No. 91185-1

COA No. 296571

Consolidated with No. 296911, 296792

FILED

AUG 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

OCTAVIO ROBLEDO, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
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Spokane, WA 99201
(509) 220-2237

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR

A. The court erred by admitting Octavio Robledo's statements to the jail booking officer regarding gang affiliation.....1

B. The court erred by admitting bad acts evidence from a gang expert about Mr. Robledo's Huelga bird tattoo.....1

C. The court erred by admitting into evidence the statements of codefendants Anthony and Ricardo Deleon, who did not testify at trial.....1

D. The court erred by imposing an exceptional sentence.....1

E. The court erred by denying the motion for mistrial.....1

Issues Pertaining to Assignments of Error

1. Did the court err by admitting Mr. Robledo's post-arrest statements to the jail booking officer and the jail booking form that were involuntary, in violation of the Fifth Amendment, tending to show he was affiliated with a criminal street gang? (Assignment of Error A).....1

2. Was the State's evidence sufficient to support a finding of guilt beyond a reasonable doubt on the charge of bail jumping? (Assignment of Error B).....1

3. Did the court err by admitting the post-arrest statements to the jail booking officer and jail booking forms for the Deleons, who did not testify at trial, that were hearsay and in violation of the confrontation clause? (Assignment

of Error C).....1

4. Did the court err by imposing an exceptional sentence based on the jury's finding that Mr. Robledo was motivated by his interest in benefiting a criminal street gang when the State only showed gang membership and nothing more? (Assignment of Error D).....2

5. Did the Court err by denying a mistrial based on a juror's misconduct in his improper use of Twitter during the proceedings? (Assignment of Error D).....2

II. STATEMENT OF THE CASE.....2

III. ARGUMENT.....8

A. The court erred by admitting Mr. Robledo's post-arrest statements to the jail booking officer and jail booking forms that were involuntary, in violation of the Fifth Amendment, tending to show he was affiliated with a criminal street gang.....8

B. The court erred by admitting bad acts evidence from a gang expert about Mr. Robledo's Huelga bird tattoo.....12

C. The court erred by admitting into evidence the statements of codefendants Anthony and Ricardo Deleon, who did not testify at trial.....14

D. The court erred by imposing an exceptional sentence.....15

E. The court erred by denying the motion for mistrial based on a juror's misconduct in his improper use of Twitter during the proceedings.....17

IV. CONCLUSION.....18

TABLE OF AUTHORITIES

Table of Cases

Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246,
113 L. Ed.2d 302 (1991).....9, 10

Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620,
20 L. Ed.2d 476 (1968).....14, 15

Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515,
93 L. Ed.2d 473 (1986).....9, 10

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354,
158 L. Ed.2d 177 (2004).....15

Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844,
2 L. Ed.2d 975 (1958).....9, 10

State v. Applegate, 147 Wn. App. 166, 194 P.3d 1000,
review denied, 165 Wn.2d 1051 (2009).....17

State v. Bluehorse, 159 Wn. App. 410, 248 P.3d 537 (2011).....17

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008).....11

State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000).....18

State v. Earls, 116 Wn.2d 364, 805 P.2d 211 (1991).....8

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996).....10

State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993).....13

State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007).....13

State v. Kell, 101 Wn. App. 619, 5 P.3d 47,
review denied, 142 Wn.2d 1013 (2000)..... 18

State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).....13

State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007).....15

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995).....12

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008).....13

State v. Stein, 140 Wn. App. 43, 165 P.3d 16 (2007).....15

State v. Unga, 165 Wn..2d 95, 196 P.3d 645 (2008).....8

State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1999).....11

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).....12

United States v. Brave Heart, 397 F.3d 1035 (8th Cir. 2005).....8

Constitution

Const. Art. 1, § 9.....8, 10

Fifth Amendment.....8, 10

Sixth Amendment.....15

Statutes

RCW 9.94A.030.....16

RCW 9.94A.030(12).....16

RCW 9.94a.030(14).....16

RCW 9.94A.535(3).....15

Rules

ER 404(b).....1, 13

ER 801(c).....14

ER 801(d)(2).....14

ER 802.....14

ER 609(b).....4, 5, 6

I. ASSIGNMENTS OF ERROR

A. The court erred by admitting Octavio Robledo's statements to the jail booking officer regarding gang affiliation.

B. The court erred by admitting bad acts evidence from a gang expert about Mr. Robledo's Huelga bird tattoo.

C. The court erred by admitting into evidence the statements of codefendants Anthony and Ricardo Deleon, who did not testify at trial.

D. The court erred by imposing an exceptional sentence.

E. The court erred by denying the motion for mistrial.

Issues Pertaining to Assignments of Error

1. Did the court err by admitting Mr. Robledo's post-arrest statements to the jail booking officer and the jail booking form that were involuntary, in violation of the Fifth Amendment, tending to show he was affiliated with a criminal street gang? (Assignment of Error A).

2. Did the court err by improperly admitting ER 404(b) bad acts evidence from a gang expert about Mr. Robledo's Huelga bird tattoo? (Assignment of Error B).

3. Did the court err by admitting the post-arrest statements to the jail booking officer and jail booking forms for the Deleons,

who did not testify at trial, that were hearsay and in violation of the confrontation clause? (Assignment of Error C).

4. Did the court err by imposing an exceptional sentence based on the jury's finding that Mr. Robledo was motivated by his interest in benefiting a criminal street gang when the State only showed gang membership and nothing more? (Assignment of Error D).

5. Did the court err by denying a mistrial based on a juror's misconduct in his improper use of Twitter during the proceedings? (Assignment of Error E).

II. STATEMENT OF THE CASE

Around 11 p.m. on May 9, 2009, Ignacio Cardenas was at his home in Sunnyside at 1111 Tacoma. A friend, Angelo Lopez, and a cousin, Miguel Acevedo, were also there. (RP 1348, 1770). Although Mr. Cardenas was shot and lost a kidney, he did not recall the events of that night. (RP 1647). Several shots were fired, but no one was hit other than Mr. Cardenas. (RP 1350-56, 1773-75).

They had been waiting for a friend, Jose Barajas, who was bringing them invitations to a Quinceanera. (RP 1232, 1379, 1772). Mr. Acevedo saw a Taurus drive by and pull a U-turn. (RP 1773). He heard a guy yelling and then saw shots coming from the

passenger, while he hid behind a car. (RP 1774, 1778). Mr. Lopez had also been waiting outside when the shots were fired. (RP 1353). Soon after, both saw that Mr. Cardenas had been shot and they took him to the hospital. (RP 1356, 1779).

Mr. Barajas saw the shooting. (RP 1568-71). He followed the Taurus, but lost it when he thought he saw the car again. (RP 1575-76). He called 911 as he came up on the road leading to the freeway. (RP 1577-78). Mr. Barajas reported following the car, a silver Taurus, involved in the shooting. (RP 1580-81).

Sunnyside Police Officer Skip Lemmon was on duty May 9, 2009, at 11 p.m. (RP 711). He was advised of the shooting at 1111 Tacoma, a Taurus being involved, and another vehicle with witnesses following it. (RP 712). He got on the freeway and headed toward Grandview. (RP 713). Officer Lemmon passed the witness vehicle. (RP 717-18). He saw something fly past his passenger side window and was concerned it might be a gun. (RP 723). He went back and searched, but found nothing. (RP 723). . Meanwhile, the Taurus got off the freeway at exit 82 and went toward Grandview again. (RP 724-25).

Spike strips were put out at exit 80 and they worked. (RP 727). Officer Lemmon saw the passenger door of the Taurus open

up before it stopped and the passenger get out. (RP 727-28). The officer cut him off as he was walking up a hill. (RP 728.). The passenger, Mr. Robledo, was arrested. (RP 729).

Grandview Reserve Officer Gary Barnett was involved in the pursuit and took Mr. Robledo to the Sunnyside Police Department. (RP 876). He smelled strongly of intoxicants. (RP 880-81).

The driver of the Taurus was Anthony Deleon and the rear seat passenger was Ricardo Deleon. The front passenger was Mr. Robledo. (RP 964-65, 1003-05).

Anthony Deleon, Ricardo Deleon, and Octavio Robledo were charged by amended information with three counts of first degree assault while armed with a firearm and with intent to benefit a criminal street gang. (CP 32-33).

The case proceeded to jury trial with all three defendants being tried together. In pretrial hearings, the court ruled that gang evidence would be admissible. (Anderson Pretrial RP 220; RP 576-582). Acknowledging such evidence was clearly prejudicial, it nonetheless allowed it because it was relevant, went to explaining what led the defendants to do what they had been accused of doing, and was more probative than prejudicial. (RP 576).

The admissibility of the jail booking forms for each of the defendants was at issue as well. (Anderson Pretrial RP 309). These Sunnyside Gang Documentation Forms allegedly showed the defendants acknowledged gang association. (Anderson Pretrial RP 281; 9/28/10 Supp. RP 35). The court determined they were admissible. (9/28/10 Supp. RP 93-94). It stated:

> Therefore, the statements, to the extent that they would be testimonial in that sense, that they are – the gentlemen were clearly in custody in these have been coerced statements, I don't find that they are just booking questions. They may have been treated that way previously, but they are very clearly asking questions of an individual that could clearly be evidence in the future and *Miranda* would be necessary before they be provided.
>
> In any event, *Miranda* has been given and I'm going to – I find that they re admissible for those purposes. That doesn't address some of the other issues that may come up, but at least from a 3.5 perspective and a statement from the Defendants, they come in. (9/28/10 Supp RP 93-94).

During the trial, Corrections Corporal Gabino Saenz of the Sunnyside jail, testified he had contact with Anthony Deleon, Ricardo Deleon, and Octavio Robledo after they were arrested. On the Sunnyside Gang Documentation Form, Corporal Saenz had entered the information from Mr. Robledo that his moniker was Fat Boy and he was affiliated with the North Side Varrio, a "red" gang.

(RP 1155, 1157). In filling out the form, the corporal asked questions and put down the answers. (RP 1141). The form was used to protect inmates. (RP 1221). He said Mr. Robledo was given his *Miranda* rights, but did not know whether he waived them. (RP 1217).

Sunnyside Police Detective Jose Ortiz testified as a fact witness as well as an expert witness on gangs. (RP 1860-61). He gave the *Miranda* rights to Mr. Robledo, who waived them, on May 10, 2009. (RP 1905). Much later on the first day of pretrial hearings, Detective Ortiz noticed a tattoo of a Huelga bird on Mr. Robledo. (RP 1906, 1956). Referring to the Huelga bird, the detective testified as to its significance:

> Cesar Chavez, back in the hay days when he was looking for farm workers' rights, made this emblem up and that's basically the rally cry for unity amongst farm workers. That is his pretty much crest, a family crest, from what I understand led up to it. What gangs are notorious of doing is that they adopt mainstream symbols, so that way the lay person, the individuals that don't know anything about the gang [inaudible] take that, would not even take a second notice to look at it. Uhm, and this is one of them.
>
> In the penitentiary, this would be considered as the keeper of knowledge. Some of the higher ranking officials would have this. On the streets, it'll be that some individual has done a very serious crime, particular drive-bys or a homicide.

> . . . That's the tattoo I saw on Mr. Robledo's hand. (RP 1155).

Detective Ortiz went on to testify that gang members are in it for life and must "put in work," *i.e.*, gain respect. (RP 1922-23, 1931-32). If one gang member disrespects a rival, the disrespect will not go unanswered and something will happen. (RP 1933). Over objection, he also testified the crime was gang-motivated and the group doing the shooting would benefit the most from it. (RP 1957).

When the jury was deliberating, the court and counsel were apprised that a particular juror had been tweeting about his views of the justice system and the progress of the trial. The Twitter printout was made of record. (CP 644; RP 2407-10). A motion for mistrial based on the tweeting was denied. (1/20/11 RP 20-23).

Mr. Robledo was convicted of three counts of first degree assault with a firearm enhancement and the aggravating factor of intent to benefit a criminal street gang. (CP 218-223). With an offender score of zero, Mr. Robledo's standard range was 93-123 months on each count. The court sentenced him to 93 months plus a 60-month firearm enhancement and a 60-month gang aggravator for a total of 213 months on each count. It thus imposed an

exceptional sentence of 243 months on each count, to run consecutively, for a total of 639 months. (CP 251-52, 253-61; 1/20/11 RP 63-64). Mr. Robledo appealed. (CP 262-73).

III. ARGUMENT

A. The court erred by admitting Mr. Robledo's post-arrest statements to the jail booking officer and jail booking forms that were involuntary, in violation of the Fifth Amendment, tending to show he was affiliated with a criminal street gang.

The Fifth Amendment and Art. 1, § 9 of the Washington Constitution protect a person from being compelled to give evidence against himself. *See* State *v. Earls*, 116 Wn.2d 364, 375, 805 P.2d 211 (1991). The court determined Mr. Robledo was in custody, but had validly waived his *Miranda* rights and voluntarily given the statements reflected in the jail booking form as to gang affiliation. (9/28/10 Supp. RP 93-94).

In deciding whether such custodial statements were voluntarily given, the court looks to the totality of the circumstances. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). Both the conduct of police in exerting pressure on the defendant to confess and his ability to resist that pressure are important. *United States v. Brave Heart*, 397 F.3d 1035, 1040 (8th Cir. 2005). Indeed, the

inquiry depends not only on whether the confession was voluntary, but also on whether the police activity was coercive. *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed.2d 473 (1986).

The purpose of the Sunnyside Gang Documentation Form was to protect prisoners affiliated with rival gangs from each other. (RP 1221). In *Payne v. Arkansas*, 356 U.S. 560, 567, 78 S. Ct. 844 2 L. Ed.2d 975 (1958), the Supreme Court found a confession was coerced in light of the police promising to protect the defendant from mob violence in return for that confession. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed.2d 302 (1991), is to the same effect where a prison informant offered to protect the defendant from threats of violence by other inmates if he told him the truth. The Supreme Court again found the confession was not voluntary and was coerced. 499 U.S. at 287.

The statements elicited from Mr. Robledo and reflected on the jail booking form were similarly coerced by Corporal Saenz in that the ostensible use of the form was to protect him against other inmates from rival gangs. (RP 1221). The corporal testified he asked the defendants if there were certain individuals or groups with whom they could not be housed. (9/28/10 Supp. RP 44, 55-

64). Of course, the segregation could only occur if Mr. Robledo gave Corporal Saenz the information he wanted from him. And Mr. Robledo did.

Although the trial court found he had been given his *Miranda* rights and had waived them, it also determined the statements were custodial and coerced. (9/28/10 Supp. RP 93). The inquiry required by *Connelly*, 479 U.S. at 167, does not just ask whether the statements were "voluntary" as the court did here by finding a *Miranda* waiver. Rather, the court must also look to determine whether the police conduct was coercive. As shown by the Supreme Court holdings in *Payne* and *Fulminante*, the promises of protection from rival gang members were plainly coercive, thus making involuntary the statements given by Mr. Robledo. Accordingly, the court erred by admitting his statements to Corporal Saenz and reflected in the jail booking form in violation of the Fifth Amendment and Const. Art. 1, § 9.

The State has the burden of showing this constitutional error was harmless. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that, without the error, any reasonable jury would still reach the same result and the untainted

evidence is so overwhelming it necessarily points to guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The State tried this case by painting a canvas of gang culture where the defendants shot at the victims because they belonged to a rival gang and that was the motivation for the shooting as they were "putting in work." Aside from the unrelenting evidence about gangs in general, however, there was nothing to show that gang culture had anything to do with what took place. The admission of gang-related evidence is extremely prejudicial because it invites the jury to make the "forbidden inference" that Mr. Robledo's gang membership showed his propensity to commit the charged offenses. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). This is precisely what happened here.

The erroneous admission of Mr. Robledo's gang-related statements to Corporal Saenz that were then reflected in his jail booking form was not harmless. Mr. Robledo was convicted not for what he did, but for what he was – a gang member. That is neither proof beyond a reasonable doubt nor untainted evidence so overwhelming he could only be guilty. *Burke*, *supra*. A new trial is required.

B. The court erred by admitting bad acts evidence from a gang expert about Mr. Robledo's Huelga bird tattoo.

Detective Ortiz, the State's gang expert, was allowed to testify regarding the purported significance of the Huelga bird tattoo on Mr. Robledo's hand. (RP 1155). The import of his testimony was the tattoo indicated some individual, *i.e.*, Mr. Robledo, had "done a very serious crime, particular drive-bys or a homicide." (RP 1155). But there was no such evidence. The only purpose of Detective Ortiz's testimony was to show Mr. Robledo's propensity to commit the crimes as indicated by the Huelga bird. *Wade*, 98 Wn. App. at 336. This is wholly improper.

A trial court's decision to admit evidence of other crimes or misconduct is reviewed for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P2d 245 (1995). An abuse occurs when a decision is manifestly unreasonable or is based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

Evidence of other crimes, wrongs, or acts is not admissible to prove character or conformity with it, but may be admissible for other purposes such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER

404(b). But the record shows that evidence of the Huelga bird was not admitted for any purpose other than to prove Mr. Robledo acted in conformity with the propensity reflected by his tattoo and thus shot at the victims. The court's admission of the evidence was an abuse of discretion as it was contrary to law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The court also failed to find by a preponderance of the evidence that Mr. Robledo had "done a very serious crime", the clear import of Detective Ortiz's testimony as to the significance of the Huelga bird tattoo, (2) failed to determine whether that evidence was relevant to a material issue, (3) failed to state on the record the purpose for which the Huelga bird tattoo evidence was being introduced, and (4) failed to balance the probative value of such evidence against the danger of unfair prejudice. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). The court erred. *See State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The error in admitting the Huelga bird evidence was not harmless because, within reasonable probability, it materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Mr. Robledo was convicted of being a

gang member and that is all the State showed. A new trial is warranted.

C. The court erred by admitting into evidence the statements of codefendants Anthony and Ricardo Deleon, who did not testify at trial.

Over hearsay objection, the court decided the statements on the jail booking forms were admissible since they were the defendants' s own statements made under penalty of perjury. (RP 1126-27). ER 801(c) defines hearsay as a statement, other than one made by the declarant while testifying at trial or hearing, to prove the truth of the matter asserted. Unless there is an exception, hearsay is inadmissible. ER 802.

Although admissions by party opponents are not hearsay between the State and these defendants under ER 801(d)(2), the statements of one codefendant who does not testify are hearsay as to the other defendants. *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed.2d 476 (1968). The court articulated no exception to the prohibition against hearsay allowing the admission of the gang-related statements reflected in the jail booking forms. The court erred. *Id.*

The Sixth Amendment provides that the accused shall have the right to be confronted with the witnesses against him. Prior testimonial statements of an absent witness can only be admitted if the defendant has had prior opportunity to cross-examine that witness. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). Here, the statements on the jail booking forms are undoubtedly testimonial in nature and were so recognized by the trial court. (9/28/10 Supp. RP 93).

A confrontation clause violation may be raised for the first time on appeal. *State v. Kronich*, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007). Review is de novo. *State v. Stein*, 140 Wn. App. 43,70, 165 P.3d 16 (2007).

Crawford dictates that statements of the non-testifying codefendants cannot be used against Mr. Robledo. They are also inadmissible hearsay. *Bruton*, *supra*. His confrontation rights were violated.

D. The court erred by imposing an exceptional sentence.

RCW 9.94A.535(3) lists as an aggravating factor that "[t]he defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW

9.94A.030, its reputation, influence, or membership." Although the jury so found, there was no evidence to support this aggravating circumstance.

Detective Ortiz, the State's expert, testified at length on gang culture. The State managed to establish that there were criminal street gangs, defined in RCW 9.94A.030(12), in the Sunnyside area. RCW 9.94A.030(14) defines a "criminal street gang-related offense":

> Any felony . . . offense . . . that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons:
>
> . . .
>
> (e) To directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage for the gang, its reputation, influence, or membership . . .

But in the absence of the improperly admitted testimony about gangs, the record is devoid of any evidence, substantial or otherwise, supporting this aggravating factor. Even when viewed in a light most favorable to the State, the only gang evidence against Mr. Robledo was that he was a member of North Side Varrio. But membership alone is insufficient to support an exceptional

sentence based on the gang aggravator. *State v. Bluehorse*, 159 Wn. App. 410, 428, 248 P.3d 537 (2011). The exceptional sentence cannot stand. The case must be remanded for resentencing.

E. The court erred by denying the motion for mistrial based on a juror's misconduct in his improper use of Twitter during the proceedings.

During the trial, including deliberation, a juror tweeted his views on the justice system and the progress of the trial. The contents of the tweets were made part of the record and are set forth in Anthony Deleon's brief at pages 36-38 and Appendix B. As noted in that brief, the juror was disgusted with the justice system, did not know who to believe, and just wanted to get it over with. The issue of juror misconduct was raised before the verdict. (RP 2407-10). Counsel did not pursue questioning of the juror, but later moved for a mistrial based on the tweeting. The motion was denied. (1/20/11 RP 20-23).

Juror misconduct, however, is grounds for a mistrial. *State v. Applegate*, 147 Wn. App. 166, 175-76, 194 P.3d 1000, *review denied*, 165 Wn.2d 1051 (2008). The juror's Twitter use during the trial proceedings was clearly against the court's instructions, his

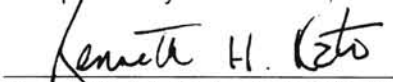
oath as a juror, and his duty of candor towards the court and the parties. This improper behavior constituted misconduct. *See State v. Davis*, 141 Wn.2d 798, 10 P.3d 977 (2000). Counsel's and the court's failure to inquire further and even to recognize the misconduct violated Mr. Robledo's right to a fair trial. The court erred by denying the motion for mistrial. *See State v. Kell*, 101 Wn. App. 619, 621, 5 P.3d 47, *review denied*, 142 Wn.2d 1013 (2000).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Robledo respectfully urges this Court to reverse his convictions and dismiss the charges or remand for new trial and/or resentencing.

DATED this 9th day of August, 2012.

Respectfully submitted,



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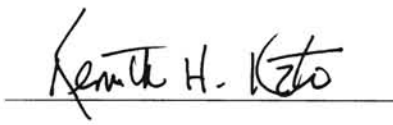
I certify that on August 9, 2012, I mailed a copy of the Brief of Appellant to Octavio Robledo, # 346528, PO Box 769, Connell, WA 99326; and sent it by e-mail, as agreed by counsel, to Kevin G. Eilmes at kevin.eilmes@co.yakima.wa.us, Jan Gemberling at jan@gemberlaw.com, and Dennis Morgan at nodblspk@rcabletv.com.