

COURT OF APPEALS OF THE STATE OF WASHINGTON  
 DIVISION I  
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NO. 69378-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SAMUEL MCDONOUGH,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

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**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. To prevail on a claim of prosecutorial misconduct, a defendant must show the challenged conduct was both improper and prejudicial in the context of the entire record. During closing argument, the prosecutor made reference to jurors “imagining what it must have been like” and used the phrase “social boundaries.” Was the use of these phrases proper when the prosecutor used them in the context of proving specific elements of the crime and when he focused his arguments on the evidence elicited during trial? If not, would the verdict on the Indecent Exposure with Sexual Motivation charge still have been guilty due to the strength of the evidence on that charge?

2. A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion, which occurs when its evidentiary ruling is manifestly unreasonable or based upon untenable grounds or reasons. The trial court allowed the arresting officer to testify that he found a folded knife in the defendant's pocket and the knife was never again mentioned in front of the jury at any other time of the trial. Did the trial court properly admit the officer's testimony that a knife was found since, at that point in the trial, this evidence appeared at least marginally relevant to prove

that the defendant intended to commit an assault if he had successfully entered the building? If not, would the verdicts on the Indecent Exposure with Sexual Motivation charge and Attempted Burglary in the Second Degree still have been guilty and not guilty, respectively, due to the relative strength of the State's evidence on those charges?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Samuel McDonough with Felony Indecent Exposure and Attempted Burglary in the Second Degree, both with Sexual Motivation enhancements. CP 6-7; RP 51-52<sup>1</sup>. The jury convicted McDonough of Felony Indecent Exposure with Sexual Motivation. CP 102; RP 714. They acquitted him of Attempted Burglary in the Second Degree and the lesser included crime of Attempted Criminal Trespass in the First Degree. CP 103-04; RP 714-15. The trial court imposed a sentence totaling 18 months, including a six month standard range sentence plus 12 months for the Sexual Motivation enhancement, as well as community custody for 36 months. CP 107-18; RP 734.

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<sup>1</sup> The Verbatim Report of Proceedings consists of five volumes: Vol. I (9/4/12, 9/5/12): RP 1-184; Vol. II (9/6/12): RP 185-352; Vol. III (9/10/12): RP 353-485; Vol. IV (9/11/12): RP 487-654; Vol. V (9/12/12, 9/13/12; 9/28/12): RP 655-745.

## 2. SUBSTANTIVE FACTS

On February 2, 2012, Demi Ryerson, Rachelle Hunt, and Meisha Peffley reported to work at the Bigfoot Java coffee stand in Issaquah, Washington. RP 204, 247, 293. The coffee stand has a drive-through window, a walk-up window, and an employee-only door near the walk-up window. RP 206-07.

Ryerson and Hunt, the two baristas, served customers and tried to keep the line moving on that busy morning. RP 204-05, 208, 294. Around 8:03 a.m., McDonough approached the Bigfoot Java walk-up window. RP 209, 231. He ordered a coffee from Hunt, paid, and gave a tip. RP 211, 213, 295. McDonough asked Hunt if he could come inside the coffee stand to use the restroom. RP 211-12. However, she told McDonough that the restroom was not for public use and that only employees on shift could enter the coffee stand. RP 211-12, 296.

After the coffee transaction, Hunt and Ryerson noticed McDonough loitering on the Bigfoot Java property for approximately 20 to 30 minutes. RP 214-15. The two baristas took note of this since it was unusual and there are no chairs in the area. RP 215, 233, 297. McDonough sat on a nearby cinderblock ledge about six feet away from the stand, leaned to the side, and kept shifting his

position back and forth. RP 233, 253, 297-98, 301, 310.

McDonough made odd facial expressions and kissing gestures with his lips at the baristas. RP 216, 297-98.

Ryerson and Hunt communicated their concerns about McDonough's behavior to each other and made sure all the windows and doors were locked. RP 223, 299. Ryerson then observed that McDonough had taken his penis out of his pants and it was exposed. RP 299. McDonough was stroking his penis while looking at the baristas. RP 300.

Overall, Ryerson saw McDonough exposing his penis and masturbating three times. RP 303. Ryerson notified Hunt about what she was seeing. RP 218. She also noted that when a customer would walk up to the stand McDonough would temporarily put his penis away and not masturbate. RP 307.

Ryerson described that, as a result of what she had seen, she was "grossed out," adding, "It's obviously an alarming and uncomfortable situation when somebody exposes themselves and acts in a lewd way towards you at 8:30 in the morning when you don't know them." RP 302. Hunt had never witnessed anything like this event before and was concerned for her safety. RP 222. She also felt "gross" and "disgusted." RP 228-29.

Ryerson and Hunt went in the back office area of the stand to tell Peffley, the area manager, what McDonough was doing. RP 218, 247, 302. Peffley briefly went into the main part of the coffee stand and looked outside the stand. RP 253. She saw McDonough's penis exposed and him masturbating while staring at her. RP 221, 254. Peffley had a clear view of McDonough moving his hand up and down while it was touching his penis. RP 255. As a result of McDonough's actions, she felt uncomfortable, gross, disgusted, and violated. Id. Peffley was also "scared" and "shocked," so she called 911 at 8:34 a.m. RP 256, 262.

While Peffley was on the phone with 911, the three coffee stand employees stayed in the back office area where there were no windows, so they could not be seen by McDonough. RP 221, 224, 263, 303. However, when customers would drive through, Ryerson and Hunt had to continue serving them, which was difficult considering the circumstances. RP 306. From the back office area, the three watched McDonough on security monitors that showed a live recording from cameras set up all around the coffee stand. RP 221, 223, 304. When it appeared that McDonough noticed that he couldn't see the baristas anymore, he approached

the coffee stand. RP 304. McDonough looked inside the windows as if to try to find where the baristas had gone. RP 224-26, 263.

The three employees zoomed in on one security monitor view, observed McDonough attempt to open the coffee stand door, and were concerned for their safety. RP 227, 264, 282, 305.

However, none of them saw McDonough's hand actually touch the coffee stand door, nor him kicking or prying a window or door open. RP 236-37, 282-23, 308, 310. McDonough then returned to sit on the ledge. RP 272, 282, 311. Peffley added that, at that point, "I have never been that scared... I was scared for my safety and the safety...for the other people that were around me." RP 265.

Issaquah Police Officer Brian Horn responded at around 8:35 a.m. to the Bigfoot Java. RP 316. As he pulled into the area, he observed McDonough, who matched the suspect description, moving quickly up an embankment near the coffee stand. RP 318. Officer Horn contacted McDonough and placed him under arrest. RP 319. McDonough indicated to Officer Horn at that time that he had done some inappropriate things that he shouldn't have done. RP 321. Still on the phone with 911, Peffley saw McDonough get apprehended. RP 265. When Issaquah Police Officer Ronald Adams contacted Peffley, Ryerson, and Hunt around that same

time, he observed that they were “obviously visibly shaken... they were upset.” RP 441. The three were “in the back room hiding,” as they did not know McDonough’s intentions. RP 442-43.

McDonough was transported to the Issaquah Police Department and spoke with Officer Horn post-Miranda for over an hour. RP 321, 326-27, 377-78. During his interview, McDonough acknowledged many of the details provided by the victims during their testimony. He confirmed that he had purchased coffee from them, asked if he could use the restroom, received a negative response from the barista, and tipped after his transaction. RP 381-82. He also confirmed that he had been leaning different directions and that he “just couldn’t sit still.” Id.

When asked if McDonough knew why police were there that day, he responded, “some girls were weirded out by me just hanging out around a parking lot,” adding that he didn’t have anywhere to go so he was just sitting on the steps. RP 380-82. When Officer Horn confronted McDonough about the fact that several people had said he had exposed his penis and was masturbating, McDonough described the way he was sitting and said that, “they might have mistook something for something else.” RP 383-84. McDonough would not admit that he had exposed his

penis, but said he had to think about how he was going to answer.  
RP 327.

McDonough gave a history of his inability to communicate with women, to have relations with women, or to have them look upon him in a favorable way. RP 327. McDonough said that women don't want to see a sissy and that they want to see dominance. Id., RP 412. He said that he could not communicate with women, so it was just easier to get to the act, meaning sexual relations, instead of trying to speak with them. RP 328.

During his interview, McDonough talked about social boundaries that he did not believe applied to him. He stated, "society at large is almost all based on emotions [inaudible] respect for each other [inaudible] do this and that and the other thing. I always seem to get that wrong, every time I've tried. And, uh, maybe I'm just looking for a shortcut." RP 410. Shortly thereafter, Officer Horn pressed McDonough for why he would have behaved in the way he did. RP 411-12. McDonough, without confessing, clarified, "[t]he boundaries and the limits that other people like live by, they don't apply to me," adding "I crossed some boundaries today... I pushed boundaries." RP 328-29, 413. In response to further questioning as the interview began to wrap up, McDonough

stated, "I break the rules," "I'm a misdemeanor," and "I said I just messed up." RP 416.

Dr. Steven Manley Juergens, a general and addiction psychiatrist, testified that, on February 2, 2012, McDonough suffered from a methamphetamine-induced intoxication delirium, which was worsened by hyperglycemia and which exacerbated his paranoid schizophrenia. RP 512, 520, 527. According to Juergens, these conditions impaired McDonough's ability to know that his conduct was likely to cause reasonable affront or alarm. RP 521, 533.

However, during Juergens' examination, McDonough provided a detailed account and timeline of what had occurred on the morning of February 2, 2012. RP 575-76. Juergens testified that, when McDonough went to Bigfoot Java, he "recalled sitting down, masturbating, he said inside his pants... He stated his hands were outside of his pants, not inside of his pants." RP 530, 575-76. McDonough also told Juergens that he walked away from the scene when he saw police. RP 591. In his opinion, Juergens thought McDonough knew he was masturbating, but didn't know if he knew that people were watching him as McDonough didn't discuss that during the evaluation. RP 592.

The Honorable Sharon Armstrong received the case for trial on September 4, 2012. RP 12. The jury convicted McDonough of Felony Indecent Exposure and found that the crime was committed with Sexual Motivation. CP 102; RP 714. The jury acquitted McDonough of Attempted Burglary in the Second Degree and the lesser included crime of Attempted Criminal Trespass in the First Degree. CP 103-04; RP 714-15. McDonough timely appealed. CP 159-60.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED TESTIMONY ABOUT MCDONOUGH'S POCKET KNIFE.**

McDonough contends that the trial court erred when it permitted the State to introduce evidence that the arresting officer found a knife in McDonough's pocket. He argues that the knife was irrelevant and prejudicial since the knife was not brandished during the incident, the trial court ultimately concluded that it was not logically connected to the charged crime, and its mention created a "stronger danger of provoking within jurors the instinct to punish or to protect the community." Appellant's Brief at 11. This argument should be rejected; the mention of the knife was neither error, nor prejudicial.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court abuses its discretion when its evidentiary ruling is manifestly unreasonable or based upon untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The burden is on the appellant to prove an abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983). A trial court's evidentiary ruling may be upheld on the grounds the trial court used or on other proper grounds the record supports. Powell, 126 Wn.2d at 259.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The threshold to admit relevant evidence is very low; even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Evidence is relevant if a logical nexus exists between the evidence and the fact to be established. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999). However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

a. Facts Related To Alleged Erroneous Knife Testimony.

At trial, Officer Horn testified about the steps that he took in apprehending McDonough near the Bigfoot Java stand on the morning of February 2, 2012. RP 320. After placing McDonough under arrest, Officer Horn searched McDonough for weapons. Id. The prosecutor asked Officer Horn what he found when searching him incident to arrest. Id. McDonough’s counsel objected as to “Relevance, 403.” Id. The court overruled defense counsel’s objection. Id. Officer Horn then responded that McDonough “[h]ad a folded knife clipped to his pant pocket in his right pant pocket,” and that the knife was taken from McDonough at the scene. RP 320-21. McDonough’s pocket knife was not mentioned in front of the jury at any other point in the proceeding.

b. The Trial Court’s Decision To Allow The Knife Testimony Is Not Manifestly Unreasonable.

To prove that McDonough committed the crime of Attempted Burglary in the Second Degree, the State had to prove beyond a reasonable doubt that McDonough did an act that was a substantial

step toward the commission of Burglary in the Second Degree and that the act was done with the intent to commit Burglary in the Second Degree, which is done when one enters or remains unlawfully in a building with intent to *commit a crime* against a person or property therein. RCW 9A.52.030, 9A.28.020; WPIC 60.03, 60.04; CP 84, 86 (emphasis added).

The State does not have to specifically plead the crime which the defendant intended to commit inside a building in order to charge a defendant with attempted burglary. State v. Jackson, 112 Wn.2d 867, 774 P.2d 867, 774 P.2d 1211 (1989). However, in this case, the prosecutor on numerous occasions noted the two alternatives for the crimes the State would be alleging McDonough intended to commit inside the building: the crimes of indecent exposure or assault. RP 149-50, 154, 198, 645.

With respect to an assault, the prosecutor noted, "that obviously could be widely interpreted into sexual contact and non-sexual contact, the apprehension, the fear that could occur through an assault, or the actual unwanted touching." RP 150. At the time the information that a knife was found in McDonough's pocket was admitted, the prosecutor had a good faith basis to admit the presence of a knife because he had to prove beyond a

reasonable doubt that McDonough was attempting to accomplish assault or, rather, to cause apprehension and fear in the victims. ER 401, 403. It was within this framework that the trial court admitted the evidence of the folded knife being retrieved from McDonough's pants pocket. RP 320-21.

Because trial is a fluid process, neither a court nor the parties to any case fully know how testimony and evidence will come out at trial; thus, the relevancy of a particular piece of evidence can change over the course of trial. After both parties had rested, the parties readdressed which crimes would be the basis for the "crimes against a person or property therein". RCW 9A.52.030; RP 644-47, 658-63.

Prior to closing, the State argued to the court that there was sufficient evidence to support the logical inference that McDonough intended to commit an assault inside the coffee stand. RP 644-47, 658-63. The prosecutor relied on the fact that McDonough was making contact with those inside the stand, had a weapon on him, and made certain statements about his state of mind and goals on that day, including how women needed dominance and he wanted to be with a woman. RP 645, 658-59.

The court expressed concern about the prosecutor arguing McDonough had a weapon and was going to go inside to cut them up, noting, "I don't think that's really justified from the evidence." RP 659. Shortly thereafter, the court inquired of the prosecutor whether he intended to talk about the knife and he responded, "I don't have to. I won't...I'll leave it at that. I mean, I –honestly, I think I probably could, based on my understanding of the inferences. But, I won't. I think that makes it easier." RP 662. At this point of the trial, now that all the evidence had been heard, the prosecutor decided not to go forward with mentioning the knife, despite the fact that the prosecutor still believed it was at least somewhat relevant.

However, just because the knife evidence became less important does not mean that at the time the evidence was admitted it wasn't relevant. Indeed, the prosecutor's decision not to mention the knife in closing was a cautious retreat. That decision, made after all the evidence had been received, should not now be used to suggest that the knife was never relevant. Rather, the prosecutor made that strategic call in the abundance of caution to prevent McDonough from later having any grounds to argue that

the prosecutor mentioning the knife in closing arguments unduly prejudiced him.

After the prosecutor confirmed he wouldn't be mentioning the knife during closing, the court ruled that the State could argue that McDonough intended to go inside and either commit another act of indecent exposure, or intimidate and cause apprehension and fear on the part of the women inside the building, adding that "he's not going to argue that obviously he intended to harm them or intimidate them by displaying the knife. There's not enough there from which the inference could be drawn." RP 663. The prosecutor at no time during the closing argument mentioned the knife or made any reference to any weapon in connection with McDonough.

The court and prosecutor initially had a good faith reason to believe that the knife was relevant to the issue of which crime McDonough intended to be commit within the building. ER 401, 403. However later, after all the evidence was heard, the court mirrored the abundance of caution exercised by the prosecutor and determined the knife should not be mentioned during closing. Id. Therefore, the court did not abuse its discretion, as those decisions

were not “manifestly unreasonable or based upon untenable grounds or reasons.” Stenson, 132 Wn.2d at 701.

c. McDonough Cannot Establish The Knife Testimony Affected The Verdicts In Any Way.

However, even if the trial court did abuse its discretion by allowing McDonough’s folded pocket knife to be mentioned in front of the jury on that one occasion, this court should still uphold the jury’s verdict because McDonough cannot show that that testimony affected the verdicts rendered in any way. The knife was mentioned only one time during Officer Horn’s testimony and it was not mentioned at all during the prosecutor’s closing argument.

Additionally, as discussed below, there was overwhelming evidence in this case to convict McDonough of Indecent Exposure with Sexual Motivation. (See section C(2)(d).) However, the evidence pertaining to the Attempted Burglary in the Second Degree charge was not as strong as that on the Indecent Exposure charge. Ultimately, the jury found McDonough not guilty of the Attempted Burglary charge.

If the one mention of a folded pocket knife did, in fact, create a “stronger danger of provoking within the jurors the instinct to punish or protect the community,” as alleged by McDonough, surely

the passions of the jury would have been so overcome and the prejudice would have been so sweeping that it would have resulted in McDonough guilty on both counts. Appellant's Brief at page 11. However, that did not occur here.

The verdicts themselves on each of these two charges, one guilty, one not guilty, demonstrate that the jurors weighed the strength of the evidence on each criminal count, rather than deciding only on passion and fear instilled from one mention of a folded knife. Under the circumstances, there is no reasonable likelihood that the mention of the knife during Officer Horn's testimony had any effect on the outcome of the trial.

**2. THE PROSECUTOR'S STATEMENTS DURING CLOSING WERE PROPER.**

McDonough contends that he was deprived of a fair trial because the prosecutor improperly appealed to the passions of the jury. He argues that the prosecutor made an improper "golden rule" argument by inviting the jury to view the evidence from the victims' point of view. Appellant's Brief at 14. He further alleges that the prosecutor improperly appealed to the jurors' notions of personal and community safety by emphasizing McDonough's violation of commonly shared social boundaries. Id. at 18.

McDonough's conviction for Indecent Exposure with Sexual Motivation should be affirmed because the prosecutor's statements during closing argument were appropriate considering the elements of the crime and aggravator. Additionally, the prosecutorial misconduct claim should fail because McDonough cannot demonstrate how the challenged comments prejudicially affected the verdict rendered.

To prevail on a claim of prosecutorial misconduct, a defendant must show the conduct was both improper and prejudicial in the context of the entire record. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). Courts will find prejudice only when there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

On review of a claim of prosecutorial misconduct, the appellate court reviews a prosecutor's comments during closing argument "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions

given to the jury.” State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Prosecutors have wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Although reference to the heinous nature of a crime and its effect on the victim can be proper argument, a prosecutor may not appeal to the jury’s passions or prejudice. State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968).

a. Facts Related To Alleged Prosecutorial Misconduct.

The prosecutor began his closing argument with a quote from Meisha Peffley, one of the victims in this case:

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

RP 671. Defense counsel objected, stating, “I’ll make a record and object to this as a simple appeal to fear.” Id. The court responded, “You’ve made your record. Thank you.” RP 672.

The prosecutor continued:

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

Id. Defense counsel again objected, stating that the line of argument was “making an appeal to community safety.” Id. The court overruled the objection and told the prosecutor he could proceed. Id.

The prosecutor did so, stating, “And these boundaries that are in place are boundaries that protect us, shield us....” Id. At this point, the defense counsel asked the court for a continuing objection to this line of argument and the court noted defense's continuing objection. RP 672-73. The prosecutor continued:

And these boundaries protect us, shield us from the Defendant's –or –or, protect us from people's actions. And, in this case, these are boundaries that should have protected Meisha [Peffley], Demi [Ryerson], and Rachelle [Hunt] from the Defendant. But the reality is, on February 2<sup>nd</sup>, these boundaries that should have

protected those girls- the Defendant didn't care. He didn't care about these boundaries.

RP 673.

The prosecutor went on to talk about how the defendant had crossed both "the type of boundaries that should protect-should have protected those young women from the Defendant's actions, disgusting exposures," as well as the "final physical boundary that thwarted the Defendant's effort to push those boundaries further that day." RP 674. The prosecutor reminded the jury to "rely on what you remember related to the evidence" and to "carefully consider all of the evidence and lack of evidence." RP 675. He then broke down the elements of each of the crimes, applying the law to the facts of the case. RP 675-81.

- b. The Prosecutor Properly Demonstrated The Reasonable Affront Or Fear Of The Victims; The Prosecutor Was Not Appealing To Fear.

To prove that McDonough committed the crime of Indecent Exposure, the State had to prove beyond a reasonable doubt that McDonough "intentionally ma[de] any open and obscene exposure of his person...knowing that such conduct [wa]s likely to cause *reasonable affront or alarm*," as well as that he had been previously

convicted of Indecent Exposure<sup>2</sup>. RCW 9A.88.010(1); WPIC 47.01, 47.02 (emphasis added); CP 79; RP 675-78. Therefore, the prosecutor had to prove that the victims' affront or alarm was reasonable or, in other words, that a reasonable person in the same situation would have felt affronted or alarmed by McDonough's conduct.

While a juror must decide a case objectively based on the evidence, there are times, as in this case, where the jurors have to consider the reasonableness of the victim's fear and therefore assess how a reasonable person would be feeling in the victim's circumstance. "Alarm" is defined as, "fear or terror resulting from a sudden sense of danger." Webster's Third New International Dictionary (Unabridged) 48 (Merriam-Webster, Inc., 1993). The prosecutor was not focused on the *theme* of fear; rather, the prosecutor was focused on proving the *element* of fear. Appellant's Brief at 6; RCW 9A.88.010 (emphasis added).

The prosecutor's phrasing about imagining what it must have been like for the victims was not appealing to the sympathy or prejudice of the jury. The prosecutor was having the jurors think about whether a reasonable person in the victims' predicament

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<sup>2</sup> McDonough stipulated to the prior Indecent Exposure element. CP 45, 48; RP 444, 677-78.

would have felt the affront and alarm that the victim's felt. Here, based on these facts, the affront and alarm that one would experience is so obvious, so reasonable, and so broad-based in society that even a person with McDonough's limitations would have realized it.

The prosecutor's arguments were proper, not only because they were addressing specific elements of the crime, but because they were focused on direct evidence elicited during trial. For example, the challenged "we" phrases in the second sentence of the State's closing were surrounded by testimony from the trial. The first sentence of the prosecutor's closing argument is a quote from Peffley: "I have never been more scared in my life." RP 265, 671. In the second sentence of his closing, the prosecutor stated, "[w]hen we think of the moments in our lives when we have the greatest amount of fear, the greatest amount of apprehension...." RP 671. However, even before the end of that second sentence, the prosecutor has shifted back to highlighting Peffley's testimony: "for [Peffley] that day was going to be February 2<sup>nd</sup>, 2012." *Id.*, RP 265. The prosecutor then talked about Peffley's actions that day after she observed McDonough masturbating. RP 671.

Similarly, while shortly thereafter the prosecutor states, “we must also imagine what it must have been like for Demi [Ryerson],” the prosecutor immediately followed that phrase with “as she’s putting forward this happy face, trying to serve customers, but knowing how violated she feels, how disgusted she is of the defendant’s actions.” RP 672. The directive to the jury to imagine what it must have been like was not an appeal to decide the case on sympathy, but a request to assess the reasonableness of each of the victim’s fear in light of the specific circumstances surrounding the charged incident.

Here, the prosecutor is talking specifically about what Ryerson was doing, feeling, and experiencing in reaction to McDonough’s exposure. Additionally, this argument focusing on Ryerson’s actions during McDonough’s exposure was intended to diffuse any potential argument that the victims were not truly afraid or affronted because they continued to serve customers. The fact that the prosecutor’s argument emanated from the evidence underscores that his goal was not to create sympathy or prejudice the jurors, but rather to prove the victim’s fear and the reasonableness of that fear in the context of the facts proven at trial. The trial court considered the arguments being made in the

context in which they were being presented, and therefore properly overruled McDonough's objections. RP 672-73.

Additionally, the prosecutor did not improperly appeal to the jurors' notions of personal and community safety by stating that, "there are additional boundaries that we have in place as a community, social boundaries that shield us... protect us from people's actions." RP 672-73. The prosecutor's reference to social boundaries was proper in the context of proving a) that McDonough's exposure was "likely to cause reasonable affront and alarm," and b) that McDonough knew that.<sup>3</sup> RCW 9A.88.010(1); RP 672-73.

"Affront" is defined as "a deliberately offensive act or utterance" or "a deliberate indication of disrespect calculated to offend." Webster's Third New International Dictionary (Unabridged) 36 (Merriam-Webster, Inc., 1993). When one is offended or feels disrespected by another, it is typically because their actions or words are not consistent with commonly held expectations about how people should behave. Therefore, the prosecutor's reference to community or social boundaries focuses the jurors on

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<sup>3</sup> If the information is sufficient to cause a reasonable person in the same situation to believe that a fact exists, the trier of fact is permitted to infer that the defendant had knowledge. State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992).

considering one of the elements that the State had to prove:  
whether a reasonable person would have felt affronted by  
McDonough's actions.

Furthermore, the prosecutor's reference to social boundaries was proper because it was a theme introduced by McDonough himself during his interview with Officer Horn.<sup>4</sup> RP 413. The prosecutor highlighted the words from McDonough's own mouth in order to emphasize to the jury that this was *not* a case where McDonough was unaware that boundaries or limits exist in society. Rather, McDonough was fully aware of those boundaries, spoke about them with the detective, appreciated the affront or alarm his actions would cause, and simply just did not care. The trial court understood the prosecutor's argument in the context of the charged crime, the issues in the case, and the evidence that was elicited at trial. The court, therefore, properly overruled McDonough's objection. Id.

c. The Prosecutor Did Not Make A "Golden Rule" Argument.

McDonough relies on Adkins v. Aluminum Co. of America, a personal injury suit by a roofer against a large corporate property

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<sup>4</sup> "The boundaries and the limits that other people like live by, they don't apply to me"; "I crossed some boundaries today"; "I pushed boundaries." RP 413.

owner, for the proposition that reference by counsel to the “golden rule”<sup>5</sup> per se, or allusions to the rule such as urging jurors to place themselves in the position of one of the parties or to grant party recovery jurors would wish themselves if they were in the same position, constitutes an improper “golden rule argument.” 110 Wn.2d 128, 139, 750 P.2d 1257, 756 P.2d 142 (1988) (quoting Jacob A. Stein, *Closing Argument*, § 60, at 159 (1985)).

However, in State v. Borboa, the Washington Supreme Court indicated in dicta that, “we are not convinced that the prohibition on ‘golden rule’ arguments applies in the criminal context,” noting that none of the cases cited by Borboa supported that proposition. 157 Wn.2d 108, n.5, 135 P.3d 469 (2006). The Court suggested that the more appropriate argument in a criminal context is that a statement or argument improperly “appeals to the sympathy or passions of the jury.” Id. (quoting People v. Fields, 35 Cal.3d 329, 362, 197 Cal.Rptr. 803, 673 P.2d 680 (1983)). The Washington Supreme Court was perhaps contemplating that jurors are sometimes tasked with considering how a reasonable person in a victim’s position would act or feel when it indicated that the

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<sup>5</sup> The biblical “golden rule” states a standard of conduct for individuals: do unto others as you would have them do unto you. New Testament, Luke 6:31.

prohibition on “golden rule” arguments may not apply in a criminal context. Borboa, 157 Wn.2d at n.5.

Here, while a “golden rule” argument is not expressly prohibited, the prosecutor did not make such an argument. At no time did the prosecutor suggest to the jury that they should do to others as they would have others do to them, or anything related to that tenet. The prosecutor could have used the term “reasonable person” in the place of the more colloquial “we” or “you” in making his argument. However, the context in which those colloquial pronouns were used demonstrates the prosecutor was not trying to evoke sympathy from or improperly appeal to the passions of the jury. As discussed above, the prosecutor was focused on what the victims were doing and feeling at the time of the incident and how their alarm was reasonable in light of the circumstances. (See Section C(2)(b).)

d. McDonough Cannot Establish That The Challenged Prosecutor's Statements Prejudiced Him.

Even if the challenged statements in the prosecutor’s closing argument had been improper, McDonough’s claims of prosecutorial misconduct should still fail because he is unable to demonstrate any prejudice. In this case, the evidence of McDonough’s guilt of

the crime of Indecent Exposure with Sexual Motivation was overwhelming.

Overall, there was little question for the jury as to whether McDonough had exposed his penis and masturbated in front of the Bigfoot Java employees. McDonough was identified in court by all three Bigfoot Java employees. RP 209, 250, 267, 295. Officer Horn located and apprehended McDonough close to the crime scene. RP 318. During Horn's interview, McDonough confirmed he was at Bigfoot Java at the time the crime occurred and many details he provided coincided with those described by the coffee stand employees. RP 380-82. Additionally, the jurors saw McDonough on the Bigfoot Java surveillance video at the time of the crime, as well as listened to Peffley's 911 call where she described that McDonough was exposing himself and masturbating. RP 231-32, 270-73.

The disputed element for the Indecent Exposure charge, as evidenced by McDonough's strategic decision to call Juergens to the stand, was whether McDonough knew that his conduct was likely to cause reasonable affront or alarm. The State noted that several actions by McDonough suggested that he did, in fact, know that his exposure and masturbation was likely to cause reasonable

affront or alarm. Specifically, according to Ryerson, when other customers came up to the coffee stand while McDonough was masturbating, he would put his penis away and not stroke himself anymore. RP 307, 676. Additionally, when Officer Horn came on scene, he saw McDonough “jumping up the embankment rapidly” and then try to walk away in the direction opposite from where Officer Horn was coming. RP 318-19, 677. Then, once Officer Horn pulled around the direction where McDonough was, McDonough started going in a different direction. Id.

McDonough’s expert did not diminish the State’s proof beyond a reasonable doubt on the charge of Indecent Exposure with Sexual Motivation and, in many ways, may have helped the jury to solidify their decision that McDonough was guilty of that crime. Furthermore, Juergens, through his testimony about what McDonough had stated to him related to this incident, largely confirmed Peffley and Ryerson’s account of McDonough exposing himself and masturbating in front of them. Juergens testified that, during his examination, McDonough recalled masturbating at the Bigfoot Java with his hand outside of his pants. RP 530, 575-76. Juergens also said that, in his opinion, McDonough knew he was masturbating and intended to masturbate. RP 592. McDonough

also told Juergens that he walked away from the scene when he saw police. RP 591.

Juergens asserted that McDonough's methamphetamine-induced intoxication delirium exacerbated his paranoid schizophrenia, thus impairing McDonough's ability to know that his conduct was likely to cause reasonable affront or alarm. RP 512, 520-21, 527, 533. However, the prosecutor exposed during cross-examination that, in coming to his conclusion, Juergens had relied largely upon McDonough's own representations about this incident and also did not consider all the discovery for the case. RP 593. For example, McDonough told Officer Horn that he had used methamphetamine six hours prior to the incident, but Juergens relied on McDonough's self-report to him months later of having taken methamphetamine right before the incident occurred. RP 331-32, 379, 572, 686.

Additionally, Juergens conceded during cross-examination that many of McDonough's behaviors that day were goal-oriented and consistent with someone who is aware of what is considered socially acceptable.<sup>6</sup> RP 596-98. The fact that McDonough

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<sup>6</sup> Such behaviors included going up to the coffee stand, purchasing a coffee, hearing the price, paying the appropriate amount of money, and providing a tip after receiving coffee. RP 596-98.

performed these various goal-oriented behaviors and, in doing so, conformed with social norms undercut Juergens' assertion that McDonough was oblivious to appropriate social conduct and lacked the ability to understand what would cause reasonable affront or alarm. Id.

In addition to the prosecutor's statements not prejudicing McDonough because of the abundance of evidence proving him guilty of Indecent Exposure with Sexual Motivation, the statements also did not prejudice McDonough because they were a minor part of a lengthy closing argument which properly focused on the evidence.

Furthermore, the jury in this case was properly instructed about the burden of proof and the fact that "lawyers' statements are not evidence." WPIC 4.01, 10.02; CP 70, 73. They were also instructed that they must not let their emotions overcome their rational thought process and that they had to reach their decision based on the facts proved to them and law given to them, "not on sympathy, prejudice, or personal preference." WPIC 10.02; CP 71. Indeed, the jurors did not let their emotions overcome their rational thought process, as evidenced by the different verdicts on each

count reflecting the relative strength of the State's evidence on that count.

McDonough's claim of prosecutorial misconduct should fail because the challenged comments, when viewed in context, are not misconduct and there is little to no likelihood they affected the jury's verdict. Accordingly, this court should affirm McDonough's conviction of Indecent Exposure with Sexual Motivation.

**D. CONCLUSION**

For the reasons stated above, the Court should find that the prosecutor did not commit misconduct, find that the trial court did not abuse its discretion, and therefore affirm McDonough's convictions.

DATED this 19<sup>th</sup> day of July, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer L. Dobson and Dana M. Nelson, the attorneys for the appellant, at Nielsen, Broman & Koch, PLLC, 1908 East Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SAMUEL MCDONOUGH, Cause No. 69378-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19<sup>th</sup> day of July, 2013

W Brame  
Wynne Brame  
Done in Seattle, Washington