PASCUA YAQUI TRIBE
7474 S. Camino de Oeste
Tucson, Arizona 85746
(520) 883-5190

Mariclare Hannah
Acting Chief Prosecuto
AZ SBN # 017257

MAILED
4/23/98

IN THE A[illegible] THE YAQUI NATION

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

ALVAREZ, Nasario,
Appellant,

vs.

PASCUA YAQUI TRIBE,
Appellee.

NO. **CA-98-004**

APPELLEE'S BRIEF

STATEMENT OF THE CASE

On January 27, 1997, the defendant was tried by the bench in a full adversarial proceeding. Photographs were suppressed (which the judge suppressed without even viewing). A rifle was suppressed due to lack of consent for a search. Prosecution witnesses were cross-examined by defense counsel. The defendant was acquitted of one charge and convicted on Domestic Violence/Disorderly Conduct. The judge made a written finding that "the defendant has committed the offense of Count 1 Domestic Violence/Disorderly Conduct with the intent to disturb the peace or quiet of his live-in girlfriend by engaging in fighting, violent, or seriously disruptive behavior." (see Order dated January 27, 1997, appended hereto)

At the sentencing hearing one month later, the judge also ruled on a defense motion to reconsider the verdict. The judge declined to reverse her verdict, restating that

the Tribe met its burden of proof (see Order dated February 23, 1998, appended hereto).

On appeal, Appellant has failed to provide any record of the proceedings and makes numerous unsupported assertions about what the evidence showed at trial.

I. THE TRIAL COURT'S RULING MUST BE SUSTAINED BECAUSE THE APPELLANT FAILS TO MEET HIS BURDEN OF PROVIDING A SUFFICIENT RECORD ON APPEAL.

On appeal, it is the moving party's burden to provide an accurate and complete record for the reviewing court, *American States Ins. v. Hanover Ins.*, 794 P.2d 662 (Kan.App. 1990) When an appellant fails to do so, the lower court's "judgment is presumed to be correct." *Levy-Wegrzyn v. Ediger*, 899 P.2d 230, 232 (Colo.App. 1994) In the absence of a sufficiently reliable record, the reviewing court "will not review any action of the trial court requiring an examination of the evidence." *First Nat. Bank & Trust Co. v. Lygrisse*, (Kan. 1982), 647 P.2d 1268, 1274. See also 4 Am.Jur.2d, *Appeal and Error* §488 (1996), Duty to Present Adequate Record.

In this case, Appellant has produced no record to review. Appellant merely references an audio tape, but does not even provide that. In the absence of a transcript, there is simply no way for the Appellate Court to review the evidence presented at trial. The arguments presented by Appellant all require a review of the evidence presented because they go to the sufficiency of the evidence presented to sustain the trial court's verdict.

The Tribe would not expect a *pro se* appellant to provide a record. In those cases, the Tribe voluntarily assumes that burden when a record is required for review. However, this case is presented by the Pascua Yaqui Public Defender's Office. A licensed attorney should make some attempt to present a record for review on appeal when it is warranted. Instead, Appellant's brief is filled with unsupported assertions about what the record would

show, if one were produced. This appeal is entirely about the sufficiency of evidence. A transcript is a basic requirement for review. This appeal should be denied for lack of a reviewable record.

II. DISORDERLY CONDUCT IS A GENERAL INTENT CRIME AND INTENT MAY BE INFERRED FROM CONDUCT.

A crime either has a general intent or a specific intent and the requirements for each vary. Most crimes require only a general intent, which require that an act is done voluntarily and intentionally and not by accident or mistake. *U.S. v. Blair*, 54 F.3d 639 at 642 (1995) quoting *Hall*, 805 F.2d at 1420; *accord Bailey*, 444 U.S. at 404, 100 S.Ct. at 631 (discussing the Model Penal Code, appended hereto). Crimes which require a specific intent, such as conspiracy or murder, do require an evil purpose or motive to break the law. *U.S. v. Blair*, *supra*. Appellant fails to distinguish between the two types of intent and confuses the two, citing or applying standards for specific intent crimes to disorderly conduct (a general intent crime).

Disorderly conduct, a modern descendent of the common law offense of breach of peace, does not require a specific intent. Am Jur 2d, Volume 12, Section 6. The generalized passages cited by the appellant apply to specific intent, not general intent. All the judge/factfinder needed to find was that the defendant intended the disruptive behavior that was displayed. He intentionally smashed a mirror, with the victim nearby, and the flying shards cut her face. The victim and the defendant were the only people present in the room. These "facts" are taken from Appellant's Statement of the Case, Appellant's Brief, page 1, and though unsupported by any accompanying record, should be viewed as

facts most favorable to the defense, if considered at all by this Court.

Appellant did not and is not arguing that the defendant hit the mirror by accident or did not intend his tantrum. Appellant merely contends that he did not intend **all** of the consequences of his actions. That is simply not a valid defense to a general intent offense.

III. INTENT MAY BE INFERRED FROM CIRCUMSTANTIAL EVIDENCE.

Appellant argues that the Tribe failed to produce a witness on the issue of intent. Intent, even when a specific intent is required, may be inferred from conduct. *U.S. v. Sterley*, 764 F.2d 530, certiorari denied 106 S.Ct. 544 (1985). Intent is determined from all the facts and circumstances surrounding the case, and ample facts support the trial court's finding.

IV. THE ONLY CASE LAW CITED BY APPELLANT DOES NOT SUPPORT APPELLANT'S ARGUMENT.

State v. Kracker, 123 Ariz. 294 (1979), the only case law cited by Appellant (appended hereto), holds that a defendant motivated by good intentions may still be convicted of a crime. Motive is not the same as intent. In *Kracker*, a non-custodial mother violated a custody order by not returning her child after a weekend visit. She argued that the father was unfit and she acted in the best interests of the child. The court held that the intent to detain the child, even if motivated by good intentions, was satisfied.

In this case on appeal, Appellant argues that the defendant was motivated by his anger toward another person who was not present in the room. The question is whether he intended his disruptive behavior to disturb the victim (the only other person present.) The *mens rea* is satisfied because the court could have found that the defendant intended

to disturb the peace of the victim, even if motivated by anger towards a third party. His conduct revealed his intent.

V. CONCLUSION

The Court correctly found the defendant guilty and its verdict should not be overturned upon appeal, especially in the absence of any record for the appellate court to review.

RESPECTFULLY SUBMITTED,

Mariclare Hannah, Acting Chief Prosecutor

Copy of the foregoing
mailed/delivered this date to:
Vince Gonzalez
Public Defender's Office
Pascua Yaqui Tribe of Arizona
By: