoxication combined with McDonough's underlying schizophrenia and his hyperglycemic condition² at the time of the incident resulted in a methamphetamine intoxication delirium. RP 520-21, 537-43. It was Jurgens' expert opinion this delirium impaired McDonough's ability to that know his conduct would reasonably cause affront or alarm. RP 521.

¹ McDonough's criminal history included the requisite prior conviction for indecent exposure, which was the subject of a stipulation submitted to the jury. CP 48; RP 444.

² McDonough is a diabetic. RP 330.

3. Trial Errors

(i). Evidence Pertaining to Knife

There was no evidence McDonough displayed a weapon during the incident or that he ever tried or intended to use one. RP 663. Yet, during direct examination of the arresting officer, the prosecutor asked if the officer had searched McDonough for weapons upon arrest. RP 320. The officer stated that he did. Defense counsel immediately objected on relevance grounds. RP 320. The trial judge responded: "Overruled. Procedure." RP 320.

The prosecutor then asked the officer what he found. Defense counsel quickly objected to the question as irrelevant and prejudicial under ER 403. The trial court overruled the objection without any further explanation. The officer then testified that McDonough was armed with a knife. RP 320.

Prior to closing arguments, defense counsel renewed his objection to the knife evidence. RP 657, 661. The prosecutor initially argued a relevant inference could be drawn between the knife and intent to cause fear. But after the trial court expressed some skepticism, he agreed not to mention the knife during argument. RP 659-62. Thereafter, the trial court assured defense

counsel that the knife evidence would not be addressed in argument, explaining:

[The prosecutor] is not going to talk about the knife. I mean, [McDonough] ... was armed with a knife at the time. He did not display the knife. So, [the prosecutor] is not going to argue that he intended to harm them or intimidate them by displaying the knife. There's not enough there from which the inference could be drawn.

RP 663.

(ii). Prosecutorial misconduct

During closing argument, the prosecutor set the tone of the state's argument by immediately focusing on the theme of fear:

"I have never been more scared in my life." When we think of the moments in our lives when we have the greatest amount of fear, the greatest amount of apprehension, for Meisha that day was going to be February 2nd, 2012. And we have only to imagine what it must have been like having to put forward a happy face, try to serve more customers, while at the same time having that level of fear and anxiety that forces you to call 911 to get help.

RP 671. Defense counsel objected on grounds that the prosecutor's argument was "a simple appeal to fear." RP 671. The trial court responded, saying only: "You've made your record. Thank You." RP 672.

The prosecutor continued:

And we must also imagine what it must have been like for Demi as she's putting forward this happy face, trying to serve customers, but knowing how violated she feels, how disgusted she is of the Defendant's actions. And how, just the very nature of where these women are, Bigfoot Java – I mean they're trapped inside – it's essential a fishbowl, visible to the outside world. The only boundary that separate – the only physical boundary that separates them from the outside world is a plane of glass. And yet, at the same time, there are additional boundaries that we have in place as a community, social boundaries that shield us ...

RP 672. Defense counsel objected to this line of argument as an improper appeal to community safety, and eventually noted a continuing objection. 2RP 672-73. The objections were overruled.

RP 672-73. The prosecutor continued:

These boundaries are in place are boundaries that protect us, that shield us from the Defendant's-or-or, protect us from people's actions. And in this case, these are boundaries that should have protected Meisha, Demi, and Rachelle from the Defendant.

CP 672-73.

C. ARGUMENT

- I. THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO INTRODUCE IRRELEVANT AND PREJUDICIAL KNIFE EVIDENCE OVER THE TIMELY OBJECTION OF THE DEFENSE.

The decision to admit evidence lies within discretion of the trial court, but such a decision will be overturned when it is shown

to be exercised on untenable grounds or for untenable reasons, or where it is shown to be manifestly unreasonable. State v. Briejer, 172 Wn. App. 209, 223, 289 P.3d 698 (2012).

Evidence is relevant only where it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Thus, evidence is relevant only “if a logical nexus exists between the evidence and the fact to be established.” Briejer, 172 Wn. App. at 226 (citing State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999)).

The fact that McDonough had a knife in his pocket when he was arrested was irrelevant because it was not logically connected to the incident or to any material facts to be established by the State. None of the alleged victims observed the knife. There is no indication McDonough ever displayed the knife or used it in any manner during the charged events.

As the trial court later recognized, based on this record the knife evidence was not logically connected to the charged crime. Indeed, it specifically stated: “[I]t concerns me a little bit that [the State] would argue... he had a weapon and he was to go in and, you know, cut them up. I don't think that's really justified from the

evidence.” RP 659 (emphasis added). More significantly, the trial court ultimately concluded there was not even enough of a logical connection to permit the State to argue the jury could infer any criminal intent from the knife evidence. RP 663 (“There’s not enough there from which the inference could be drawn”).

Given the lack of a logical nexus between the knife evidence and incident or the facts to be proved, it cannot be said the evidence was relevant under ER 401. Hence, the trial court should have sustained defense counsel’s objection and not allowed the jury to hear that McDonough was armed.

Even if this court disagrees and finds the evidence was minimally relevant, the evidence still should have been excluded under ER 403. ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Applying this rule to the record here demonstrated that the evidence should have been excluded.

On the one hand, as explained above, the probative value of the knife evidence was exceptionally low because McDonough

never displayed the knife and there was no proof that the women were even aware he had it. Thus, as the trial court ultimately recognized, the knife evidence was not particularly probative of any of elements of the charged crimes. RP 663.

On the other hand, however, the knife evidence was highly prejudicial. Under ER 403, evidence may be found unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or "triggers other mainsprings of human action." 1 J. Weinstein & M. Berger, Evidence § 403, at 403-36 (1985). The record shows this to be the case.

First, evidence of weapons is generally considered highly prejudicial, and courts have "uniformly condemned ... evidence of ... dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged." State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001) (citations omitted). The knife had nothing to do with the charged events. Hence, this evidence carried with it an innate prejudice that should not have been injected into the trial.

Second, McDonough was charged with a sex offense, a type of charge where prejudice reaches "its loftiest peak." State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982) (citation

omitted). Thus, whether weapons evidence might not be overly prejudicial in another type of case, the same cannot be said here where the charge involved a sex offense – which, by its very nature, carries with it a greater danger for enhanced prejudice.

Third, the knife evidence combined with the other evidence before the jury worked together to create a stronger danger of provoking within jurors the instinct to punish or to protect the community. In that regard, the jury heard that McDonough is schizophrenic who has a criminal history and believes conventional boundaries don't apply to him. They also heard he has a history of abusing drugs which exacerbate his underlying psychosis. That the jury also heard that McDonough walks around armed with a knife created a stronger danger that jurors' fears were provoked and their desire triggered to remove McDonough from the community via incarceration, regardless of whether the State had met its burden of proving the charge beyond a reasonable doubt.

Finally, the inherently prejudicial nature of the weapon, the charge, and the evidence of the defendant's mental instability was amplified when the State chose to make fear the overarching theme of its closing argument. As set forth in detail below, the State improperly appealed to the jurors' passions and fear. And the knife

evidence played right into this theme. Even though the State did not reiterate the knife evidence in closing, the jury was never told to disregard it. Thus, the jury remained free to consider it as much as any other piece of evidence, and it was free to consider it with the passions evoked by the State during closing argument. As such, the State's argument contributed to the extremely prejudicial impact of the knife evidence.

In sum, the knife evidence was irrelevant under ER 401, and the trial court erred when it overruled the defense objection and permitted the State to introduce it. ER 402. Alternatively, the evidence should have been excluded under ER 403 because any arguably minimal probative value was substantially outweighed by the danger of unfair prejudice. In either case, this Court should reverse.

II. APPELLANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR IMPORPERLY APPEALED TO THE PASSIONS OF THE JURY.

McDonough was denied a fair trial when the prosecutor appealed to the jurors' passions by invoking community-safety fears and by using a "golden rule" argument.

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 (citing State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956)).

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 has a duty to "seek a verdict free of prejudice and based on reason" and prosecutorial conduct that departs from

this is improper. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). It is also improper for the prosecutor to make an argument which diverts the jury from its duty to decide the case on the evidence. ABA Standards for Criminal Justice 3–5.8 (3d ed.1993).³ Hence, appeals to the jury's passion and prejudice that divert the jury's attention are improper. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (“Appeals to the jury's passion and prejudice are improper.”).

In this case, the prosecutor presented an argument that improperly appealed to the juror's passions and fears in two ways. First, it invited the jury to view the evidence from the alleged victims' point of view, essentially making a forbidden “golden-rule” argument. Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 139, 750 P.2d 1257, 756 P.2d 142 (1988). Second, the prosecutor contrasted the juror's sense of community safety and social norms to the charged crime, which also runs afoul of the duty not to appeal to jurors' passions or self-interests. See, United States v. Mooney, 315 F.3d 54, 59 (1st Cir.2002) (finding misconduct where

³ ABA Standards for Criminal Justice serve as “useful guidelines” when considering claim of prosecutorial misconduct. United States v. Young, 470 U.S. 1, 8, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

prosecutor's remarks "contrast[ed] the jurors' sense of community safety with the armed robbery" at issue).

Turning first to the "golden rule" prohibition, such arguments are improper because the prosecutor urges the jurors to divert their attention away from an impartial review of the evidence and invites them "to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position." State v. Borboa, 157 Wn.2d 108, 124, n.4, 135 P.3d 469 (2006) (citation omitted).

The reasoning supporting the "golden rule" prohibition is particularly applicable in the criminal context where the defendant is constitutionally guaranteed a fair trial. As explained by the Mississippi Supreme Court:

It is the essence of our system of courts and laws that every party is entitled to a fair and impartial jury. It is a fundamental tenet of our system that a man may not judge his own case, for experience teaches that men are usually not impartial and fair when self interest is involved. Therefore, it is improper to permit an attorney to tell the jury to put themselves in the shoes of one of the parties or to apply the golden rule. Attorneys should not tell a jury, in effect, that the law authorizes it to depart from neutrality and to make its determination from the point of view of bias or personal interest.

Chisholm v. State, 529 So.2d 635, 640 (1988). Based on this reasoning, that Court expressly held the “golden-rule” prohibition applies to criminal trials. Id.

Likewise, the Idaho Supreme Court found the prohibition to apply in criminal cases, stating: “asking a jury to put themselves in the victim's position runs the significant risk of emotional attachment to the victim.” State v. Thumm, 153 Idaho 533, 285 P.3d 348, 358 (2012). Similarly, many other courts have disapproved of “golden rule” arguments in the criminal context. See, e.g., Gomez v. State, 751 So.2d 630, 632 (Fla. Dist. Ct. App. 1999); Hayes v. State, 512 S.E.2d 294, 297 (Ga. App. 1999); State v. Carlson, 559 N.W.2d 802, 812 (N.D. Ct. App. 1997); United States v. Kirvan, 997 F.2d 963 (1st Cir. 1993).⁴

⁴ In dicta, the Washington Supreme Court expressed some concern that the prohibition might not apply in the criminal context; however, it did not undertake an independent analysis beyond reviewing the cases cited by that defendant. Borboa, 157 Wn.2d at 124, n. 5. There is nothing suggesting the Washington Supreme Court would limit the “golden rule” prohibition to only civil cases if it were provided the cases cited above. This Court should find the reasoning in those cases sound and apply it here.

Here, the prosecutor expressly asked the jurors on multiple occasions to imagine themselves in the position of the victims and imagine the fear they felt.

When **we** think of the moments in our lives when **we** have the greatest amount of fear, the greatest amount of apprehension, for Meisha that day was going to be February 2nd, 2012. And **we** have only to imagine what it must have been like having to put forward a happy face, try to serve more customers, while at the same time having that level of fear and anxiety that forces **you** to call 911 to get help.

... And **we** must also imagine what it must have been like for Demi as she's putting forward this happy face, trying to serve customers, but knowing how violated she feels, how disgusted she is of the Defendant's actions.

RP 671. This was not merely descriptive, but was instead an appeal to emotion.

Not only did the prosecutor invite the jury to imagine themselves in the victims' shoes, he went one step further and invited the jurors to dig into their own personal history and remember the time in their lives when they were most afraid and then apply that to this case. The only purpose served by this argument was to foster an emotional attachment between the jurors and the victims and, then, exploit that attachment by asking jurors to call upon their own worst fears when considering the case.

While the fears of the victims were relevant to the charges and the prosecutor could properly highlight their testimony, the prosecutor crossed the line when he invited the jurors to depart from their duty to decide the case objectively based on the evidence and, instead, to decide the case from the perspective of the victims and their own fears. This alone constituted reversible prosecutorial misconduct. State v. Pierce, 169 Wn. App. 533, 555, 280 P.3d 1158 (2012).

Additionally, the prosecutor improperly appealed to the jurors' notions of personal and community safety by emphasizing the defendant's violation of commonly shared "social boundaries" that are meant to keep the community safe. He argued:

And yet, at the same time, there are additional boundaries that we have in place as a community, social boundaries that shield us ...

These boundaries are in place are boundaries that protect us, that shield us from the Defendant's-or-or, protect us from people's actions. And in this case, these are boundaries that should have protected Meisha, Demi, Rachelle from the Defendant.

RP 672. This was an improper appeal to community safety. See, Mooney, 315 F.3d at 59.

It was improper for the prosecutor to divert the jury's attention away from deciding the case based on its determination as to whether McDonough committed the charged crime and,

instead, focus its attention on McDonough's alleged violation of "community social boundaries." Any violations of community social boundaries which were not covered within the charged crime were irrelevant.

Additionally, urging the jurors to focus on the alleged violations of social boundaries and community safety norms was improper and especially prejudicial because such an argument may easily lead a jury to apply a propensity inference when determining guilt (i.e. if he violates social boundaries he must have committed the charged offense). See, ER 404.

Finally, this type of argument was likely to trigger the jury to make an emotion decision based on self/community safety interests rather than a reasoned decision based on the strength or weakness of the evidence alone. Indeed, the prosecutor argued strenuously that the social boundaries violated by the defendant are in place to protect "us" (i.e. the jurors) and keep the community safe. Given this, a juror would be hard pressed to push aside his or her own personal or community safety concerns and decide the case rationally based solely on the evidence.

For these reasons, the prosecutor's community safety argument was improper and prejudicial, inviting the jury to decide

the case based on personal or community fear or moral outrage. Hence, this argument constituted reversible prosecutorial misconduct. Pierce, 169 Wn. App. at 555.

In sum, appellant was denied a fair trial when the trial court permitted, over defense objection, the jury to hear the prosecutor's highly improper appeals to their passions and fears. As such, this Court should reverse McDonough's conviction.

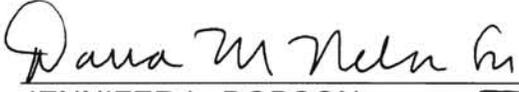
D. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to reverse.

Dated this 17th day of April 2013.

Respectfully submitted

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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Respondent,)

vs.)

SAMUEL MCDONOUGH,)

Appellant.)

COA NO. 69378-6-I

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STATE OF WASHINGTON
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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 17TH DAY OF APRIL, 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] SAMUEL MCDONOUGH
DOC NO. 301287
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF APRIL, 2013.

x Patrick Mayovsky