

64068-2

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NO. 64068-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH MASSINGALE,

Appellant.

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

The Honorable David Needy

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence was presented to prove each element of possession of motor vehicle theft tools beyond a reasonable doubt.
2. Insufficient evidence was presented to prove each element of possession of a stolen motor vehicle beyond a reasonable doubt.
3. The court erred in refusing to give Defense Instruction No. 4.
4. The court erred in refusing to give Defense Instruction No. 5.
5. Prosecutorial misconduct denied Massingale a fair trial.
6. Denial of Massingale's request for a Drug Offender Sentencing Alternative (DOSA) based on the exercise of his right to trial violated that right under art. I, §§ 21 and 22.
7. Denial of Massingale's DOSA request based on the exercise of his right to appeal violated that right under art. I, § 22.
8. The sentencing court abused its discretion in denying Massingale's DOSA request based on untenable grounds.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove every element of the crime beyond a reasonable doubt. It is a gross misdemeanor to knowingly possess any motor vehicle theft tool as defined by statute. Household tools were found in a vehicle Massingale had recently left. There was no evidence that these tools are commonly used for vehicle theft, that

Massingale intended to use them for theft, or that he knew another intended to do so. Did the State fail to prove each element of this crime?

2. To convict for possession of a stolen vehicle, the State must prove the defendant knew the vehicle was stolen. The State presented evidence that Massingale drove the vehicle, but nothing else suggesting knowledge. Did the State fail to prove every element of this crime?

3. The State also argued Massingale was a passenger in the stolen car, but presented no evidence that the passenger exercised dominion and control over it. Did the State fail to prove every element of this crime?

4. The State argued Massingale acted as an accomplice to the other person in the vehicle. Accomplice liability requires knowledge of the crime and specific intent that it succeed. The State offered no evidence Massingale had the requisite knowledge and intent to act as an accomplice. Did the State fail to prove every element of this crime?

5. A defendant is entitled to jury instructions which are supported by the evidence, accurately state the law, and allow him to argue the theory of his case. Massingale's Instruction No. 4 stated mere possession is insufficient to establish the offense of possession of a stolen vehicle; No. 5 stated a passenger cannot be presumed to know if the vehicle is stolen. Did the court err in refusing to give these instructions, violating Massingale's Sixth Amendment right to present a defense?

6. A prosecutor commits misconduct by pitting the credibility of State witnesses against the defendant's innocence, shifting the burden of proof onto the defendant, or arguing facts not in evidence. In closing and rebuttal, the prosecutor 1) mischaracterized the defense theory as accusing all the police witnesses of lying and implied that in order to convict, the jury would have to find they were lying, 2) implied it was the defendant's burden to prove the car was *not* started with the tools found in the car, and 3) argued facts not on the record, exacerbating the due process violations of the State's failure to prove each element of the crimes beyond a reasonable doubt. Did she commit misconduct requiring reversal?

7. A sentencing court abuses its discretion if it denies a DOSA request based on untenable grounds or refuses to exercise discretion at all. The court based its decision to deny the DOSA on only two factors: 1) the prosecutor and evaluator's shared belief that Massingale, by exercising his rights to stand trial and appeal, sought to avoid responsibility for his crime, and 2) his criminal history, with no explanation of how this impacted the advisability of a DOSA in his case. Did the court abuse its discretion?

C. STATEMENT OF THE CASE

Tyler Call testified his father's blue 1993 Accura Integra, which he had driven that night, was stolen from downtown Sedro Woolley on the night of December 7, 2008. 6/2/09RP 29-30.

Skagit County Deputy Sheriff Brad Holmes testified he was leaving an AM/PM store on the night of December 17, 2008 when he saw a blue sports car pull up to a gas pump. 6/2/09RP 44-45. He testified the two people in the vehicle looked at him and then rapidly accelerated out of the parking lot. 6/2/09RP 45. Deputy Holmes ran the license plate and learned the car was reported stolen. 6/2/09RP 46. With his narration, the State played two videos for the jury, taken from the security cameras in the parking lot. 6/2/09RP 48-53, 72-74. Deputy Holmes' police report stated the driver of the vehicle wore a dark shirt and the passenger wore a white shirt, but the video showed the opposite. 6/2/09RP 73-74, 97.

Deputy Holmes testified he was able to follow the car's tracks away from the AM/PM because they were the only tracks on the fresh snow. 6/2/09RP 75. He found the vehicle parked and unoccupied, with two distinct sets of footprints leading away from it. 6/2/09RP 77-78. He and other officers followed the prints for about an hour. 6/2/09RP 105.

Deputy Holmes and Skagit County Deputy Rick Duhaime followed the footprints to a trailer court. There, the footprints appeared to end at the threshold of the back door. 6/2/09RP 83-85, 167. Although the homeowner denied him entry, Deputy Duhaime opened the door to find Massingale and another man, Curtis Duprey, inside. 6/2/09RP 168-71.

The officers described the two sets of footprints consistently, one having a “flat” or “skateboard-type” sole with a “zig-zag pattern” and the other with a “distinct” “rectangle indent” on the heel. 6/2/09RP 78, 137, 163, 172-73. When Deputy Duhaime contacted the suspects, he looked at their shoes and determined that Massingale’s matched the “flat” “zig-zag” tread, while Duprey’s matched the tread with a “distinct heel.” 6/2/09RP 172-73. Sedro Woolley Police Sergeant Dan McIlraith noted in his report that the footprints with “zig-zag” tread came from the passenger side of the vehicle. 6/2/09RP 155. Deputy Duhaime, however, thought the prints with “flat” tread came from the passenger side. 6/2/09RP 164.

Sergeant McIlraith found tools on the front passenger floor of the vehicle. 6/2/09RP 140. Although he described only two screwdrivers and one file, photographs taken by him showed three other tools, similar to small awls. CP 172-73 (Exhibits 20-22, attached). No witness testified about the unidentified tools. Sergeant McIlraith examined the ignition for signs of tampering and found it intact, but scratch marks suggested “it was started with something other than a key.” 6/2/09RP 143, 158.

Tyler Call testified when the vehicle was returned, the key no longer fit in the passenger door and the ignition did not work as well as before. 6/2/09RP 34. There was no damage around the ignition or on the

outside of the vehicle. 6/2/09RP 36. Call testified he kept a spare key in the vehicle but did not know whether it was still there. 6/2/09RP 38.

After a jury trial before the Honorable David Needy, Massingale was convicted of possession of motor vehicle theft tools (a gross misdemeanor) and possession of a stolen vehicle (a felony). CP 85.

Over the course of two sentencing hearings, the prosecutor requested a high-end standard range sentence, arguing that because Massingale chose to stand trial and planned to appeal, he refused to accept responsibility for the crime. 7/9/09RP 93-94, 8/13/09RP 5-7. Massingale requested a DOSA and had already shown progress in short-term drug treatment, but the evaluator recommended against it, echoing the prosecutor's argument that Massingale was "trying to avoid the consequences of his actions." The court noted his lengthy criminal record, deferred to the arguments of the DOSA evaluator and prosecutor, and denied the DOSA request. 8/13/09RP 10.

D. ARGUMENT

1. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT EITHER CONVICTION.

The State must prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470

(1989). Evidence is sufficient only if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

a. The State failed to prove possession of motor vehicle theft tools beyond a reasonable doubt. RCW 9A.56.063 provides:

(1) Any person who makes or mends, or causes to be made or mended, uses, or has in his or her possession any motor vehicle theft tool, that is adapted, designed, or commonly used for the commission of motor vehicle related theft, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of motor vehicle theft, or knowing that the same is intended to be so used, is guilty of making or having motor vehicle theft tools.

(2) For the purpose of this section, motor vehicle theft tool includes... any other implement shown by facts and circumstances that is intended to be used in the commission of a motor vehicle related theft, or knowing that the same is intended to be so used.

The State argued that the tools found in the vehicle were “motor vehicle theft tools.” To convict Massingale, the State was required to prove beyond a reasonable doubt that at least one of those tools was “adapted, designed, or commonly used for” motor vehicle theft, *and* Massingale intended to use that tool for motor vehicle theft or knew that someone else intended to do so. The State offered no such evidence.

Sergeant McIlraith testified he found the tools on the floor of the front passenger seat and photographed them, specifically identified the file

and screwdrivers, and opined that the marks on the ignition suggested the vehicle had been started with “something other than a key.” 6/2/09RP 140, 143. This was the extent of the testimony concerning the tools.

No one testified that these tools are commonly used for theft or if so, how they might be used. No one described the marks on the ignition or suggested what type of object could have made them or how long ago. No evidence connected the tools to the marks.¹ Tyler Call testified that before the theft there was “nothing wrong” with the ignition, but did not suggest it was in pristine condition. Importantly, he testified he noticed “nothing... visibly out of the ordinary” and no “damage” around the ignition. 6/2/09RP 36, 38. The only difference was that “[i]t would catch when you’d try to start it... It’s impeded by something, so you have to pull [the key] out a little bit in order to get it to turn.” 6/2/09RP 34, 37. Any change must have been minimal, as Melvin Call, the owner of the vehicle “didn’t notice anything different after it came back.” 6/2/09RP 42.

Tyler Call also testified he kept a spare key somewhere in the vehicle, maybe in the driver door, and he did not know whether it was still

¹ In fact, it is doubtful whether a screwdriver can be used for this purpose without causing severe damage. In every Washington case where a screwdriver was evidence that a vehicle was stolen, the ignition was “punched out,” damaged, or destroyed. See, e.g. In re Personal Restraint of Percer, 150 Wn.2d 41, 44, 75 P.3d 488 (2003); State v. Hiatt, 154 Wn.2d 560, 563 n.1, 115 P.3d 274 (2005); State v. Gonzales, 133 Wn.App. 236, 239, 148 P.3d 1046 (2006); State v. Donahoe, 105 Wn.App. 97, 99, 18 P.3d 618 (2001).

there when the car was returned. 6/2/09RP 34. Given the existence of an easily accessible key, the State's theory becomes even more tenuous.

The court denied the defense motion to dismiss this charge:

[W]e do know that those tools were not owned by the Calls... They were not there on December 7th... They were there on the floorboard on December 17th when the vehicle was recovered. That can certainly lead to the inference as to whoever did steal the car placed these tools in it and, therefore, could have used those tools to get in the car.

6/2/09RP 191-92. Although the court summarized the evidence correctly, its conclusion was error. The court added candidly, “[i]t’s a little bit of a stretch in my mind” and admitted, “any... reasonable trier of fact is left to jump to that conclusion based on the location of the tools.” 6/2/09RP 192.

In fact, “jumping to a conclusion” is precisely what the jury did. Such a leap falls far short of reasonable doubt. Due process does not permit the jury to jump to conclusions to compensate for the State’s failure to prove its case. The court erred.

At best, the State proved Massingale possessed common household tools in a stolen vehicle which an unknown person, at an unknown time, tried to start with an unknown object which was not a key. Even with every inference in the State’s favor, the evidence does not establish that the tools were motor vehicle theft, that Massingale intended them for that

purpose, or that he knew someone else did. The State fell short of proving the crime beyond a reasonable doubt.

b. The State presented insufficient evidence to support Massingale's conviction for possession of a stolen vehicle. In order to convict Massingale of possession of a stolen vehicle, the State had to prove not only that he possessed the vehicle, but also that he knew it was stolen. State v. Pruitt, 145 Wn.App. 784, 790, 187 P.3d 326 (2008); RCW 9A.56.068(1), .140(1). The State offered no evidence of knowledge.

i. The jury could not infer knowledge from the presence of the tools. The State argued Massingale was the driver and must have known the car was stolen because he would have had to use one of the tools to start the vehicle. But that inference requires the assumptions that 1) the car could not have been started with a key, 2) the innocuous household tools found in the vehicle can be used to start a car at all, and 3) they were used to start this car. As discussed above, this leap, and the State's theory, is completely unsupported by the evidence.

In State v. Hutchinson, the defendant was charged with "voluntarily riding in an automobile with knowledge" that it was stolen, under former RCW 9.54.020. 16 Wn.App. 290, 555 P.2d 1181 (1976), rev. denied, 88 Wn.2d 1008 (1977). The Court ruled knowledge could be inferred from testimony that no key was found in the vehicle and the

defendant possessed unnamed tools. *Id.* at 291. But unlike the instant case, the tools were found on the defendant's person, and an "expert testified that the tools could be used to start a car without a key and that they were particularly suitable for that purpose." *Id.* That testimony was critical; without comparable evidence the tools in this case imply nothing.

ii. The jury could not infer knowledge from a finding that Massingale was the driver. Assuming without conceding that Massingale was the driver, this fact was also insufficient to establish knowledge. Mere possession, without corroborating evidence, cannot prove knowledge that the item possessed was stolen.

This Court has previously held:

In the absence of corroborative evidence such as a damaged ignition, an improbable explanation or fleeing when stopped, there is not sufficient evidence to support the finding that [the defendant] knew the vehicle was taken unlawfully.

State v. L.A., 82 Wn.App. 275, 918 P.2d 173 (1996) (citations omitted).

In L.A., the 14 year-old appellant was convicted of taking a motor vehicle, which requires knowledge that the vehicle was taken without the owner's permission. This Court found knowledge could not be inferred from the defendant's youth or the fact of a broken window, and accepted the State's concession of insufficient evidence. L.A., 82 Wn.App. at 276.

In cases where knowledge was properly inferred from the defendant's possession of stolen property, the corroborating evidence was far stronger than in this case. See e.g. State v. Lakotiy, 151 Wn.App. 699, 714-15, 214 P.3d 181 (2009), rev. denied, __ P.3d __ (2010) (defendant found in storage unit, holding ignition and jiggler keys, next to stolen vehicle in process of being disassembled); State v. Lillard, 122 Wn.App. 422, 437-38, 93 P.3d 969 (2004), rev. denied, 154 Wn.2d 1002 (2005) (defendant told officer he "realized [scam] was going on" and video showed him directing others to use with fraudulent gift cards); State v. Rhinehart, 21 Wn.App. 708, 713, 586 P.2d 124 (1978), reversed on other grounds by 92 Wn.2d 923 (1979) (defendant sold stolen vehicle, demanded cash and asked buyer not to record the sale yet). In this case, there were no such suspicious behaviors or circumstances.

The State may argue that the acceleration from the gas station or the fact that the two men walked away from the vehicle is sufficiently suspicious. Evidence of flight following the commission of a crime may be admissible to infer guilt, but only insofar as the inference is "substantial and real" rather than "speculative, conjectural, or fanciful." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965).

Pyramiding vague inference upon vague inference will not supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn.

Id. With no other evidence to establish guilty knowledge, this would be no more than vague inference.

The insufficiency is particularly critical in light of the possibility that Massingale was not the driver. The only evidence of that fact was that Massingale wore a white shirt when he was arrested, as did the driver in the security video. But Deputy Holmes' report described the passenger in a white shirt, and Sergeant McIlraith (who was responsible for the search of the vehicle and therefore particularly attentive to it), stated in his report that the footprints matching Massingale's shoes led from the passenger side of the vehicle. 6/2/09RP 97, 155.

The uncertainty on this point underscores the State's failure to prove knowledge. The State offered only innocuous tools with no evidence they were used in theft, and controverted evidence that Massingale drove the vehicle at some point. A reasonable jury could not infer from these facts that he knew the car was stolen.

iii. If Massingale was the passenger, the State did not prove that he either possessed the vehicle or acted as an accomplice. The State argued that even if Massingale was the passenger, he was still guilty as charged. This argument fails for several reasons.

First, the State did not and could not prove the passenger had dominion and control over the vehicle. Mere presence or proximity to property is insufficient to show possession of it. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). This Court has reversed convictions for possession of stolen property where the evidence established only that the defendant was a passenger in the stolen car, not that he constructively possessed it (State v. Plank, 46 Wn.App. 728, 732-33, 731 P.3d 1170 (1987)), and where the State proved the defendant had the opportunity to steal chain saw and was seen in close proximity to a chain saw matching the description of the stolen saw (State v. Summers, 45 Wn.App. 761, 728 P.2d 613 (1986)). In both cases, the evidence was insufficient. See also State v. McCaughey, 14 Wn.App. 326, 329, 541 P.2d 998 (1975) (defendant was found, with co-defendant, sleeping next to vehicle containing stolen merchandise and adopted the other's suspicious statements about the merchandise; jury could infer defendant knew it was stolen, but not that he ever had dominion and control over it). As this Court pointed out in Plank, where the evidence established only that the co-defendants were in a stolen vehicle together on the day of their arrest. 46 Wn.App. at 733. Here, too, the State has proven no more than that.

Secondly, as argued above, the State could not prove knowledge if Massingale was the driver, and even less so if he was the passenger. See

e.g. Rohde v. City of Roseburg, 137 F.3d 1142, 1144 (9th Cir. 1998)

(passenger cannot be presumed to know whether vehicle is stolen).

Without knowledge of the crime, he could not have been an accomplice.

“A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to make succeed.” State v. Luna, 71 Wn.App. 755, 759, 862 P.2d 620 (1993) (citations omitted); RCW 9A.08.020(3).

To establish accomplice liability, the State must prove the alleged accomplice had knowledge of the specific crime *and* was ready to assist in the commission of that crime. State v. Roberts, 142 Wn.2d 471, 511, 14 P.3d 713 (2000); State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Furthermore, a conviction for accomplice liability is valid only with proof that a principal “actually committed the crime.” State v. Peterson, 54 Wn.App. 75, 78, 772 P.2d 513, rev. denied, 113 Wn.2d 1007 (1989) (citations omitted). Just as the State could not prove that Massingale, if he was the driver, knew the vehicle was stolen, nor could it prove that Duprey, if he was the driver, had the requisite knowledge.

The only evidence the State can possibly rely on is that the men walked away from the vehicle together. But this proves only Massingale’s continuing presence, not his intent. Nothing about that walk suggests the specific *mens rea* required for accomplice liability. Roberts, 142 Wn.2d at

511; Cronin, 142 Wn.2d at 579. Without evidence of knowledge and intent, the State could not prove Massingale's guilt under any theory.

c. Reversal and dismissal is required. Without evidence from which a rational trier of fact could find beyond a reasonable doubt that the tools were motor vehicle theft tools, that Massingale knew the vehicle was stolen as either driver or passenger, that he possessed the vehicle as a passenger, or that he acted as an accomplice, the judgment may not stand. See e.g. State v. Spruell, 57 Wn.App. 383, 389, 788 P.2d 21 (1990). Both convictions should therefore be reversed and the charges dismissed.

2. DENIAL OF MASSINGALE'S PROPOSED INSTRUCTIONS VIOLATED HIS RIGHT TO PRESENT A DEFENSE.

Massingale proposed the following instructions:

Possession of recently stolen property alone is not sufficient to justify a conviction for the crime of possessing stolen property.

CP 90.

A mere passenger in a vehicle cannot be presumed to be aware of the vehicle's legal condition.

CP 91. The court denied both. 6/3/09RP 205-06.

It is axiomatic that jury instructions are sufficient if they permit the parties to argue their theories of the case, are not misleading, and when read as a whole, properly inform the jury of the applicable law. Douglas

v. Freeman, 117 Wn.2d 242, 256-67, 814 P.2d 1160 (1991). Because both instructions met those requirements, the court erred in denying them.

a. The right to present a defense is fundamental. The Sixth Amendment guarantees the fundamental right to present a defense, “which the courts should safeguard with meticulous care.” State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). The jury is “entitled to have the benefit of the defense theory before them so that they can make an informed judgment as to the weight to place on” the evidence. Davis v. Alaska, 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Since “[a]ny statements as to the law in closing argument are to be confined to the law set forth in the instructions,” the jury cannot hear the defense theory unless the instructions provide the framework for it. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, (1986). Proper instructions are so critical to a fair trial because jurors

are not free to conjure up the law for themselves... Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal.

United States v. Escobar de Bright, 742 F.2d 1196, 1201 (9th Cir. 1984).

b. Both proposed instructions were supported by substantial evidence. Generally “a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a

reasonable jury to find in his favor.” Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) (citations omitted). Here, both proposed instructions go directly to knowledge, an essential element. The burden of proving knowledge was entirely on the State.

No evidence was needed to justify the first instruction, which simply explains one element of possession of a stolen vehicle. For the second instruction, the defense needed only sufficient evidence that Massingale could have been the passenger. The State essentially conceded this point by insisting on an accomplice liability instruction. Whether Massingale actually was the passenger was a question for the jury. The proposed instruction would ensure that if the jury believed he was, they would not presume he knew the vehicle was stolen, but require the State to prove it beyond a reasonable doubt. The law requires no less.

c. Both instructions present accurate statements of the law. The rule stated in the first instruction (mere possession insufficient to prove possession of stolen property) is discussed in depth above. (See, L.A., 82 Wn.App. 275; State v. Ford, 33 Wn.App. 788, 658 P.2d 36 (1983). The specific language of that instruction (“recently stolen property”) is directly from longstanding caselaw.² The rule stated in the second instruction –

² “It has long been the law in this state that bare possession of recently stolen property alone is not sufficient to justify a conviction.” State v. Pisauro, 14 Wn.App. 217, 219-20, 540 P.2d 447 (1975) (citations omitted).

passenger cannot be presumed to know whether vehicle is stolen – is also well-established. See Plank, 46 Wn.App. 728; Rohde, 137 F.3d at 1144.

“When read as a whole, jury instructions must make the legal standard ‘manifestly apparent to the average juror.’” State v. Bland, 128 Wn.App. 511, 514, 116 P.3d 428 (2005) (citation omitted). The knowledge element was properly included in both “to convict” instructions, the definition of possession of a stolen motor vehicle, and the accomplice liability instruction. CP 5, 11, 14, 15. But the instructions read as a whole did not make the legal standard “manifestly apparent.”

The instruction defining knowledge, while a correct statement of the law, clouded the issue in ways that the proposed instructions would have easily addressed. The knowledge instruction permitted the jury to infer knowledge from “information that would lead a reasonable person in the same situation to believe that a fact exists” and stated knowledge of a particular fact “is also established if a person acts intentionally as to that fact.” CP 73. This instruction could lead jurors to erroneously conclude the tools found in the vehicle supplied sufficient information to infer knowledge, or that innocuous “intent,” in the sense that a passenger intends to ride in a vehicle, can supplant knowledge that the vehicle is stolen. Although this language has been approved in Washington, its inclusion made the denied instructions necessary for the defense theory.

In State v. Allery, the court issued a self-defense instruction, but refused instructions stating the defendant had no duty to retreat from her abuser and telling the jurors to put themselves in her shoes and evaluate her actions from that perspective. 101 Wn.2d 591, 594, 597, 682 P.2d 312 (1984). The instructions given were accurate, but without the denied instructions, the self-defense standard was not made “manifestly apparent to the average juror.” Id. at 597-98 (citations omitted). Similarly here, the instructions given constituted a technically accurate statement of the law, but without the proposed instructions, the knowledge element was not made “manifestly apparent to the average juror.”

d. The conviction must be reversed. The violation of a defendant’s constitutional right is presumed prejudicial. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Reversal is required unless the prosecution proves “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Washington Courts have repeatedly found reversible error where failure to instruct denied a defendant the ability to present his theory of the case. See e.g. State v. Kruger, 116 Wn.App. 685, 694, 67 P.3d 1147, rev. denied, 81 P.3d 120 (2003) (failure to give an intoxication defense was reversible error); State v. George, 146 Wn.App. 906, 912, 193 P.3d 693

(2008) (failure to instruct on unwitting possession was reversible error); State v. Otis, 151 Wn.App. 572, 578-79, 213 P.3d 61 (2009) (although evidence of “primary caregiver” defense to possession of marijuana was thin, it was sufficient to justify denied instruction, requiring reversal).

Without the proposed instructions, Massingale could not fully argue lack of knowledge, which was critical to his defense. The error was not harmless and requires reversal.

3. THE PROSECUTOR’S REPEATED AND FLAGRANT MISCONDUCT DENIED MASSINGALE A FAIR TRIAL.

a. Prosecutors have special duties which limit their advocacy.

The prosecutor has a special responsibility “to act impartially in the interest only of justice” and to seek a verdict free of prejudice and based on reason. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. . . . We do not condemn vigor, only its misuse. . . . No prejudicial instrument, however, will be permitted.

State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969).

b. The prosecutor committed misconduct by implying Massingale had a burden to prove his innocence. In a criminal trial, the State has the

burden of proving every element beyond a reasonable doubt. Winship, 397 U.S. at 363; State v. Fleming, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). Because a defendant is not required to present any evidence on his own behalf, a prosecutor commits misconduct by shifting the burden of proof to him. Id.; State v. Traweek, 43 Wn.App. 99, 106-07, 715 P.2d 114, rev. denied, 106 Wn.2d 1007 (1986). The attempt to circumvent the State's fundamental burden of proof is reviewable on appeal even if no objection was made below. Fleming, 83 Wn.App. at 216; RAP 2.5(a).

In Traweek, the prosecutor correctly noted that the defendant's failure to testify could not be used against him, but asked why defense counsel didn't bring other witnesses to explain the evidence. 43 Wn.App at 106. These statements were improper because they emphasized to the jury that the defense presented no witnesses, although it is clear that a defendant has no duty to do so. Id. at 107.

Similarly, in Fleming, the prosecutor argued in closing that since there was no evidence the complainant fabricated the event, the defendants must be convicted of rape. 83 Wn.App. at 214. This Court noted:

These statements improperly shifted the burden of proof to the defendants to disprove the State's case. The comments also infringed upon the defendants' election to remain silent, when viewed in conjunction with the following remark: "[I]t's true that the burden is on the State. *But you . . . would expect and hope that*

if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter]. And several things, they never explained.”

Id. (emphasis in original). The prosecutor’s comments not only infringed on the defendants’ constitutional right to remain silent but also improperly shifted the burden of proof onto them, requiring reversal. Id. at 215-16.

Here, the prosecutor, arguing the vehicle must have been started with the tools found inside it, emphasized the absence of a key:

You didn’t hear any evidence that a key was located on anyone’s person or as to how is it that they were operating this vehicle... There was no evidence that the key was missing or had been used from the vehicle, that spare key. There’s been no evidence that the defendant’s found that spare key and used it in the vehicle.

6/3/09RP 224, 261.

Massingale did not testify. The only witness who could have supplied information about the key was the State’s own witness, Tyler Call. Call testified he kept a spare key in the vehicle, but did not know if it was there when the vehicle was returned.³ 6/2/09RP 38. Massingale had no duty to prove he found and used the key. If the prosecutor’s strategy was to rely on the absence of a key to prove the tools were used for theft, then she had to prove the key was missing.

³ The prosecutor’s only acknowledgement of this testimony was to say, “There may have been a spare key in the vehicle, but if the door is locked, no one can access that. So we know that there had to be some tool or implement[.]” 6/3/09RP 210. But no evidence connected the tools to the door lock.

As Traweek and Fleming make clear, a defendant may not be penalized for holding the State to its burden of proof. The State must obtain a conviction “on the merits, and not by way of... improperly shifting the burden to the defense.” Fleming, 83 Wn.App. at 216. By suggesting Massingale had some burden of proving his own innocence, the prosecutor shifted the burden of proof, requiring reversal.

c. The prosecutor committed misconduct by arguing the defense theory was that all the police witnesses were lying. This Court has held that a prosecutor commits misconduct by arguing the defense theory is that the State’s witness is lying, as such arguments “are irrelevant and interfere with the jury’s duty to make credibility determinations.” State v. Barrow, 60 Wn.App. 869, 876, 809 P.2d 209, rev. denied, 118 Wn.2d 1007, 822 P.2d 288 (1991) (citations omitted).

In Fleming, the prosecutor committed misconduct by arguing the jury could acquit only by finding the complainant was lying or mistaken. Fleming, 83 Wn.App. at 213. This argument is not only misconduct, but also a misstatement of the law, since the jury *must* acquit unless it has an abiding conviction in the truth of the State’s case. Id. A prosecutor also committed misconduct in cross-examination by trying “to get the [defense] witnesses to say that the officer witnesses were lying.” State v. Casteneda-Perez, 61 Wn.App. 354, 360, 810 P.2d 74, rev. denied, 118

Wn.2d 1007 (1991). This Court condemned the practice, holding, "it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying." *Id.* at 362-63.

Here, the prosecutor argued in rebuttal:

Essentially, what [defense counsel's] closing argument did was tell you that *every one of those officers got up here testified and lied*. That when they testified that they, in fact, did see the tread in the snow. They lied. That when they said that when they were walking along and could contentiously [sic] see that tread in the snow, that they lied.

6/3/09RP 257 (emphasis added).

Defense counsel did not say or imply anything of the sort. In fact, she described several facts as undisputed, including the fact that the officers followed footprints to the trailer where Massingale was found. 6/3/09RP 235-37, 246-47. Defense counsel properly pointed out certain inconsistencies in the testimony. For example, she noted correctly that Deputy Holmes' police report was inconsistent with his testimony and the security video, but described this as a "mistake," *not a lie*, and questioned whether he or other officers made other mistakes. 6/3/09RP 236-37, 239-40, 245-48. In pointing out other inconsistencies and gaps in the officers' testimony, defense counsel urged the jury to consider whether they constituted reasonable doubt. She never implied that any witness lied.⁴

⁴ In fact, defense counsel went out of her way *not* to accuse them of impropriety:

There were multiple ways the jury could have acquitted Massingale without finding any of the police officers were lying. Massingale could have driven the vehicle and then walked to Jones' house without any knowledge that the vehicle was stolen. He could have ridden in the vehicle without possessing it or knowing it was stolen. He could have possessed the tools without knowing they were motor vehicle theft tools – or, indeed, without them actually being motor vehicle theft tools. In any of these scenarios, all the testimony of the State's witnesses could be completely true. It was blatantly false to argue that the defense theory depended on the dishonesty of the police witnesses. By mischaracterizing the defense theory this way, the prosecutor implied that the only way for the jury to acquit Massingale was to find the officers were lying.

In Barrow, this Court considered a similar issue. There, the prosecutor argued in closing the “only... inference that can be drawn from the defendant's testimony... is that [he] was calling the officers liars.” 60 Wn.App. at 874, n.5. The prosecutor also argued in rebuttal,

The officers in doing this tracking are... working in concert as a team... And I'm not suggesting that's not a good thing. In fact, quite the opposite. But teamwork often ends up in results. It doesn't mean that those results aren't faulty... [A]nd I raise these questions because a case is not just about evidence, but it can also be about lack of evidence. And I don't say that with the intention of disparaging the officers. I have already admired the in-concert teamwork. I say that because the lack of evidence is reasons to doubt.

6/3/09RP 244, 247.

in order for you to find the defendant not guilty on either of these charges, you have to believe his testimony and you have to completely disbelieve the officer's testimony. You have to believe that the officers are lying.

Id. at 874-75. The Court pointed out the prosecutor's remarks mischaracterized the testimony and the law. The officers "simply could have been mistaken" and "the jurors did not need to 'completely disbelieve' the officers' testimony in order to acquit Barrow; all they needed was to entertain a reasonable doubt." Id. at 875-76. The Court therefore found the prosecutor committed misconduct. Just as in Barrow, the prosecutor in this case mischaracterized the defense theory and misstated the law, committing misconduct requiring reversal.

d. The prosecutor committed misconduct by arguing facts not in evidence. Although counsel has wide latitude to draw and express reasonable inferences from the evidence presented at trial in argument, she may not mislead a jury by misstating the evidence or arguing facts not in the record. State v. Grover, 55 Wn.App. 923, 936, 780 P.2d 901, rev. denied, 114 Wn.2d 1008 (1990). "Comments meant to appeal to the jury's prejudice and encourage it to render a verdict on facts not in evidence are improper." State v. Smith, 67 Wn.App. 838, 844, 841 P.2d 76 (1992).

Here, in closing, the prosecutor argued facts not in evidence:

They are things such as files, very thin skinny files that you can easily insert. You can tell by the size and the way they're

designed. *You can insert these into a door or an ignition...* There is some other, kind of more pointer punch type mechanisms *that can be inserted into those locations.*

These are easily accessible. They're right there...in plain view for everybody to see and *clearly used in order to operate this car.*

[T]he only way into this car or to use this car was by use of the tools that are on the floorboard of the vehicle.

6/3/09RP 224-25 (emphasis added). And in rebuttal:

How did he gain access – with damage to the passenger-side door, damage to the ignition. And *they had to have used those tools on the floorboard of the vehicle...* So what are they using as they drive down the street? They're using those tools[.]

6/3/09RP 261 (emphasis added).

As discussed at length above, these facts were not in evidence.

There was no testimony that any of the tools could have been or actually were inserted into a door lock or ignition or used to start the vehicle. The prosecutor impermissibly tried to supply that testimony herself. Because the State clearly could not prove possession of motor vehicle theft tools on the actual evidence, this misconduct was particularly prejudicial. When the court denied the motion to dismiss, it warned the State that its evidence on this charge required the jury to “jump to conclusions” and even identified the most critical gaps in the State’s evidence, pointing out, “if they were just the two screwdrivers... I don’t believe there would be any case made” and “I don’t recall any testimony that any of these tools could

fit with any of the marks.” 6/2/09RP 191-93. The prosecutor, having failed to ask her witness any questions about the other tools, made sure to emphasize them in argument. 6/3/09RP 224-25. And since no evidence could supply the nexus between the tools and the marks, the prosecutor simply asserted it, repeatedly but improperly. 6/3/09RP 225-27, 261.

e. Because the prosecutorial misconduct was flagrant, ill-intentioned, and prejudicial, this Court should reverse the convictions. Prosecutorial misconduct may be addressed for the first time on appeal when the misconduct was so “flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991) (citations omitted). “[T]he issue is whether there was a substantial likelihood the prosecutor’s comments affected the verdict.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Here, the prosecutor’s statements were so “flagrant and ill-intentioned” as to irrevocably prejudice the jury against Massingale. The misconduct was particularly prejudicial in light of 1) the weakness of the State’s evidence on both counts, which the prosecutor attempted to bolster with improper argument, 2) the instructional errors discussed above, which confused the issues, and 3) the fact that Massingale did not testify

or present any evidence. The prosecutor's improper comments were not ideas which could have been reversed by a curative instruction. A "bell once rung cannot be unring." State v. Trickel, 16 Wn.App. 18, 30, 553 P.2d 139 (1976), rev. denied, 88 Wn.2d 1004 (1977).

In Fleming, defense counsel failed to timely object to the prosecutor's argument that the defense was calling all the police witnesses liars – the same tactic used here. 83 Wn.App. 214. This Court explained such remarks can be "even more egregious when the defendant does not testify than when he or she does" and found it was "a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial." Id. The Court correctly pointed out the danger that multiple acts of prosecutorial misconduct will reinforce one another.

Misstating the bases upon which a jury can acquit may insidiously lead, as it did here, to burden-shifting and to an invasion of the right to remain silent. First, the prosecutor erred by telling the jury that it could only acquit if it found that the complaining witness lied or was confused. Next, the prosecutor argued that there was no reasonable doubt because there was no evidence that the witness was lying or confused, and if there had been any such evidence, the defendants would have presented it... These statements improperly shifted the burden to the defendants to disprove the State's case.

Id. These errors "compounded" one another; taking them "together and by cumulative effect," the Court found they "rose to the level of manifest constitutional error" and could not be harmless. Id. at 215-16.

Because the prosecutor's misconduct denied Massingale a fair trial, he may raise this claim on appeal. RAP 2.5(a)(3). As in Fleming, because the multiple flagrant instances of misconduct denied Massingale a fair trial, reversal of his tainted convictions and remand for retrial is necessary. 83 Wn.App. 214-16; Belgarde, 110 Wn.2d at 508.

4. THE COURT ABUSED ITS DISCRETION BY DENYING MASSINGALE'S REQUEST FOR A DOSA BASED ON UNTENABLE GROUNDS.

a. Massingale requests this Court review the denial of DOSA for abuse of discretion. A defendant may appeal a standard range sentence if the sentencing court failed to follow a procedure required by the Sentencing Reform Act (SRA). State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (citing State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989)); State v. J.W., 84 Wn.App. 808, 811, 929 P.2d 1197 (1997) (citing State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). This Court may reverse a sentencing court's decision if it finds a clear abuse of discretion or misapplication of the law. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

If an offender is eligible for DOSA under RCW 9.94A.660(1), the sentencing court may order an examination. After receiving the evaluation, the court may, within its discretion, impose a DOSA if it determines the defendant and community would benefit from the

treatment alternative. RCW 9.94A.505(2), .660(4).⁵ The court has wide discretion in this decision, but appellate review is appropriate where the court, “has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” RAP 2.4; Grayson, 154 Wn.2d at 338.

b. The sentencing court improperly based its decision on Massingale’s exercise of his constitutional rights. As this Court has held, “a defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial.” State v. Montgomery, 105 Wn.App. 442, 446, 17 P.3d 1237 (2001); Const. art. I, §§ 21, 22; U.S. Const. amend. VI. The “inviolable” right to an impartial trial by jury in Washington is one that is “deserving of the highest protection.” State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003); Const. art. I, § 21

In addition, no penalty can be imposed for the exercise of the right to appeal under Article I § 22. City of Seattle v. Brenden, 8 Wn.App. 472, 474, 506 P.2d 1314 (1973); see also State v. A.N.J., 168 Wn.2d 91, 96, 225 P.3d 956 (2010) (“[t]he right of review [is] fundamental to, and implicit in, any meaningful modern concept of ordered liberty”).

⁵ If so, the offender serves half of his standard range sentence in total confinement in a state facility and the other half as a term of community custody, with appropriate substance abuse treatment, crime-related prohibitions, urinalysis monitoring, and a term of community custody to be served upon failure to complete the DOSA program under RCW 9.94A.715. The unsuccessful offender must complete the full term of his sentence and is eligible for sanctions for noncompliance. RCW 9.94A.660(5).

The prosecutor and DOSA evaluator strenuously contended Massingale, by exercising his rights to stand trial and appeal, sought to avoid responsibility for his crimes. 7/9/09RP 94, 107; 8/13/09RP 5; CP 179. Although recognizing Massingale's progress and potential, the court ultimately deferred to the prosecutor's and evaluator's opinions. 8/13/09RP 10. Because of the emphasis they placed on Massingale's exercise of his rights, the court abused its discretion.

i. Sentencing Hearing of July, 9, 2009. The prosecutor requested the high end of the standard range, because 1) the standard range did not account for Massingale's offender score of 10, 2) he had two prior convictions of a similar nature, 3) he was released from the latter of these in 2008, suggesting rapid recidivism, and 4) "his lack of acceptance of responsibility in this case." 7/9/09RP 94.

Defense counsel pointed out that for the current offense, prior convictions for theft of a motor vehicle or possession of a stolen motor vehicle were triple-scored, as required by the SRA. 7/9/09RP 96. This contributed to Massingale's high offender score and also demonstrated that the Legislature had already prescribed additional punishment for prior convictions of a similar nature. She also addressed the prosecutor's assertion that Massingale had not accepted responsibility, explaining,

I wanted the Court to know that Massingale accepted his responsibility early on and we went through this process, his right of a trial, because of other things that were going on in his life, primarily a pending dependency issue with his daughter.

7/9/09RP 96. Counsel pointed out the summary and plan Massingale received upon discharge from drug treatment, just before this trial, reported he did accept responsibility for his behavior, by dealing with "guilt and shame regarding his behaviors of theft, dishonesty, and unreliability while active in his addiction." 7/9/09RP 97. That summary also reported Massingale's impressive progress in treatment. Id.

Massingale's dependency attorney, Wendy Wall, described seeing a "significant change in his behavior and demeanor since this most recent arrest and his participation in treatment." 7/9/09RP 99. She confirmed he was trying to be an available parent for his child, but a trial on the termination of his parental rights was scheduled in two months. Id.

Massingale's aunt, Debbie Ewing, and mother, Donna Pageant, also spoke about the impressive changes they had seen he completed treatment. Ms. Ewing promised she would provide a stable home for him upon release and "will not set him up to fail again." 7/9/09RP 102. Ms. Pageant described discussing with her son his decision to plead not guilty:

He called me one day in early February and said he was going to put in for a TRO for treatment. I immediately thanked God. Finally, he realizes. He then said, "when I do that all plea bargains are off the table and charges go up. And if I'm convicted the

sentence will be 43 to 57 months.” My heart stopped. I said, “Joe, [M.] is 2. In her life the difference between 43 to 57 months is huge... You need to think about this.” He said, “I have. I need help. I’m never going to be the dad [M.] deserves without it.”

7/9/09RP 103.

Massingale briefly addressed the Court himself, explaining,

You can tell by looking at my criminal history that I’ve never been in criminal trouble until I was 20 years old and until I found meth. I’m a meth addict. And I asked for drug court. I was denied... All my crimes are due to drugs. I just want to get back to my family.

7/9/09RP 104-05.

The court noted that Massingale appeared to be a promising candidate for DOSA and set the matter over to give him time to obtain an evaluation. 7/9/09RP 106. The prosecutor objected, arguing:

Maybe he did need treatment and he did receive treatment. He can get treatment while he’s in custody at the Department of Corrections.⁶... I take issue with the fact that he’s apparently coming up now and saying: I’m going to accept responsibility for this. Even though for two months after he came back from treatment the State kept open the original offer in this case and he still refused to take it. Rather, he decided to bring 3.6 motions, and he decided to go to trial, and he lost.

7/9/09RP 107.

ii. DOSA/Risk Assessment Report. The evaluation reported, as Massingale told the court, that his criminal history began at

⁶ Counsel’s assumption was incorrect. This Court can take judicial notice of the fact that custodial treatment is offered at only a few correctional facilities in the state, and not automatically or widely available to any inmate who needs or wants it.

age 20. CP 174. He was released from his last offense five months before the current offense. CP 175. The evaluator stated she had spoken to the prosecutor about the case, but did not mention speaking with defense counsel. CP 176. She reported Massingale still hoped to regain custody of his daughter and hoped if he could get into treatment the family court “might extend the time” to remedy his parental deficiencies. CP 177.

The evaluator reported Massingale completed one to two months of intensive drug treatment while incarcerated in 2008. attended a weekly class for about two months after his release, and completed a 30-day inpatient program in 2009 which “was required by DSHS for3ws4 him to have ongoing contact with his daughter.” CP 177-78. “In treatment, he learned ‘his triggers are boredom... old friends, people that bring me down... parts of town’” and planned to stay away from his daughter’s mother, also an addict. CP 177.⁷ The evaluator concluded:

I do not believe Massingale is an appropriate candidate for a DOSA. Yes, he seems to be chemically dependent but he also lives a criminal lifestyle, as do those with whom he routinely associates. He was involved in a [chemical dependency] treatment program and well aware of the behavior changes needed to gain custody of his daughter when he was released from prison in 2008, yet he made other choices and *is now trying to avoid the consequences of his actions*. Massingale is likely asking for a DOSA primarily to minimize the potential amount of time he will

⁷ The evaluator stated “[d]espite this knowledge, he went right back to fulltime drug use less than three months after his release from prison.” CP 177. However, it is not clear in which treatment program he learned this and therefore whether he actually had the opportunity to apply this knowledge in 2008 or at any other time.

spend in prison. *He said he took this case to trial so he could return to the community as soon as possible, believing that would maximize his chances of gaining custody of his daughter... He also admitted he had committed the current offense, yet he is planning an immediate appeal of his conviction at the sentencing hearing; his explanation (again) was that he wants to return to the community as soon as possible, to gain custody of his daughter.*

CP 178-79 (emph. added). The evaluator recommended against DOSA.

iii. Sentencing Hearing of August 13, 2009. At the continued sentencing hearing, defense counsel acknowledged that the evaluator recommended against DOSA for Massingale. She explained that, despite having tried to contact the evaluator for four weeks, the evaluator had not responded to her. She then pointed out that the recommendation appeared to rely in part on “issues that I don’t believe are relevant to whether or not Massingale is eligible or amenable to [DOSA],⁸ and those are with respect to his exercise of his right to trial and whether or not he chose to accept an offer.” 8/13/09RP 4.

The prosecutor responded by continuing to belabor that very point. She argued, “this is an issue of amenability.” 8/13/09RP 5.

His ultimate motivation here is not the treatment. It is not getting [DOSA]. It’s trying to get out of these charges. He did elect to go to trial. That’s his right. By doing so he’s made it abundantly clear that his motivation is to defeat the charges to get out of jail as soon as possible. He wants his cake and he wants to eat it, too.

⁸ The parties consistently refer to DOSA as ADATSA (the Alcoholism and Drug Addiction Treatment and Support Act); this is likely a court reporter’s error.

He not only wants [DOSA], but he wants to appeal the jury's finding of guilt in this case. And not only that, he then also wants the Court to stay his sentence pending appeal. He has already filed that paperwork to stay the sentence. This is not somebody who wants to step up, and take responsibility and take advantage of the treatment being offered by [DOSA]. It is simply to avoid the sentence. ... [W]e shouldn't be rewarding people [with] [DOSA] after a trial. He has not accepted responsibility.

Id.

Defense counsel pointed out again that Massingale's decisions to go to trial and to appeal were on the advice of his dependency attorney.

7/9/09RP 7. She also told the court she had informed the prosecutor well before trial that Massingale wanted treatment.⁹ 7/9/09RP 7.

Massingale explained that, contrary to the prosecutor's allegations, he wanted treatment not only to fulfill his DSHS obligations but also so he could parent his daughter:

My CPS attorney said that I probably would have to sign adoption over to my mom even if I went to treatment even if I got the 29 months. But I need the treatment so I went anyway. Regardless of whether I get [DOSA] or not I'm probably going to have to sign adoption over to my mom. But that doesn't mean I lose [M.]. I'll still be part of her life. I'm not going to be part of her life if I'm

⁹ There was factual dispute about plea negotiations. Defense counsel stated that one week after arraignment, the prosecutor made an offer, to which she immediately responded by email, indicating Massingale's desire for treatment and asking if a deal could include treatment. 7/9/09RP 7. The prosecutor stated she asked defense counsel what she had in mind but never received a reply. 7/9/09RP 8. Massingale stated he asked for treatment "when the 29 month offer was on the table" but "the prosecutor said, [i]f he goes to treatment I'm just going [to] raise it up to a higher charge." 7/9/09RP 9. Whatever transpired in negotiations, it is clear that *Massingale's desire for treatment was known before trial; it did not develop only after he was convicted.*

running around getting high, or going back to prison or going back to jail. I'm not going to be there.... I need treatment, your Honor.

8/13/09RP 9-10.

The court denied the request, stating:

Well, you've had treatment, Massingale, and you were successful in that treatment at least on the 30-day basis. I'm not a big fan of warehousing folks. You have a substantial criminal history, and both the presentence report writer and the state have very strong reasons for believing that you are not the kind of person we want to put in [DOSA], and that you knew the consequences when you went out and once again chose to do a criminal activity. I would have hoped that there would have been a strong recommendation for [DOSA], and I am hopeful that you have turned the corner, and that you've decided that you've had enough of this life of crime and that you want to be part of your family's life.

8/13/09RP 10.

iv. The court impermissibly considered Massingale's exercise of his rights to trial and appeal in its decision. Montgomery is directly on point. In that case, the defendant was convicted by a jury of rape of a child in the first degree and child molestation in the first degree. 105 Wn.App. at 443. The sentencing court denied his request for a Special Sex Offender Sentencing Alternative (SSOSA) because his decision to go to trial caused his victim to testify. Id. at 446. As the prosecutor and evaluator contended in the instant case, "the court also stated that Montgomery's taking the case to trial was an indication of his unwillingness and inability to acknowledge what he did and his need for

treatment.” Id. at 446, n.8. Although finding the error moot because the defendant was ineligible for SSOSA, this Court held in no uncertain terms,

[t]his was a violation of Montgomery's constitutional rights. Notwithstanding the common belief that an offender must accept past deviancy in order for treatment to be successful, the minimal protections provided by the United States Constitution may not be violated. A defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial.

Id.

In Grayson, the defendant was eligible for DOSA but had a criminal history more extensive and serious than Massingale’s. 154 Wn.2d at 336. The sentencing judge “did not dwell on the facts of Grayson's case in his oral ruling” but instead simply denied the DOSA because of his belief “that the State no longer has money available to treat people who go through a DOSA program... He’s not going to get treatment.” Id. at 337. The Supreme Court held,

where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.

Id. at 342. Even though this was not the only reason for the denial of DOSA, the abuse of discretion required reversal of the sentence. Id.

This case combines the holdings of Montgomery and Grayson. Like Montgomery, Massingale was punished for going to trial. And as in

Grayson, the court’s decision amounted to a categorical refusal of DOSA sentences for defendants who go to trial.

The parties agreed Massingale was eligible. But the court stated, “both the presentence report writer and the state have very strong reasons for believing that you are not the kind of person we want to put in [DOSA].” 8/13/09RP 10. Those “very strong reasons” – argued vociferously and repeatedly by the prosecutor and spelled out just as clearly in the evaluator’s conclusion – amounted to the belief that simply because he took his case to trial and intended to appeal, Massingale was trying to elude responsibility for his crime, making him less amenable to treatment. This belief is both incorrect and irrelevant to the determination of whether a DOSA would benefit Massingale and the community.

First, Massingale *did* admit this and other crimes. 7/9/09RP 95; CP 176-77 Accepting responsibility for one’s criminal acts and exercising all constitutional rights connected to the prosecution for those acts are not mutually exclusive.

But even if Massingale did not admit his crime, the Legislature did not intend that DOSA decisions should hinge on that factor. If it did, it would have demonstrated that intent as it did in the SSOSA statute. The first factor of eligibility for SSOSA is that the offender has been convicted of an eligible sex offense, but:

If the conviction results from a guilty plea, the offender must, as part of his or her plea of guilty, voluntarily and affirmatively admit he or she committed all of the elements of the crime to which the offender is pleading guilty.

RCW 9.94A.670(2)(a).¹⁰ No such requirements appear in the DOSA statute. Although a comparable provision would not be applicable to Massingale because he did not plead guilty, this distinction is significant. It demonstrates the Legislature's concern that SSOSA applicants establish their amenability to treatment by admitting their crime, but no such concern for DOSA applicants. There is an obvious reason for that difference. SSOSA eligibility is premised on the nature of the *offense* – a sex offense. It is therefore reasonable (albeit controversial)¹¹ to believe an offender will not be amenable to treatment if he denies the offense for which he would be treated. DOSA, however, is premised on the diagnosis of the *offender* as a substance abuser. It does not matter whether he possessed a stolen vehicle or motor vehicle tools, or both or neither. He

¹⁰ Furthermore, SSOSA is not available to an offender who pled without admitting the crime, pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976) .

¹¹ This Court in Montgomery noted:

Although common, this belief [that the offender must admit past deviant acts] in order for treatment to be successful is disputed by some in the treatment community, while even some who share that belief concede that it may be sufficient if the offender acknowledges a general problem with deviancy, but not specific criminal acts.

105 Wn.App. at 446, n.9 (citing Jonathan Kaden, Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination, 89 J.Crim. L. & Criminology 347, 365-673 (1998)).

will not be treated for an addiction to possessing contraband. If, as the prosecutor argued, this boils down to a question of amenability, what matters is whether he admits that he is addicted to drugs and accepts responsibility for the consequences of his addiction. This, and not whether his attorney moved to suppress the fruits of a warrantless search, indicates his amenability to treatment. Massingale clearly expressed, before and after trial, that he knew he needed treatment.

There are many reasons why an individual might choose to stand trial and appeal other than avoiding responsibility for his crime. Massingale's dependency attorney reasonably advised him to take his case to trial. Indeed, when the parent of a small child already in dependency receives a new conviction and/or prison sentence, his chances of retaining his parental rights are slim at best. Massingale was faced with the choice of either 1) going to trial, in the hopes that he might be acquitted and thus possibly available to parent his child in the foreseeable future, or 2) pleading guilty, in the hopes that the criminal court might consider him more seriously for DOSA *and* the family court would be willing to overlook his new conviction *and* he would not receive a sentence lengthy enough to further jeopardize his chances of reunification – or even just visits – with his daughter. Faced with two gambles, Massingale chose the one more likely to make him available for his daughter.

There was no reason to assume, as the prosecutor and evaluator insisted, that Massingale's decisions to stand trial and appeal must have been motivated by a selfish lack of responsibility. To the contrary, it appears these choices were motivated by a *sense* of responsibility to finally be a present and available parent to his daughter. If he had been acquitted, he might have had a chance to retain his parental rights. If he prevails on this appeal and his convictions are vacated or his sentence reduced, he can be involved in his daughter's life that much sooner. Whether he is guilty or innocent, this motivation should not be disparaged.

It is ironic that the prosecutor and evaluator devalued Massingale's most recent and most successful participation in treatment because it was purportedly required by DSHS. If they meant to imply that treatment is only sincere or legitimate if it is done with no promise of a benefit or threat of a penalty, that principle would destroy the entire premise of the DOSA program. Many parents do not fulfill their court-ordered dependency obligations, as this Court has observed in numerous termination appeals. The fact that Massingale did fulfill his obligation should have helped, not hurt his chances for DOSA.

Both the prosecutor and evaluator insisted Massingale's request was motivated by a desire to "minimize the potential amount of time he will spend in prison." CP 178. This is also ironic, since a guilty plea –

which the prosecutor and evaluator apparently believed would have shown the correct type of responsibility – is generally rewarded with a reduced sentence. All DOSA participants, as well, are rewarded with a reduced sentence. The Legislature intentionally structured the DOSA program with a reduced sentence, both to give “addicted drug offenders one chance to kick their addiction” and to “free up prison beds for more violent offenders.” HB 1549 (1999). It would be fair to assume that all DOSA candidates are at least partly motivated by a desire to reduce their time in confinement. Not all candidates, however, have a recent record of success in treatment, a supportive family offering a stable home, and the powerful incentive of a young child with no other available parent. Massingale did.

The court did not explicitly state that DOSA was denied because Massingale went to trial and planned to appeal. Instead, the court said, “both the presentence report writer and the state have very strong reasons for believing that you are not the kind of person we want to put in [DOSA].” The prosecutor’s argument was so forceful and consistent, and the evaluation’s conclusion so similar, that the necessary inference is “the kind of person we want to put in [DOSA]” is the kind who accepts the State’s plea offer and does not appeal his conviction or sentence. This reasoning is implicit in the court’s ruling and cannot be consistent with the

protection of fundamental constitutional rights or basic principles of fairness and due process. Montgomery, 105 Wn.2d at 446.¹²

The essential question of the DOSA determination is whether it will, in this case, benefit the offender and the community. The court did not and could not find that because Massingale chose to stand trial and planned to appeal, DOSA would not benefit him or the community. But denying a DOSA because he exercised those rights does hurt the community, perhaps in the long run more than it hurts Massingale himself. This Court has held, where a defendant faces a different penalty for the same offense depending on whether he went to trial, that “situation needlessly chills a defendant's constitutional right to plead not guilty and

¹² See also State v. Richardson, 105 Wn.App. 19, 22, 19 P.3d 431 (2001) (right to trial violated where sentencing court imposed costs after learning defendant refused to plead guilty); Bordenkircher v. Hayes, 434 U.S. 357, 363-64, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort”); United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir.), cert. denied, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973) (“Courts may not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice”); United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (holding unconstitutional the federal Kidnapping Act because it provided a more severe sentence for a conviction after a plea of not guilty); State v. Smith, 52 Or.App. 681, 683-84, 629 P.2d 420 (1981) (right to trial violated where trial court refused to recommend deferred sentence because defendant did not “own up to his misdeeds”); Commonwealth v. Bethea, 474 Pa. 571, 578-80, 379 A.2d 102, 107 (Pa. 1977) (although sentencing court recited only legitimate factors in its ruling, sentence was unconstitutional because court stated, “had you pled guilty it might have shown me the right side of your attitude about this, but you pled not guilty, fought it all the way, and the jury found you guilty and I’m going to sentence you at this time”); .” In re Lewallen, 23 Cal.3d 274, 279, 152 Cal.Rptr. 528, 590 P.2d 383, 100 A.L.R.3d 823 (1979) (reversing where judge considered defendant’s plea as a factor in sentencing, and holding “if a judge bases a sentence, or any aspect thereof, on the fact that [a not guilty] plea is entered, error has been committed and the sentence cannot stand”).

demand a jury trial, thus violating due process.” State v. Vance, 142 Wn.App. 398, 412, 174 P.3d 697 (2008) (citation omitted). “A person cannot be influenced to surrender a constitutional right by imposing a penalty on its use... Legitimate objectives may not be pursued by means that needlessly chill the exercise of basic constitutional rights.” State v. Eide, 83 Wn.2d 676, 679, 682, 521 P.2d 706 (1974) (citations omitted).

The sentencing court’s wide discretion over a DOSA request does not include consideration of a defendant’s exercise of basic constitutional rights. That fact can never be a permissible factor in the decision.

c. The sentencing court improperly based its decision on Massingale’s criminal history. The only other factor in the sentencing court’s decision was Massingale’s “substantial criminal history.” But this fact alone could not justify the denial of an otherwise promising candidate.

The Legislature did not intend to bar someone with Massingale’s criminal history from DOSA consideration. Under RCW 9.94A.660(1)(c), anyone with a felony violent or sex offense within ten years of the conviction for the current offense is ineligible for DOSA.¹³ Clearly, if the

¹³ The current statute is actually more inclusive than previous versions. Before the 2005 amendments, DOSA could not be considered for an offender with “current or prior convictions for a sex offense of violent offense” at *any* time, not just in the last ten years. RCW 9.94A.660(1)(c); former RCW 9.94A.660(1)(b); Laws of 2005, ch. 460, § 1. In the first version of DOSA, an offender was ineligible if he had *any* prior felony conviction at all. State v. McNeair, 88 Wn.App. 331, 341-42, 944 P.2d 1099 (1997) (quoting former RCW 9.94A.120(6)(a)). Thus, the trajectory has been for the Legislature to make DOSA available to more, not fewer, offenders with felony records.

Legislature intended for the courts to bar, or even more closely scrutinize, a candidate with a certain type or length of criminal record, it would have said so. Instead, it must have intended exactly what it said: if a candidate, like Massingale, is statutorily eligible, the court shall determine whether a DOSA in his particular case would benefit him and the community.

Massingale's criminal history was of no help in answering this question.

The evaluator made no connection between Massingale's criminal record and her recommendation against DOS, except to say, "he seems to be chemically dependent but he also lives a criminal lifestyle." CP 178. It is not clear what "criminal lifestyle" means except "recidivist," which surely describes most DOSA candidates. It is precisely because there is a close relationship between drug addiction and recidivism that DOSA exists.¹⁴ But she did not suggest and the court did not find that the nature

¹⁴ The Legislature intended

to increase the use of effective substance abuse treatment for defendants and offenders in Washington... thus reducing recidivism and increasing the likelihood that defendants and offenders will become productive and law-abiding persons. The legislature recognizes that substance abuse treatment can be effective if it is well planned and involves adequate monitoring, and that substance abuse and addiction is a public safety and public health issue that must be more effectively addressed if recidivism is to be reduced.

HB 2338 (2002); Wash. Laws 2002, ch. 290, § 1. This language obviously contemplates that many drug-addicted offenders are already recidivists. The legislative history is replete with examples of this premise; see e.g. E2SHB 1006 (1999) (reporting high numbers of prison and jail inmates "who have been convicted of a drug charge or whom a chemical dependency addiction has contributed to their crime... [DOSA] stops the

of Massingale's convictions, or some other characteristic of his criminal history, meant DOSA would not benefit him or the community.

d. The evaluation relied upon by the court was insufficient.

Finally, the court did not have all the information required by statute.

Under RCW 9.94A.660(2) the evaluation "shall, at a minimum," answer

(a) Whether the offender suffers from drug addiction;

(b) Whether the addiction is such that there is a probability that criminal behavior will occur in the future;

(c) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the division of alcohol and substance abuse of the department of social and health services; and

(d) Whether the offender and the community will benefit from the use of the alternative.

This evaluation answered factor (a) in the affirmative. Arguably, factor (d) was implicitly addressed by the evaluator's recommendation against DOSA. Factors (b) and (c) were not addressed at all.

Thus, the court made its decision based on incomplete information (far short of what the Legislature intended) and irrelevant, speculative, unconstitutional information (far afield of what the Legislature intended). The result was an abuse of discretion.

revolving door to the prisons"); SSB 5847 (1999) ("drug crimes are the single largest use of criminal justice dollars").

e. The proper remedy is reversal and remand for resentencing.

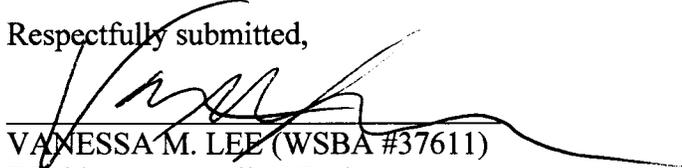
Both grounds for the DOSA denial were untenable. In addition, by adopting the prosecutor's and evaluator's arguments about Massingale's lack of responsibility, the court's ruling amounted to a categorical refusal to consider any candidate who exercises his right to stand trial and/or appeal. Because the court abused its discretion, the sentence must be reversed. Grayson, 154 Wn.2d at 342.

E. CONCLUSION

Massingale respectfully requests this Court reverse and dismiss both convictions, as they were not supported by sufficient evidence. In the alternative, because of the instructional errors and the prosecutor's flagrant, ill-intentioned, and prejudicial misconduct, Massingale requests this Court reverse the convictions and remand. In the alternative, because the court abused its discretion and violated Massingale's constitutional rights in denying his DOSA request, he requests this Court reverse the judgment and sentence and remand for reconsideration.

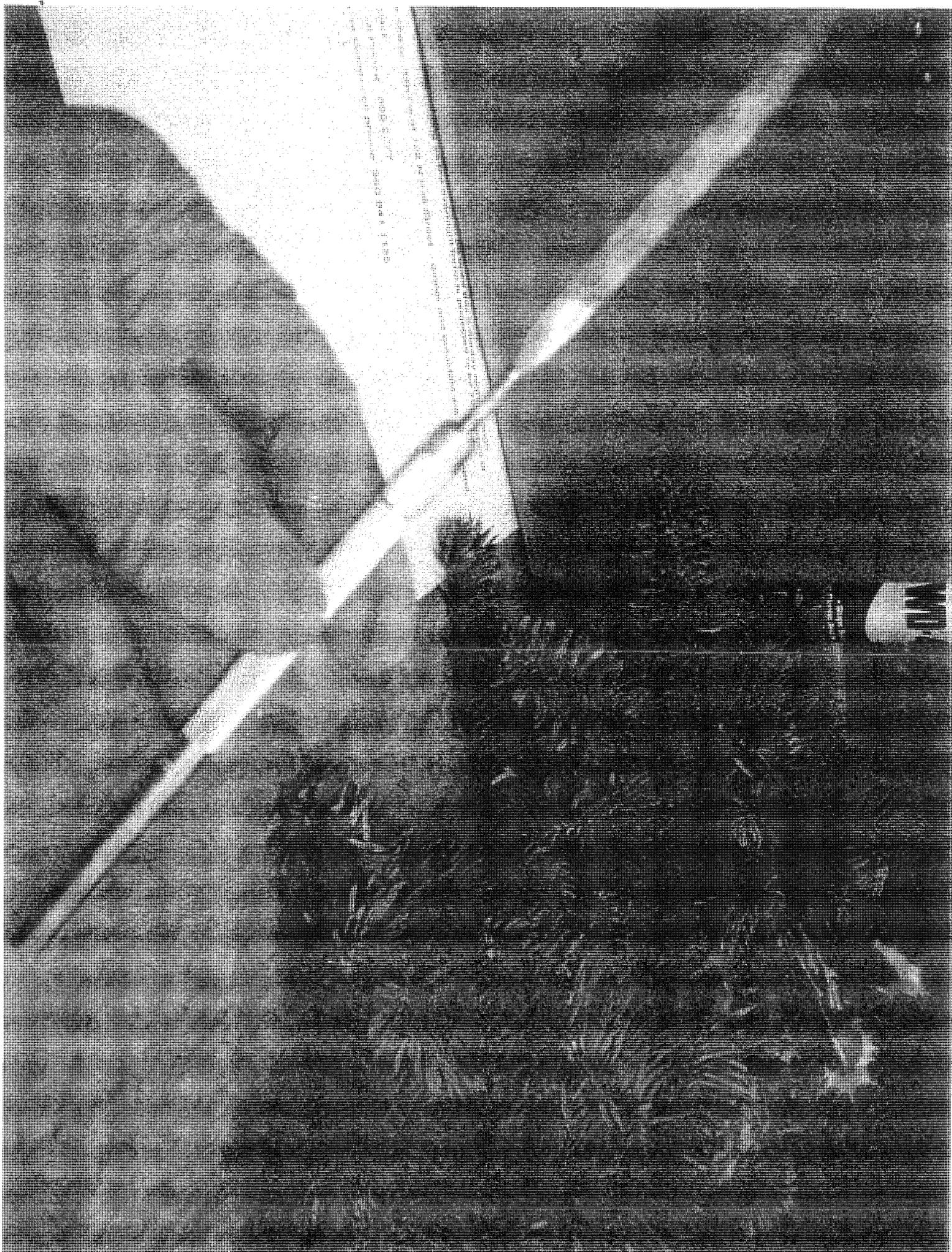
DATED this 14th day of May, 2010.

Respectfully submitted,



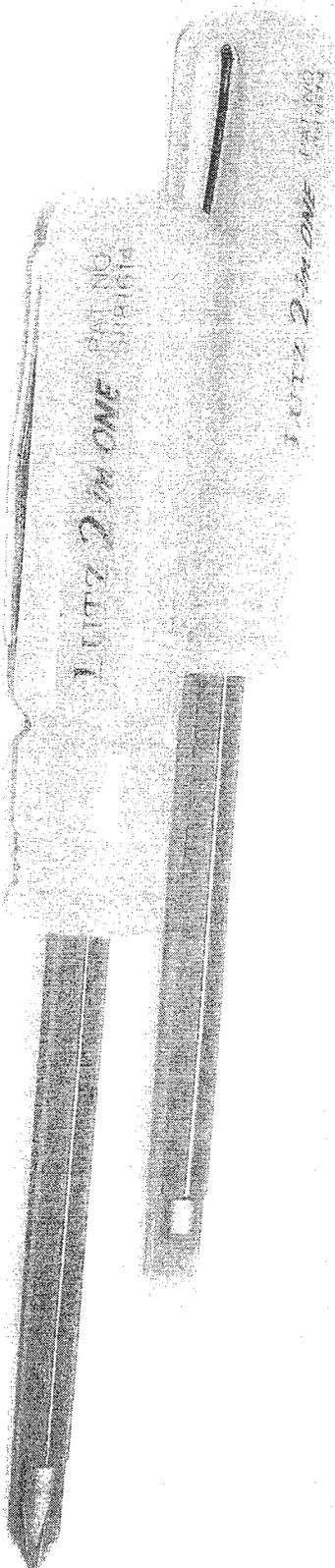
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APPENDIX A

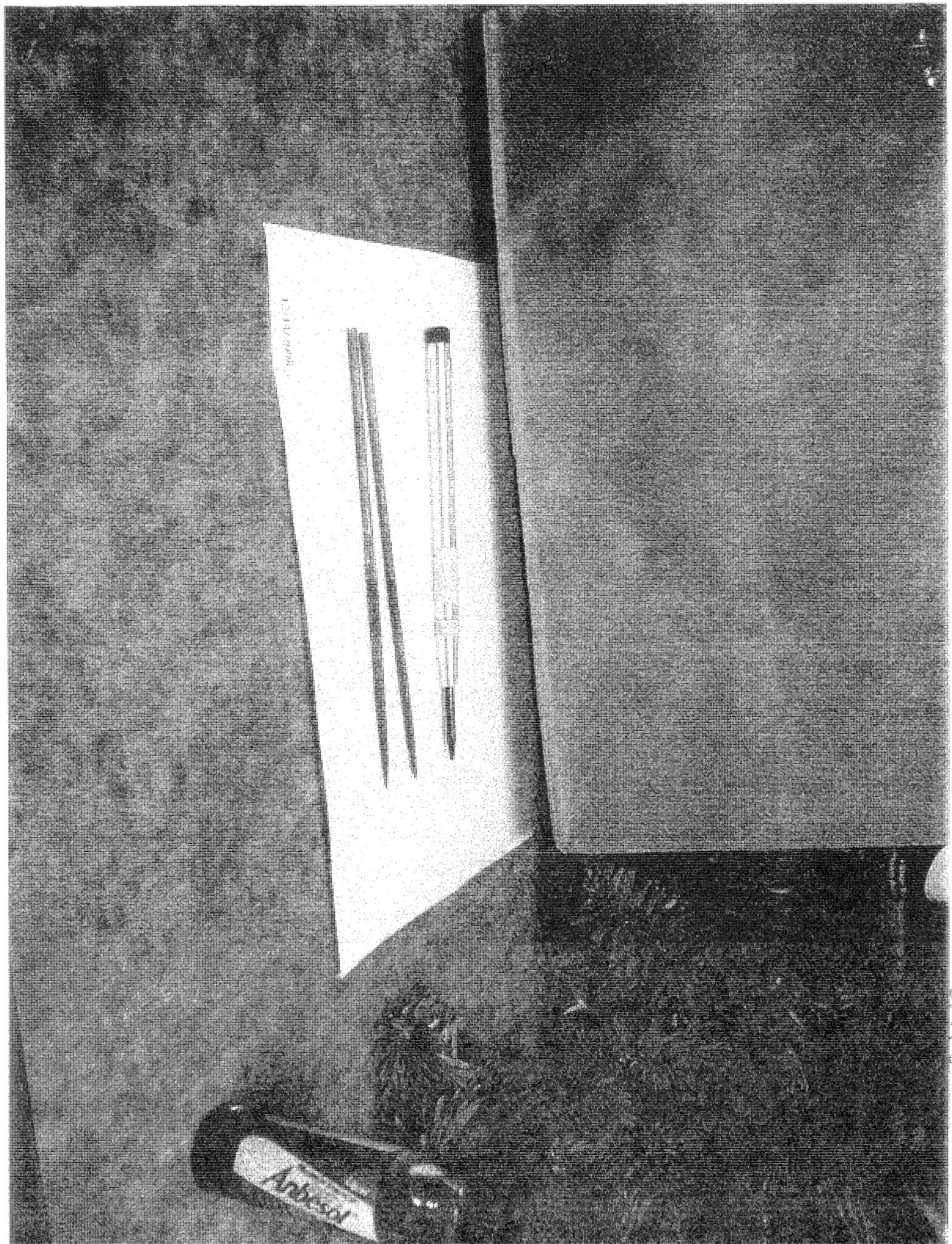


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 64068-2-I
)	
JOSEPH MASSINGALE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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