No. 33073-7-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

RALPH E. WHITLOCK, Appellant.

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

In the very early hours of June 10, 2014, the Appellant, Ralph E. Whitlock, and his accomplice and co-Appellant, David R. Johnson, went to the residence of Tanya Routt in Clarkston, Washington for the purposes of robbing Routt. Report of Proceedings (hereinafter RP) at 248. About four weeks prior to this incident, Mr. Johnson had stayed at Routt's residence for two weeks. RP 180. Routt had been involved with selling drugs and Mr. Johnson was aware of this fact. RP 192.

Prior to the arrival of Mr. Whitlock and Mr. Johnson, Ms. Routt had left the residence sometime between 11:00 p.m. and 1:30 a.m and was gone until morning. RP 185 -190. Present in the residence were Lisa Jones, Damien Hester, Crista Ansel, Ms. Routt's two daughters, Ms. Jones' daughter, and three unidentified friends of Mr. Hester who were from Orofino, Idaho. RP185. Mr. Whitlock and Mr. Johnson arrived sometime after 1:00 a.m. RP 248. They approached the residence from the back through the yard. RP 248. Mr. Whitlock and Mr. Johnson had been dropped off in the rear alley by Jacob Gustafson who was instructed to come back and pick them up shortly thereafter. RP 383 - 384.

Damien Hester and Lisa Jones went outside to smoke a cigarette and Lisa saw two men in back yard. RP 247, 570-1. Mr. Whitlock and Mr. Johnson approached and began talking with Jones and Hester. RP 247, 570-1. Mr. Whitlock claimed he had left some

laundry at the house and asked if he could come in. RP 249. Jones told him that Routt was not home and that he couldn't come in (RP 249) and she told him he needed to talk to Routt. RP 249. After Mr. Hester and Ms. Jones returned into the house, Mr. Whitlock and Mr. Johnson entered the residence. RP 252, 254, 309, 310. Mr. Whitlock went into the hallway leading to Routt's bedroom and attempted to turn the handle on the bedroom door which was locked. RP 254. Jones again told him that he couldn't go into Routt's room. 254-5. Mr. Whitlock told Jones that there was nothing she could do to stop him. RP 256. Mr. Whitlock then told Jones that, out of respect for her brother, he would let her leave and that she should get her daughter and her belongings and just leave. RP 257. Jones roused her daughter from sleep, quickly gathered her belongings, and left with an individual named Ryan Blue.[1] RP 257.

Hester had retreated to the basement area where he told Crista Ansel that her "brother"[2] Ralph was there. RP 307. Hester was very upset. RP 307. Ansel went upstairs and saw Mr. Whitlock and Mr. Johnson. RP 308-9. She saw Jones packing up to leave. RP 308-9. Ansel spoke to Mr. Whitlock who asked her why she was

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[1] Mr. Blue appears to be one of the three people who were visiting from Orofino, Idaho.

[2]Ansel testified that Ralph was "like a brother to me." RP 305, ln 10.

there and stated that he never would have come to the residence if he had known Ms. Ansel was staying there. RP 309. Ansel saw Mr. Johnson in the kitchen with a silver handgun. RP 310-13. Ansel testified that Mr. Johnson had the pistol out, pointing it at her and the others and said, "Don't do anything stupid." Ansel confronted Mr. Whitlock about his presence and his intentions and he claimed that he wanted to see if Routt had his electronic equipment (a TV) which he stated had been stolen from him. RP 312. She testified that Mr. Whitlock had a crowbar up his sleeve, and threatened to break down the bedroom door. RP 313, 314. Ansel told him that he wasn't going to break down the door, and she opened the bedroom door by "popping" the lock and showed him that his TV wasn't in the bedroom. RP 313. She then took him downstairs and showed him other bedrooms to prove that his stolen electronics weren't in the house. RP 314. Ansel then asked Whitlock to just leave and he told her it was too late and that he was sorry. RP 316. He then shut the basement bedroom door, trapping Ansel inside. RP 316, 318.

Mr. Whitlock then went upstairs and he and Mr. Johnson removed a security camera system with a monitor from Routt's bedroom along with a dial entry safe. RP 193. Inside the safe was methamphetamine, pills, and three thousand dollars ($3,000.00) cash, as well as other personal records. RP 194. Mr. Whitlock and Mr. Johnson took the property that they stole from the house and got

into Gustafson's waiting vehicle. RP 385. Gustafson then observed Mr. Johnson carrying a handgun in his right hand. RP 385. Mr. Whitlock then told Gustafson to "keep his mouth shut" and take them back to Kelly McDonough's.[3] RP 387. Gustafson drove Mr. Whitlock and Mr. Johnson to Kelly McDonough's apartment where he dropped them off, along with the safe and the security system and monitor. RP 387.

Mr. Whitlock was (ultimately) charged by information with the crimes of Burglary in the First Degree, Robbery in The First Degree, both with Deadly Weapon and Firearm Enhancements, and two counts of Bribing a Witness. Second Amended Information, Clerk's Papers (hereinafter CP) 60 - 63.

On December 8, 2014, Mr. Whitlock and Mr. Johnson were tried to bench, and at the conclusion thereof, the Court took the matter under consideration. RP 679. Thereafter, the Trial Court prepared findings and found both Mr. Whitlock and Mr. Johnson guilty of Burglary in the First Degree and Robbery in the First Degree. Amended Findings fo Fact and Conclusions of Law, CP 71 - 77. The Court further found that Mr. Johnson was Mr. Whitlock's accomplice and that Mr. Johnson was armed with a firearm during the commission of these crimes. CP 71 - 77.

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[3]Gustafson testified that he had met up with Whitlock and Johnson at Kelly McDonough's residence prior to driving them to Tonya Routt's house. RP 380 - 381.

A sentencing hearing was held on December 22, 2014. RP 683. Over the State's objection, the Trial Court determined that the charges of Burglary in the First Degree and Robbery in the First Degree were the same criminal conduct, and sentenced Mr. Whitlock to one-hundred eighty (180) months (base of 60 months with an additional 60 months each for the two firearm enhancements, to be served consecutively). RP 699 - 700, Judgement and Sentence, (*hereinafter:* J & S) CP 140 - 149.

On January 20, 2015, both the Appellant and the State filed timely notice of appeal to this court. The Appellant has, to date, not filed a *Pro Se* Brief.

IV. DISCUSSION

1. THE COURT'S AMENDED FINDINGS SUPPORT THE VERDICTS OF GUILTY AS TO THE CHARGES OF BURGLARY IN THE FIRST DEGREE AND ROBBERY IN THE FIRST DEGREE.

Mr. Whitlock first complains, with regard to his conviction for Burglary in the First Degree, that the Trial Court failed to find that he entered Ms. Routt's residence with the intent to commit a crime therein.[4] *See* Brief of Appellant, pp. 8-9. He further complains that

[4] His argument is couched in terms of the Trial Court's failure to enter a "conclusion of law" regarding Mr. Whitlock's intent to commit a crime inside the residence. The State would assert that such would constitute a finding of fact rather than a conclusion of law. The Trial

the Court did not find that Mr. Whitlock actually entered Routt's residence. He further claims that the Trial Court did not find that he "unlawfully took personal property from the person of another or in his or her presence against his or her will by the threatened use of immediate force, violence, or fear of injury to that person." Brief of Appellant, at 10. These claims are without merit and, in any event, do not merit reversal of the convictions.

A. The Courts Findings Adequately Support Each Element of the Crimes Charged.

Mr. Whitlock first argues that the Court failed to find necessary elements required to support his convictions for Burglary in the First Degree and Robbery in the First Degree. As stated in State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003):

> The criminal rules for superior court judges require that, following a bench trial, the judge enter findings of fact and conclusions of law. Findings and conclusions comprise a record that may be reviewed on appeal. Each element must be addressed separately, setting out the factual basis for each conclusion of law. In addition, the findings must specifically state that an element has been met.

Court's conclusion that Mr. Whitlock is guilty is the conclusion of law that flows from the individual findings of fact relating to the necessary elements of each charge. "We review findings of fact erroneously labeled "conclusions of law" as findings of fact, and conclusions of law labeled "findings of fact" as conclusions of law." *See* Merriman v. Cokeley, 152 Wn. App. 115, 125, 215 P.3d 241 (Div. II, 2009)(*citing* Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). The distinction is without a difference for the purposes herein.

(*Internal citations omitted*). The Trial Court's findings do not separately list out the elements of each offense and the evidence relied on by the Court to support each element. However, it is clear from the findings that the Court did find facts necessary to support each and every element.

Burglary in the First Degree is committed where a person enters or remains unlawfully in a building, with the intent to commit a crime against a person or property therein, that in so entering or while in the building or in the immediate flight from the building the actor or another participant in the crime assaulted another person and/or was armed with a deadly weapon. ***See*** RCW 9A.52.020.[5] While the Appellant complains that the Court did not find that he entered with the requisite intent, in fact the Court specifically found such intent. In the section labeled "Conclusions of Law," in paragraph 1, the Court found that "David R. Johnson(sic) entered the residence of Tonya Routt . . . with the intent to commit a crime therein." Mr. Whitlock seizes upon the fact that the Court identified Mr. Johnson, but this is clearly a scrivner's error. If this Court looks at the Findings of Fact and Conclusions of Law in David R. Johnson's case, it will see that the findings read virtually identically, strongly suggesting that the

[5]In the interest of brevity, this brief will not address the unchallenged elements of the crimes for which the Appellant was convicted.

Court drafted Mr. Johnson's findings and then modified these to apply to Mr. Whitlock's case.[6] *See* Findings of Fact and Conclusions of Law, State v. David R. Johnson, Asotin County Superior Court Cause 14-1-00088-1, COA # 33074-5-III, CP 98-103, *therein.* The Court further clarified in Paragraph 2, that "his remaining in the residence while committing a crime was unauthorized and unlicensed." CP 71 - 77. The Trial Court did, in fact, find that Mr. Whitlock entered the residence in Paragraph 4 of the Findings of Fact. CP 71 - 77. Therein, the Court stated, "A short time later, Damien Hester reentered the residence and was followed in by Ralph Whitlock." *See id.* The Court further found: "He then tried to open the door to Tanya Routt's room which was locked." All this makes clear that the Court did in fact, find that Mr. Whitlock entered the residence, and did so with the intent to commit a crime against persons or property therein.

The Court further found that Mr. Whitlock and Mr. Johnson were accomplices in Conclusion of Law, paragraph 6. RP 71 - 77. Therein, the Court specifically stated that Mr. Johnson was an accomplice to Mr. Whitlock and that Mr. Johnson was armed with a firearm. This finding, as it relates to the Special Firearm

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[6]If this Court has any concerns on this point, remand for a reference hearing would be an appropriate option. *See* RAP 9.11

Enhancement pursuant to RCW 9.94A.533(3), necessitates that the Court specifically find that the offender ***or an accomplice*** was armed during commission of the crimes. Since the Court found that Mr. Johnson was an accomplice in these crime with Mr. Whitlock, it makes no difference that the Court stated, regardless of any scriverner's error, that Mr. Johnson entered or remained with the intent to commit a crime against persons or property in the residence of Tanya Routt . As an accomplice, Mr. Whitlock is culpable for the criminal conduct of Mr. Johnson. *See* RCW 9A.08.020(2)(c).

With regard to his complaint concerning the Robbery First Degree charge, Mr. Whitlock's logic is likewise faulty.[7] *See*, *e.g.*, State v. Wheaton, 121 Wn.2d 347, 850 P.2d 507 (1993); Not only did the Court herein find that Mr. Johnson and Mr. Whitlock were accomplices, the Trial Court further found: "The property of Tanya Routt was stolen in the presence of Crista Ansel and Damien Hester against those person's will by force, intimidation, and/or fear of injury." CP 71 - 77, paragraph 3. The use of the term "stolen" by the Court makes clear that the property was taken unlawfully. As to the taking of property, in paragraph 11 of the Findings, the Court further found

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[7]With regard to the Robbery First Degree charge, Appellant's argument is poorly developed as he fails to identify which aspect of the elements that the Court failed to find. As such, this claim should not be considered as it is inadequately addressed therein. *See* State v. Wheaton, 121 Wn.2d 347, 850 P.2d 507 (1993).

that both "Mr. Whitlock and Mr. Johnson took the stolen items out through the backyard . . ." CP 71 - 77. In paragraph 12, the Court again found: "The two men placed the ***stolen*** items in the trunk of the car" and later in that same paragraph, once they arrived at Mr. McDonough's residence, "they unloaded the ***stolen*** items and took them inside." CP 71 - 77. (*Emphasis added*).

As to the requirement of force, the Court found that Mr. Johnson displayed a silver pistol and told Crista Ansel not to "do anything stupid." *Id.* Findings of Fact, paragraph 6. The Court found that **Ms** Ansel had been locked in the bedroom downstairs. *Id.* Findings of Fact, paragraph 8. The requirement that the taking of the property occur "from the person of another or in his or her presence" is satisfied where the victim is prevented, by force or fear, has been removed from or prevented from approaching the place from which the asportation of the personalty occurred. *See* State v. McDonald, 74 Wn.2d 141, 144, 443 P.2d 651 (1968). Here, the Court found, in addition to Mr. Johnson's threatening display of the gun, that Ms. Ansel was locked in a room in the basement. While not providing an itemized list of elements and supporting evidence thereof, the Trial Court's findings, scrivener's error notwithstanding, support the Court's conclusion of law that the Appellant, Ralph Whitlock, is guilty of Burglary in the First Degree and Robbery in the First Degree.

B. Any Claimed Error Is Harmless Where it Clearly Did Not Contribute to the Verdict Beyond a Reasonable Doubt.

At worst, the Trial Court's Findings of Fact and Conclusions of Law could be described as inartfully drafted. However, this does not render the Court's decision to convict Mr. Whitlock infirm. Even if the Trial Court's findings omitted discussion of all necessary elements, such error is grounds for remand only if it was not harmless. *See* State v. Banks, *supra*, at 44:

> The test to determine whether an error is harmless is " 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " Stated another way, "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred . . . . A reasonable probability exists when confidence in the outcome of the trial is undermined."

Id. (*Internal citations omitted*). In Banks, the omitted element was "knowledgeable" possession of the firearm. *Id.* at 41-42. Therein, neither the trial court nor the prosecutor even discussed the element of knowledge as neither was aware that knowledge was a necessary element. *Id.* at 45. In Banks, the Supreme Court considered the fact that the defendant therein contested that he knew that the gun was in his coat. *Id.* at 46. In rejecting his arguments, the Supreme Court noted that the trial court specifically found that the defendant actually picked up the gun. *Id.* This fact, the Supreme Court determined,

demonstrated that the trial court took account of the defendant's knowledge. Therein, the Supreme Court found that the trial court's omission of the knowledge element was harmless beyond a reasonable doubt. *Id*. Therein, the Court stated:

> We hold that, because the trial court's decision in Banks' trial would have been the same absent the errors, they were harmless beyond a reasonable doubt.

Id.

From the written findings and conclusions the Trial Court herein clearly found the necessary elements of unlawful entry by both Mr. Whitlock and Mr. Johnson. Read as a whole, it is clear from these findings that the Court found the two men to be acting in concert, describing them as accomplices. The Court further clearly found that the two men unlawfully took property of Tanya Routt through the use of force or intimidation and that they intended to do so when they entered the residence. Finally, it is clear that the Court found that Mr. Johnson displayed a deadly weapon (the firearm) during the commission of these crimes. As such, there is no reason to believe that the failure of the Findings to specifically state that Mr. Whitlock, as opposed to Mr. Johnson, entered the residence with the intent to take property had any bearing on the outcome. The Findings entered herein make clear that the Court did find that Mr. Whitlock and Mr. Johnson, either as principle or as accomplice, entered a residence

unlawfully, with the intent to commit a crime (robbery and/or theft), were armed with a deadly weapon, and did take property from the person or in the presence of Crista Ansel and/or Damien Hester, by force or threat of force. Therefore, any shortcomings in the Trial Court's written findings and conclusions, are clearly harmless beyond a reasonable doubt. *See* Banks, *supra*.

Finally, the Appellant is not entitled to reversal of his convictions. "Remand for entry of written findings and conclusions is the proper course." *See* State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). At best, the Appellant is entitled to remand for entry of findings which address the claimed missing elements.

2. THIS COURT SHOULD DECLINE TO CONSIDER THE ISSUE OF WHETHER THE TRIAL COURT ADEQUATELY CONSIDERED THE APPELLANT'S ABILITY TO PAY PURSUANT TO *STATE v. BLAZINA*, WHERE THE APPELLANT FAILED TO OBJECT BELOW.

The State recognizes that RCW 10.01.160(3) requires the trial court to make an individualized inquiry into the defendant's current and future ability to pay prior to imposing costs. *See* State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry includes evaluating a defendant's financial resources, incarceration, and other debts, including restitution. Blazina, 182 Wn.2d at 838-39. However,

where, as here, the Appellant failed to object below, this Court should decline to consider this pursuant to RAP 2.5. *See* State v. Duncan, 180 Wn. App. 245, 249-50, 327 P.3d 699 (2014), *review granted*, 183 Wn.2d 1013, 353 P.3d 641 (August 5, 2015).

Refusal to entertain issues for the first time on appeal is based upon well settled issues of jurisprudence: "insistence on issue preservation is to encourage 'the efficient use of judicial resources.'" *See* State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011)(*quoting* State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

> Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.

See id. Here, it will not encourage the efficient use of resources to require the transport of the Appellant back to the Asotin County for a hearing which could have been avoided had the Appellant merely objected and prompted the Trial Court to inquire.

It should be further recognized that the directive of RCW 10.01.160(3) to inquire regarding ability to pay, as more further described in Blazina, only applies to imposition of discretionary costs.

> For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account.

State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755, 758 (Div.

II, 2013)(*Citing* State v. Kuster, 175 Wn. App. 420, 306 P.3d 1022 (Div. III, 2013). Further, the Court's decision to impose a fine pursuant to RCW 9A.20.021 does not require inquiry into the offender's ability to pay. *See* State v. Clark, ___ Wn.App. ___, ___ P.3d ____ (Div. III, November 19, 2015). Of the financial obligations imposed herein, on the Sheriff's service costs, witness costs, and court appointed attorney costs are at issue.

The State would agree that, should State prevail on cross-appeal, and the matter be remanded to correct the Appellant's offender score, it would then be necessary to hold a new sentencing hearing. In that event, it would be appropriate to remand the issue of discretionary costs to the Trial Court for consideration at a new sentencing hearing. At that time the court could inquire regarding Mr. Johnson's ability to pay.

3. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE CRIMES OF BURGLARY IN THE FIRST DEGREE AND ROBBERY IN THE FIRST DEGREE CONSTITUTED THE SAME CRIMINAL CONDUCT WHERE THERE WAS NOT UNITY OF VICTIMS.

By way of cross appeal, the State would charge that the Trial Court erred, as a matter of law, in finding that the crimes of Burglary in the First Degree and Robbery in the First Degree constituted the

same criminal conduct. Because the clear authority is contrary to the Trial Court's conclusion, this Court should remand for resentencing with instruction to the Trial Court that the two charges cannot be considered same criminal conduct.

"'Same criminal conduct' means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve ***the same victim***." See RCW 9.94A.589(1)(a). (*Emphasis added*). "[I]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." See *id*. The same-criminal conduct test focuses on the extent to which a defendant's criminal intent, as objectively viewed, changes from one crime to the next. See State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The defendant bears the burden of proving that his offenses encompass the same criminal conduct. See State v. Williams, 176 Wn. App. 138, 142, 307 P.3d 819 (Div. III, 2013), *aff'd*, 181 Wn.2d 795 (2015).

The Court herein determined that the two crimes were "same criminal conduct." In so finding, the Court focused on the objective intent of Mr. Whitlock in committing the two crimes. RP 699. In so ruling, the Court stated, "[T]he only reason for the burglary was to facilitate the robbery and so I think there is same criminal conduct under that analysis." The Court limited its focus to time, place and

intent and did not consider identity of victims in determining that the two crimes constituted same criminal conduct.

The victims of a burglary include the occupants of a residence and their guests—in this case, a total of at least seven people. *See* State v. Davison, 56 Wn. App. 554, 559-60, 784 P.2d 1268 (Div. I, 1990). Further, Tonya Routt, the homeowner, while not present at the time of the crime, was clearly a victim of the Burglary charge as it was her home that was unlawfully entered and it was her property that was taken. The State's information charged the Appellant with robbery of three other persons, not including Tonya Routt. Named therein was Damien Hester, Lisa Jones and/or Crista Ansel. The Court entered findings after bench trial which included the findings that intimidation was used against Ansel and Hester to take Routt's property. Both Davison and State v. Davis, 90 Wn. App. 776, 954 P.2d 325 (Div. I, 1998) hold that a burglary of a home in which more than one person is present does not have the same victims for "same criminal conduct" purposes as an assault against one of the persons present in the course of the burglary. Davison, at 558 - 560; Davis, at 782. *See also* State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, (1987).(*"Convictions of crimes involving multiple victims must be treated separately."*). The logic of these cases applies *a fortiori* where a burglary, such as the case at bar, has ten victims (Routt, Ansel, Hester, Jones, three children, and three unidentified others)

and a robbery during the course of the burglary having two victims (Ansel and Hester).

Simple plain language analysis of the statute makes clear that these crimes, even if the multiple victims between the counts were identical, cannot be treated as the "same criminal conduct." The "same criminal conduct" analysis requires that the two crimes involve the same ***victim*** (singular) not the same ***victims*** (plural). *See* RCW 9.94A.589(1)(a). Multiple victims, even if the victims are all identical between counts, should further preclude a finding of "same criminal conduct."

The Trial Court abused its discretion in finding that the Burglary First Degree and Robbery First Degree, as charged and convicted herein, were the same criminal conduct. This Court should remand for resentencing and instruct the Trial Court that, as a matter of law, these two crimes do not constitute "same criminal conduct." In that event, this Court should then properly remand for the Trial Court to consider whether the Appellant has the ability to pay legal financial obligations pursuant to 10.01.160(3).

V. CONCLUSION

The Findings and Conclusions entered by the Trial Court adequately support each and every element of the offenses for which the Court found the Appellant guilty. Any shortcomings therein are clearly harmless beyond a reasonable doubt. Pursuant to RAP 2.5,

this Court should reject the Appellant's unpreserved claims concerning imposition of legal financial obligations. Finally, this Court reverse the Trial Court's ruling that the two crimes constitute the "same criminal conduct" and should remand for resentencing with a corrected offender score. The State respectfully requests this Court enter such decision.

Dated this 20th day of November, 2015.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. RALPH E. WHITLOCK, Appellant.	Court of Appeals No: 330737 **DECLARATION OF SERVICE**

DECLARATION

On November 23, 2015 I electronically mailed, with prior approval from Mr. Kato, a copy of the BRIEF OF RESPONDENT in this matter to:

KENNETH H. KATO
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I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on November 23, 2015.

Lisa M. Webber

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