

FILED
Court of Appeals
Division III
State of Washington
6/28/2019 4:23 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
7/2/2019
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Supreme Court No. 97376-8

Court of Appeals No. 35594-2-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARRETT GUY KIM,

Petitioner.

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

PETITION FOR REVIEW

Kate Benward
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED 3

1. This Court should grant review to determine whether Mr. Kim was deprived of his right to a unanimous jury verdict in a multicount case where the jury’s question about unanimity went unanswered by the court’s failure to instruct the jury that it must unanimously agree on the conduct in support of the conviction. RAP 13.4(b)(1) and (3)...... 3

a. The trial court must ensure the jury unanimously agrees on the conduct that supports the conviction, even in a multicount case. 3

b. A unanimity instruction was required in response to the jury’s question about what evidence it could consider in relation to the two charged counts of identity theft. 6

c. Mr. Kim was prejudiced by the trial court’s failure to instruct the jury it must unanimously agree on the conduct underlying its verdict. 7

2. The court’s failure to instruct the jury that it could not convict Mr. Kim for the same act violated his right to be free from double jeopardy, entitling Mr. Kim to review under RAP 13.4(b)(3)...... 8

E. CONCLUSION 11

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

State v. Carson, 184 Wn.2d 207, 357 P.3d 1064 (2015) 1, 3, 4, 5

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)..... 4, 7, 8

State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) 4

State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011)..... 9, 10

State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991) 4

State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) 3, 4

Rules

RAP 13.3..... 1

RAP 13.4(b)(1) 1, 3

RAP 13.4(b)(3) 1, 2, 8, 11

RAP 2.5(a)(3)..... 4

Washington Court of Appeals Decisions

State v. Watkins, 136 Wn. App. 240, 148 P.3d 1112 (2006) 4, 7

State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) 9, 11

State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007)..... 4, 9, 10

Washington Constitutional Provisions

Const. Art. I, sec. 9.....2, 9

Const. Art. I, sec. 21.....1, 3

Federal Constitutional Provisions

U.S. Const. amend. V..... 1, 9

United States Supreme Court Decisions

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705
(1967)7

Other Authorities

Washington Pattern Jury Instruction 3.01.....6
Washington Pattern Jury Instruction 4.25.....5
Washington Pattern Jury Instruction 4.26..... 5

A. IDENTITY OF PETITIONER

Garrett Kim, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 35594-2-III, issued on May 30, 2019, pursuant to RAP 13.3 and RAP 13.4(b)(1) and (3). The opinion is attached.

B. ISSUES PRESENTED FOR REVIEW

1. Article I, § 21 of the Washington Constitution requires the jury to unanimously agree on which act constitutes the crime charged. The Court of Appeals ruled that a unanimity instruction was not required in Mr. Kim's case because this was not a single count case, contrary to *State v. Carson*, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015), which determined that a unanimity instruction may be required in a multicount case just as in a single count case. Here, where the jury had questions about what evidence it could rely on in considering the two counts of identity theft, was Mr. Kim's right to a unanimous jury verdict violated by the court's failure to instruct the jury to unanimously agree the State proved a particular act for each count charged beyond a reasonable doubt? RAP 13.4(b)(1) and (3).

2. The federal and state constitutions protect persons from being twice put in jeopardy for the same offense. U.S. Const. amend. V; Const.

art. 1 § 9. The jury's question to the court indicated that it sought to use all evidence presented at trial in considering both counts, but the jury was not instructed that each count requires proof of a different act. Did this failure to instruct the jury that each count required proof beyond a reasonable doubt of a separate act for each count of identity theft violate Mr. Kim's protection against double jeopardy? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

Garrett Kim was working on a large house project with his family members and friends throughout the entire day that someone made two unauthorized debit card transactions on Alexa Proctor Sanders's debit card at Farmer's Feed Store and Baxter's Auto Parts. RP 89, 90, 93, 238-242.

Nevertheless, Mr. Kim was charged with these offenses. CP 1-2. The State presented different identifying evidence about the person who used the debit card at Farmer's than about the person who used it at Baxter's. RP 118-126; 131-137; see also Opening Brief of Appellant, p. 6-9.

During deliberations, the jury asked the court whether it could rely on all the admitted evidence for both counts, reflecting the paucity of evidence in support of the individual counts. CP 56. The court told the jury to refer to its instructions, but there was no instruction that the jury must unanimously find that the act charged in the Information was proven

beyond a reasonable doubt, or that the jury may not convict Mr. Kim twice for the same act. CP 39-54, 56. The jury ultimately returned a guilty verdict on both counts. CP 57-58.

Ignoring this Court's decision in *Carson*, the Court of Appeals rejected Mr. Kim's claim that a *Petrich*¹ instruction may be required in a multicount case. 184 Wn.2d at 222. Slip op. at 4-5. The Court of Appeals affirmed Mr. Kim's conviction, determining that despite the jury's question about unanimity that went unanswered, the court's failure to provide a unanimity instruction to the jury violated Mr. Kim's constitutional right to a unanimous jury and right to be free from double jeopardy. Slip op. at 4-5.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review to determine whether Mr. Kim was deprived of his right to a unanimous jury verdict in a multicount case where the jury's question about unanimity went unanswered by the court's failure to instruct the jury that it must unanimously agree on the conduct in support of the conviction. RAP 13.4(b)(1) and (3).

a. The trial court must ensure the jury unanimously agrees on the conduct that supports the conviction, even in a multicount case.

Article I, § 21 of the Washington Constitution requires a unanimous jury verdict. The accused may only be convicted when a

¹ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

unanimous jury concludes the criminal act charged in the information has been committed. *State v. Watkins*, 136 Wn. App. 240, 243, 148 P.3d 1112 (2006). This means the jury “must be unanimous as to *which* act or incident constitutes a particular charged count of criminal conduct.” *State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417 (2007)(citing *State v. Noltie*, 116 Wn.2d 831, 842–43, 809 P.2d 190 (1991))(emphasis in original). A court’s failure to supply a unanimity instruction is constitutional error that may be raised for the first time on appeal when, as here, it has practical and identifiable consequences that affect the accused’s trial rights, and resulted in actual prejudice. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014); RAP 2.5(a)(3).

When the State presents evidence of multiple acts, any one of which could form the basis for conviction, jury unanimity must be protected. The prosecutor must either elect the act it will rely on for conviction, or alternatively, the court ensures this by instructing the jury that “that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt.” *State v. Carson*, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015)(citing *State v. Petrich*, 101 Wn.2d at 572); *see also State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (Where a person is accused of multiple charges based on multiple acts, the

State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act).

This has come to be known as the *Petrich* rule, which has been incorporated into the Washington Pattern Jury Instructions. *Carson*, 184 Wn.2d at 217; Washington Pattern Jury Instruction 4.25, 4.26. The *Carson* court notes the WPIC that developed from this rule reflects the “single-count roots of *Petrich*” which instructs the jury that it must find “one particular act” was proved beyond a reasonable doubt, and “must unanimously agree as to which act has been proved.” *Carson*, 184 Wn.2d at 217 (citing Washington Pattern Jury Instruction 4.25, at 110). But a unanimity instruction may be required in a multicount case just as in a single count case. This Court’s observation that “we have never specifically held that *Petrich* must be read in cases where there is exact congruence between the number of incidents described in the evidence and the number of criminal counts charged” does not mean that a unanimity instruction is never required in a multicount case. *Carson*, 184 Wn.2d at 222. Despite this Court’s ruling in *Carson*, the Court of Appeals determined that “because Mr. Kim was charged with two counts, and the evidence only indicated two criminal acts, there was no need for a *Petrich* instruction to ensure jury unanimity.” Slip op. at 5.

b. A unanimity instruction was required in response to the jury's question about what evidence it could consider in relation to the two charged counts of identity theft.

Mr. Kim's case is a multicount case where a unanimity instruction was necessary to ensure Mr. Kim's right to a unanimous jury because without this instruction, the jury was permitted to convict Mr. Kim of the two charges without unanimously agreeing on the conduct in support of each charge.

The "to convict" instruction for count I stated that in order to convict Mr. Kim of identity theft, the jury was required to find, beyond a reasonable doubt, that Mr. Kim obtained goods, or anything else having a value of \$1500 or less from Baxter's Auto Parts, through the knowing use of another's financial information. CP 49. The second "to convict" instruction for count II required the same elements, but for Farmer's Feed Store. CP 50.

The jury asked the court whether all the evidence admitted can be used to consider both (each) counts (individually). CP 56. The jury's question indicates it had serious doubts about the evidence alleged in support of each charged crime. The court did not instruct the jury to decide each count separately, or that the jury's verdict should not control its verdict on the other count. Washington Pattern Jury Instruction 3.01. Nor did the court instruct the jury had to **unanimously agree as to which act**

has been proved. Washington Pattern Jury Instruction 4.25; *Watkins*, 136 Wn. App. 240 at 243 (“A defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed”). Absent these instructions, the jury was impermissibly permitted to convict Mr. Kim without unanimously agreeing on the conduct in support of the jury verdict as to each count.

c. Mr. Kim was prejudiced by the trial court’s failure to instruct the jury it must unanimously agree on the conduct underlying its verdict.

The trial court’s failure to correctly instruct the jury on the limits of its consideration of the evidence in these two counts was certainly prejudicial, because there were profound evidentiary deficiencies in both identity theft charges.

Because a court’s failure to instruct the jury on unanimity is a constitutional error, the State must prove this error was “harmless beyond a reasonable doubt” *Kitchen*, 110 Wn.2d at 412 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

Contrary to Detective Todd’s testimony that the Baxter’s employee Mr. Barber identified Mr. Kim, Mr. Barber testified that did not recall telling the detective that person had been in the store. RP 194, 200. Mr. Barber could not recognize the person in the photo lineup that Detective Todd had assembled either during the investigation or at trial. RP 196.

There was no video evidence from Baxter's, so Mr. Barber's ability to identify Mr. Kim as the person in the store on the day in question was crucial evidence the jury needed to convict Mr. Kim for identity theft at Baxter's.

The video surveillance in support of the charge at Farmer's was equivocal because the person's face in the video was not visible and the Farmer's employee was only 80% sure of her ability to identify Mr. Kim as this person. RP 215. The evidentiary problems for each count prejudiced Mr. Kim because the jurors likely disagreed about what evidence to base its verdict in each count, making it very likely that Mr. Kim was convicted without the jury unanimously agreeing on the conduct it relied on in its guilty verdict for both counts. This error requires reversal of Mr. Kim's convictions for identity theft and remand for a new trial.

Kitchen, 110 Wn.2d at 412.

2. The court's failure to instruct the jury that it could not convict Mr. Kim for the same act violated his right to be free from double jeopardy, entitling Mr. Kim to review under RAP 13.4(b)(3).

The trial court also failed to instruct the jury that each charge must be based on a different act, which violated Mr. Kim's right to be free from double jeopardy. Though the Court of Appeals noted it would have been "preferable" for the court to issue an instruction that "clearly identified count 1 and count 2 as involving different transaction (or stores) and

therefore distinct criminal acts,” the Court of Appeals did not require this. Slip op at 5.

The constitutional guarantee against double jeopardy protects the accused against multiple punishments for the same offense. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); U.S. Const. amend V; Const. art. I, § 9. Like jury unanimity, this constitutional argument may be raised for the first time on appeal, and challenges to jury instructions are reviewed de novo. *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

The right to be free from double jeopardy may be violated when it is not manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense. *Borsheim*, 140 Wn. App. at 367.

In *Borsheim* the jury was instructed that “a separate crime is charged in each count.” *Borsheim*, 140 Wn. App. at 367. But neither this instruction, nor any other instruction informed the jury that “each ‘crime’ required proof of a different act.” *Id.* Absent an instruction that each crime required proof a different act, the instructions did not prevent the jury from convicting the accused for more than one identical count on a single underlying event, thereby exposing him to multiple punishments for a

single offense in violation of double jeopardy. *Borsheim*, 140 Wn. App. at 366.

The same result must be true here, where Mr. Kim was charged with two separate acts, identity theft at Baxter's and at Farmer's, and the jury explicitly asked whether all the admitted evidence could be used to convict Mr. Kim of both counts. CP 56. The court's failure to provide a "separate and distinct act" instruction or an instruction that required the jury to base each charged count on a separate and distinct underlying event exposed Mr. Kim to double jeopardy.

A reviewing court may look to the entire record to determine whether it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense. *Mutch*, 171 Wn.2d at 664. Here, the record firmly establishes that it was in no way manifestly apparent to the jury that they were prohibited from convicting Mr. Kim twice for the same offense. Although each "to-convict" instruction referenced a separate store, the proof was very different for each count, and the jurors specifically asked if they could rely on all the evidence admitted in considering both counts of identity theft, but were not told they could not convict Mr. Kim twice for the same conduct. CP 56. This meant the jury was permitted to convict Mr. Kim of the Baxter's charge based on the same evidence used to convict Mr. Kim of the

Farmer's charge. The court's failure to provide this instruction to the jury requires reversal and remand for one of the two identity theft convictions.

Berg, 147 Wn. App. at 935.

Mr. Kim seeks review by this Court of the double jeopardy violation pursuant to RAP 13.4(b)(3).

E. CONCLUSION

Based on the foregoing, Mr. Kim respectfully requests review by this Court.

Respectfully submitted this the 28th day of June 2019.

s/ Kate Benward
Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711
E-mail: katebenward@washapp.org

FILED
MAY 30, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 35594-2-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
GARRETT GUY KIM,)	
)	
Appellant.)	

PENNELL, J. — Garrett Kim appeals his convictions for two counts of second degree identity theft. We affirm his convictions, but remand with instructions to strike \$831.13 in court costs.

FACTS

On March 20, 2016, Alexa Proctor’s debit card went missing after it was used at an O’Reilly Auto Parts store. Ms. Proctor did not notice the card was missing until the following day, at which point she went to her bank to obtain a replacement card. On March 22, Ms. Proctor noticed there were two unauthorized transactions on her card,

No. 35594-2-III
State v. Kim

both occurring around noon on March 21. One transaction took place at Baxter's Auto Parts and the other at Farmer's Exchange.

Surveillance footage from Farmer's Exchange enabled law enforcement to pull some still photos of a suspect. The images depicted a white male wearing sunglasses and distinctive clothing.

Armed with still images, law enforcement talked to employees from Baxter's Auto Parts, Farmer's Exchange, and O'Reilly Auto Parts. Information obtained from the employees helped law enforcement identify Garrett Kim as the suspect in the surveillance footage. A subsequent search of Mr. Kim's home uncovered clothing similar to the items worn by the suspect in the surveillance footage. However, law enforcement were not able to recover Ms. Proctor's debit card.

Mr. Kim was charged with two counts of second degree identity theft. Count 1 pertained to the transaction at Baxter's Auto Parts. Count 2 pertained to the transaction at Farmer's Exchange. Mr. Kim exercised his right to a jury trial. At trial, he and other defense witnesses testified that Mr. Kim was not involved in the theft or use of Ms. Proctor's debit card. Instead, Mr. Kim claimed he spent the dates of March 20 and 21 working at home.

Mr. Kim's jury was provided nine separate instructions. Instructions 7 and 8 were the to-convict instructions for the two identity theft charges. The wording of instructions

7 and 8 was identical, save two details: Instruction 7 stated it pertained to count 1 and the Baxter's Auto Parts transaction. Instruction 8 stated it pertained to count 2 and the Farmer's Exchange transaction. Instruction 9 provided the jury with instructions on deliberations and for reaching a verdict. It advised the jury that "[b]ecause this is a criminal case, each of you must agree for you to return a verdict." Clerk's Papers (CP) at 52. The trial court did not provide the jury with an instruction based on WPIC 3.01¹ ("Multiple Counts—Single Defendant"), which would have advised the jury that it must decide each count separately. However, the jury was provided separate verdict forms for count 1 and count 2. Mr. Kim did not object to the court's instructions.

During deliberations, the jury asked the trial court "whether all the evidence admitted can be used to consider both (each) counts (individually)?" CP at 56. As approved by both Mr. Kim and the State, the trial court answered the jury's question with, "[y]ou must rely on the instructions regarding the evidence previously given, no further instruction may be given." *Id.*

The jury entered guilty verdicts on both count 1 and count 2 and the trial court sentenced Mr. Kim to 13 months' incarceration and assessed \$1,331.13 in legal financial

¹ WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 3.01, at 88 (4th ed. 2016) (WPIC).

No. 35594-2-III
State v. Kim

obligations (LFOs). Specifically, the trial court imposed a \$500 crime victim penalty assessment and \$831.13 in court costs.

Mr. Kim appeals his judgment and sentence.

ANALYSIS

Identity theft convictions

Mr. Kim argues that because the jury was not instructed that each count must be considered separate from the other, he was deprived of his constitutional rights to unanimous verdicts and to be free from double jeopardy. According to Mr. Kim, the jury's question indicates confusion over whether the same conduct could be used to justify convictions for both counts 1 and 2.

Mr. Kim's constitutional challenges to his convictions are claims that may be raised for the first time on appeal. RAP 2.5(a). "Our review is de novo." *State v. Mutch*, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Contrary to Mr. Kim's position, this is not a multiple acts case where a *Petrich* instruction would be necessary to avoid jury unanimity problems. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 406 n.1, 756 P.2d 105 (1988). A *Petrich* instruction is appropriate when the defendant has been charged with one count of criminal conduct, but the evidence indicates the commission of several distinct criminal acts. In such circumstances, a

unanimity instruction is generally necessary in order to ensure that all 12 jurors agree as to which act justifies the offense of conviction. Had Mr. Kim been charged with only one count of identity theft, a *Petrich* instruction would have been warranted. But because Mr. Kim was charged with two counts, and the evidence only indicated two criminal acts, there was no need for a *Petrich* instruction to ensure jury unanimity.

Mr. Kim also complains that because the jury was not provided an instruction akin to WPIC 3.01 (“Multiple Counts—Single Defendant”), there is a danger he may have been convicted twice of the same conduct, in violation of double jeopardy.² We find no cause for concern. Although it would have been preferable for the trial court to issue an instruction pursuant to WPIC 3.01, the court’s instructions clearly identified count 1 and count 2 as involving different transactions (or stores) and therefore distinct criminal acts.

The jury’s question does not indicate that it may have convicted Mr. Kim twice based on the same criminal conduct. There was never any question that the transactions at Baxter’s Auto Parts and Farmer’s Exchange involved the same person. It was therefore appropriate for the jury to assess the evidence pertaining to both transactions in order to discern whether Mr. Kim was the individual involved. By reviewing the totality of the evidence, the jury did not run the risk of twice convicting Mr. Kim for the same conduct.

² U.S. CONST. amend. V; WASH. CONST. art I, § 9.

No. 35594-2-III
State v. Kim

The court's clearly written instructions prevented this possibility.

LFOs

Citing recent statutory changes to Washington's LFO scheme,³ Mr. Kim challenges the trial court's imposition of (1) \$831.13 in court costs (\$200.00 criminal filing fee, \$60.00 sheriff's service fee, \$400.00 in jury demand fees, and \$171.13 in witness cost) and (2) a \$500.00 crime victim penalty assessment. Our Supreme Court has held that the 2018 LFO amendments apply prospectively to cases on direct appellate review at the time of enactment. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Among other things, the LFO amendments prohibit imposition of court costs on defendants who are "indigent," as that term is defined by RCW 10.101.010(3)(a)-(c), at the time of sentencing. RCW 10.01.160(3).

The State concedes Mr. Kim's LFO assignments of error and requests we remand this matter to strike all \$1,331.13 in LFOs from Mr. Kim's judgment and sentence.

We accept the State's concession with respect to imposition of the \$831.13 in court costs. The 2018 LFO amendments prohibit imposition of these costs against indigent defendants. RCW 10.01.160(3); *see also* RCW 36.18.020(2)(h), RCW 36.18.040, RCW 10.46.190, RCW 10.64.015.

³ LAWS OF 2018, ch. 269.


No. 35594-2-III
State v. Kim

We do not accept the State’s concession with respect to the crime victim penalty assessment. The penalty assessment is not a cost of prosecution under RCW 10.01.160. It is instead governed by RCW 7.68.035. “An offender being indigent . . . is not grounds for failing to impose . . . the crime victim penalty assessment under RCW 7.68.035.” RCW 9.94A.760(1). The 2018 LFO amendments did not change the mandatory nature of this assessment. *See* RCW 7.68.035; LAWS OF 2018, ch. 269 § 19. Neither the LFO statutory amendments nor *Ramirez* provides a basis for striking the penalty assessment.

CONCLUSION

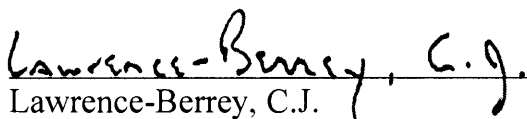
Mr. Kim’s convictions are affirmed, but we remand to strike the aforementioned \$831.13 in court costs from the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

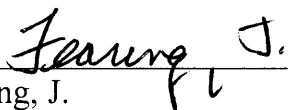


Pennell, J.

WE CONCUR:



Lawrence-Berrey, C.J.



Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.) COA NO. 35594-2-III
)
GARRETT KIM,)
)
PETITIONER.)

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[prosecuting@co.benton.wa.us]	()	HAND DELIVERY
[Brandon.Pang@co.benton.wa.us]	(X)	E-SERVICE VIA PORTAL
BENTON COUNTY PROSECUTOR'S OFFICE		
7122 W OKANOGAN AVE		
KENNEWICK WA 99336-2341		
<input checked="" type="checkbox"/> GARRETT KIM	(X)	U.S. MAIL
1203 E 19 TH AVE	()	HAND DELIVERY
KENNEWICK, WA 99337	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JUNE, 2019.

X 

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

June 28, 2019 - 4:23 PM

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