

FILED
Jul 21, 2016
Court of Appeals
Division I
State of Washington

No. 74416-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DONALD GOSNEY,

Appellant.

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

OPENING BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing restitution absent sufficient proof of loss, in violation of the sentencing statute and constitutional due process.

2. Given Donald Gosney's indigency, this Court should not impose appellate costs, even if the State substantially prevails.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. If the defendant disputes the amount of restitution requested in a criminal case, the State must present substantial evidence to prove the victim's actual damages. The evidence must be reliable and refutable to comport with due process. Here, the State requested restitution to reimburse the Washington State Department of Labor and Industries for funds paid to compensate the alleged victim for medical care and lost wages. Mr. Gosney disputed the amount requested, and the State presented insufficient corroborating evidence to prove that the expenses incurred by the victim, as well as his lost wages, were caused by the actions of Mr. Gosney. Was restitution thus awarded in violation of the statute, as well as in violation of constitutional due process?

2. Given that the trial court found Mr. Gosney is indigent and his indigency is presumed to continue throughout review, should this Court disallow appellate costs even if the State substantially prevails?

C. STATEMENT OF THE CASE

Donald Gosney is a disabled veteran, who served in the United States military police for eight years, including tours of service in Vietnam, Panama, and the Philippines. CP ___, sub. no. 34 (Defense Sentencing Recommendation). He was honorably discharged following a helicopter accident in 1978, which left him with a permanent back injury. Id. After eight surgeries, an addiction to painkillers and other drug use followed, and Mr. Gosney's involvement with the criminal justice system began. Id.

Mr. Gosney cannot clearly recall the events that led to Officer Scott Oak's injury on August 5, 2014. On that day, Mr. Gosney drove to the SCORE¹ jail facility to pick up a friend who had been released. CP 5. According to officers, Des Moines Police Officer Scott Oak approached Mr. Gosney, who was waiting in his vehicle, and informed him that he had an open arrest warrant. Mr. Gosney put his car into reverse and began to drive away. Id. at 5-6. Rather than step out of the

¹ SCORE (South Correctional Entity Regional Jail) is located in Des Moines, Washington. <http://www.scorejail.org/> (last viewed 7/21/15).

way, Officer Oak attempted to block the open car door with his hand, then tried to grab the steering wheel of Mr. Gosney's car. Id.

After several miles of pursuit, Mr. Gosney's vehicle was stopped by officers using a "PIT maneuver."² CP 7. Deputy Weekley noted that upon arrest, Mr. Gosney appeared to be either intoxicated or to have some sort of medical condition – or both. Id. Mr. Gosney was evaluated by a Des Moines drug recognition expert, who determined Mr. Gosney was suffering from some sort of stroke. CP 7. Mr. Gosney was transported to Highline Hospital and admitted for several weeks. CP 7; 11/19/15 RP 24.

Meanwhile, Officer Oak stated he had suffered a contusion to his shoulder, cervical strain, and a contusion to his face, scalp and neck, as well as a contusion to his leg when Mr. Gosney drove away. CP 7. Officer Oak stated he missed three days of work due to his injuries. Id.; CP __, sub. no. 55 (Appendix); 6/15/15 RP 15.

The State charged Mr. Gosney with one count of third degree assault and one count of attempting to elude a pursuing police vehicle. CP 1-2. Mr. Gosney pled guilty to assault in the third degree, for an agreed sentence of 51 months incarceration. CP 10-36.

One of the conditions of Mr. Gosney's sentence was the payment of restitution in an amount to be determined at a later hearing. CP 37-45.

In support of its restitution request, the State submitted a packet of materials, including explanations of benefits from the Washington State Department of Labor & Industries (L & I), medical billing, workers' compensation documents, and a Victim Impact Statement from Officer Oak. CP 58-96; CP ___, sub. no. 55 (Appendix). The prosecutor requested restitution in the amount of \$61,581.16, to compensate L & I for Officer Oak's expenses. CP 46.

Following Mr. Gosney's objection during a restitution hearing on November 19, 2015, the trial court reduced this amount, citing insufficient proof of causation to support the claim for mental health therapy expenses which totaled \$7,085.07. 11/19/15 RP 29 (ordering restitution of \$54,496.23); CP 46 (Order Setting Restitution). Mr. Gosney objected to the lower amount as well. He argued the State had failed to prove a causal connection to support the award of \$54,496.23, supplying only a list of medical expenses and time loss entries, without

² PIT refers to the Pursuit Immobilization Technique utilized by officers. CP 7.

evidence to show the causal relationship between the injury and the amounts. Id. at 27-28.

On December 17, 2015, the State produced a letter from Officer Oak's therapist, stating she was treating him for "the LNI [sic] on the job injury" associated with his related claim number. CP 61. The State also produced a letter from Officer Oak, indicating he was seeing this therapist for psychological treatment "directly due to this assault." CP 60. The court ordered the additional amount of restitution, over Mr. Gosney's objection to the award in total. 12/17/15 RP 3; CP 54 (Order Setting Additional Restitution).

D. ARGUMENT

- 1. The court violated the sentencing statute and constitutional due process by ordering restitution without requiring the State to prove the actual amount of the victim's lost wages.**

When a defendant disputes the amount of restitution requested by the State, the court must require the State to present substantial evidence to prove its allegations. Principles of constitutional due process require that the evidence be reliable and refutable. Here, Mr. Gosney disputed the State's allegation that L & I should be reimbursed \$61,581.16 in expenses incurred as a result of the assault. Despite the objection, the court did not require the State to present evidence to

prove the relationship between the expenses incurred by L & I and the assault, nor the precise amount of the victim's loss. Because the restitution award rests on insufficient evidence, it must be reversed.

a. The sentencing statute required the State to prove the damages that resulted from Mr. Gosney's criminal act.

The court's authority to impose restitution is statutory, and is found in the Sentencing Reform Act. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); RCW 9.94A.753. Restitution is meant to be both punitive and compensatory. State v. Cosgaya-Alvarez, 172 Wn. App. 785, 790-91, 291 P.3d 939 (2013); State v. Kinneman, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005).

When the State seeks restitution to cover expenses paid by L & I, reimbursement of L & I is authorized by RCW 9.94A.753(7). That statute provides in part, "Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order." RCW 9.94A.753(7).³

³ RCW 9.94A.753(7) provides in full:

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter [7.68](#) RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry

Under the crime victims' compensation act, a "victim" is a person who "suffers bodily injury or death as a proximate result of a criminal act of another person." RCW 7.68.020(15). A victim is entitled to benefits under the act if he or she was "injured as a result of a criminal act." RCW 7.68.070(1). Benefits may include financial support for medical expenses and for lost wages, if the lost wages are due to a temporary total disability resulting from the criminal act. RCW 7.68.070(1), (5).⁴

Here, the court was authorized to order Mr. Gosney to pay restitution to L & I for Officer Oak's medical expenses and lost wages, only if these were the result of Mr. Gosney's criminal act. RCW 7.68.070(1); RCW 9.94A.753(7).

When disputed, the facts supporting a restitution award must be proved by a preponderance of the evidence. Tobin, 161 Wn.2d at 524. Here, Mr. Gosney disputed the connection between the \$61,581.16 in damages that L & I sought to collect on behalf of Officer Oak, and the conduct committed by Mr. Gosney. 11/19/15 RP 27-28. Therefore, the

of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

⁴ There was no evidence in the record that Officer Oak was, or remains, disabled as a result of this incident, since the court held no evidentiary hearing.

State was required to prove that amount by a preponderance of the evidence. Tobin, 161 Wn.2d at 524.

- b. The sentencing statute and constitutional due process required the State to present reliable, refutable evidence to prove the actual amount of Officer Oak's medical expenses and lost wages.*

Setting the restitution amount is an integral part of the sentencing proceeding that must be performed with the same care and deliberation as other aspects of the sentencing decision. State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992). Evidence admitted at a sentencing hearing must meet due process requirements, such as providing the defendant an opportunity to refute the evidence presented; the evidence must also be reliable. State v. Strauss, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992), citing Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948); see also State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012).

The amount of restitution awarded must be based upon sufficient evidence. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). While the claimed loss need not be established with specific accuracy, evidence is sufficient if it affords a reasonable basis for estimating loss. Id. “Although the Rules of Evidence do not apply

at restitution hearings, the evidence presented to the trial judge must nevertheless be sufficient to support a finding of restitution in the amount ordered.” Pollard, 66 Wn. App. at 784.

In addition, restitution proceedings must comply with principles of constitutional due process. Pollard, 66 Wn. App. 779, 784-85; Const. art. I, § 3; U.S. Const. amend. XIV. The Due Process Clause places the burden on the State to ensure that the record before the court is adequate to support a court’s sentencing decision. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Due process requires that the court’s decision be based upon information bearing “some minimal indicium of reliability *beyond mere allegation*.” Id. (internal quotation marks and citations omitted). A defendant may not be sentenced on the basis of information that is false, lacks minimum indicia of reliability, or is unsupported by the record. State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). Any action taken by the sentencing judge that fails to comport with due process requirements is constitutionally impermissible. Id.

The Due Process Clause requires the court’s restitution award be based upon evidence that is reliable and refutable. Pollard, 66 Wn. App. at 784-85. If the State relies upon hearsay statements, the record

must be adequate to provide the defendant with a sufficient basis to rebut the State's evidence. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). By the same token, "the record must permit a reviewing court to determine exactly what figure is established by the evidence." Pollard, 66 Wn. App. at 785.

These basic principles of fairness were violated in this case because the State did not present sufficient reliable and refutable evidence to prove the actual amount of Officer Oak's losses.

c. The State did not present sufficient evidence to support the restitution amount.

According to the above well-established principles, the State was required to present sufficient reliable evidence to prove the amount in medical expenses and lost wages the officer actually lost as a result of the assault. The State's evidence was insufficient because it consisted merely of hearsay allegations about how much L & I had paid to Officer Oak, with no evidence to show the claims were related to, or caused by, the incident with Mr. Gosney.

The State's evidence of actual loss consisted only of a third-hand report, compiled by an investigator at the Victim Assistance Unit of the prosecutor's office. CP 58-96. The report is comprised of a letter from the investigator, stating that L & I had already paid the

claim to Officer Oak, and that for this reason, L & I is requesting restitution from Mr. Gosney. CP 59. The letter from the investigator breaks down the \$61,581.16 claim into two parts – medical claims (\$31,884.88) and time loss (\$29,696.28). CP 59.

The packet contains a letter from L & I, verifying that the department has already paid \$61,581.16 in worker's compensation benefits to Officer Oak, and that this figure may increase. CP 62. The packet also contains approximately 25 pages of medical billing records for Officer Oak, on pages titled "claimant history profile." CP 66-92. These entries are not categorized in any manner, but indicate that Officer Oak sought medical treatment from a variety of providers, including physicians, radiologists, chiropractors, massage therapists, rehabilitation clinics, psychologists, and physical therapists. CP 66-92. The packet also includes three pages apparently related to payroll entries from L & I based on worker's compensation paid to Officer Oak for lost wages. CP 63-65 ("time loss").

However, no evidence, testamentary or documentary, connected the voluminous medical billing evidence with the incident caused by Mr. Gosney on August 5, 2014. To add to the confusion, the record shows that Officer Oak claimed he missed only three days of work as a

result of the incident, not the year indicated by the time loss L & I paperwork. CP ___, sub. no. 55 (Victim Impact Statement); Appendix; CP 6-7. At best, the State's evidence was inconsistent as to the restitution amount; at worst, it was wildly contradictory. Either requires an evidentiary hearing. Dedonado, 99 Wn. App. 256-57 (a causal connection is not established simply by submitting proof of expenditures; an evidentiary hearing is required); see also State v. Dennis, 101 Wn. App. 223, 227, 6 P.3d 1173 (2000) (summary of medical treatment is insufficient to show causal connection).

The State's evidence was insufficient because it was double hearsay and Mr. Gosney had no opportunity to refute or rebut it. The State failed to produce actual paystubs or any other corroborative evidence to support the hearsay allegations regarding the amount of loss. CP 63-65. The State also failed to connect the 25 pages of medical billing entries to the event on August 5, 2014, or to show how any of these medical, chiropractic, massage, or other treatments were necessitated by Mr. Gosney's actions.

As discussed, it is the State's burden to prove the amount of restitution, and that it was causally related to the defendant's actions. E.g., Dedonado, 99 Wn. App. at 256. Because no witnesses were

called at the restitution hearing, the only statements relied upon by the State to show the medical billing and time loss expenses were causally connected to the incident were the following: 1) a four-sentence email from Officer Oak, stating that he sought psychological treatment and therapy from Dr. Cheryl Hart, related to this incident, CP 60; 2) a one-sentence email from Dr. Cheryl Hart, verifying the same, CP 61; and 3) a Victim Impact Statement signed by Officer Oak, CP ___, sub. no. 55, Appendix.

The State also relied on vague and unsupported conclusions offered by the prosecutor that the benefits provided to Officer Oak by L & I were related to injuries that he suffered as a result of the incident and were authorized. 11/19/15 RP 25.⁵ But it was the duty of the *court*, not the State or L & I, to determine whether restitution was authorized, and whether the expenses were causally connected. Tobin, 161 Wn.2d at 524; RCW 9.94A.753. To allow a court to impose restitution based on a third party's assessment of how much restitution is due, without requiring the State to present evidence to support the allegations, or offering the defense an opportunity to refute them, is a

⁵ Prosecutor: "The documentation that has been provided are for medical services rendered as a result of those injuries, and we believe that the additional amount, the roughly \$54,000, is appropriate and the Court should sign that order." 11/19/15 RP 25.

violation of constitutional due process. Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 481; Pollard, 66 Wn. App. at 784-85; Kisor, 68 Wn. App. at 620; Dedonado, 99 Wn. App. at 256-57 (also holding the State must show the insurer did not pay for items of greater or lesser value, but must show the actual loss).

Here, the State merely presented evidence of how much the L & I fund paid to Officer Oak, without proof of his injury was caused by Mr. Gosney, and indeed – without proof that he is not actually working, since the State also filed a document indicating the officer only missed three days of work. Because Mr. Gosney disputed the restitution amount, the State was required to present additional evidence to show the amount paid by L & I was equal to the amount of Officer Oak's actual losses. Dedonado, 99 Wn. App. at 257. The State failed to do so. For this reason, and also because the State merely relied on double hearsay that Mr. Gosney had no opportunity to rebut, the restitution award violated both the statute and constitutional due process.

Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 481; Dennis, 101 Wn. App. at 229; Dedonado, 99 Wn. App. at 257; Kisor, 68 Wn. App. at 620; Pollard, 66 Wn. App. at 784-85.

d. The restitution order must be vacated.

When the record is inadequate to support a restitution award, the Court must vacate the restitution order. Dedonado, 99 Wn. App. at 257; Dennis, 101 Wn. App. at 229 (noting that if the State has failed to produce sufficient evidence to support a restitution award within the 180-day time period after sentencing, crime victims may pursue civil remedies against offenders). In Dennis, this Court noted, “the State must not be given a further opportunity to carry its burden of proof after it fails to do so following a specific objection.” 101 Wn. App. at 229.

Because the record is inadequate to sustain the restitution award, the order should be vacated.

2. Any request that appellate costs be imposed on Mr. Gosney should be denied because the trial court determined he does not have the ability to pay legal financial obligations.

This Court has discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016).

A defendant’s inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow

costs. Sinclair, 192 Wn. App. at 393. Here, the trial court did not require Mr. Gosney to pay discretionary legal obligations. CP 39. Mr. Gosney was represented by a public defender at trial, and is presently represented by appointed counsel on appeal, as he lacks the ability to pay any of the expenses of appellate review. Mr. Gosney suffers from several chronic medical conditions, including the stroke which hospitalized him for several weeks following the August 2014 incident. CP ___, sub. no. 34. He appeared in court in a wheelchair, and will remain disabled for the remainder of his life. 11/19/15 RP 24.

Mr. Gosney's indigency is presumed to continue throughout review absent a contrary order by the trial court. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). Given Mr. Gosney's continued indigency, it is appropriate for this Court to exercise its discretion and disallow appellate costs should the State substantially prevail. Sinclair, 192 Wn. App. at 393; RAP 1.2(a), (c); State v. Blazina, 182 Wn.2d 827, 835, 841, 344 P.3d 680 (2015) (Fairhurst, J., concurring).

E. CONCLUSION

Because the State did not present sufficient evidence to prove the amount of restitution, the restitution order must be reversed. Furthermore, even if the State substantially prevails, this Court should

exercise its discretion and disallow appellate costs because Mr. Gosney is indigent.

Respectfully submitted this 21st day of July, 2016.

s/ Jan Trasen

JAN TRASEN (WSBA 41177)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

FILED

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KING COUNTY
 SUPERIOR COURT CLERK
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 CASE NUMBER: 14-1-04849-8 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 IN AND FOR KING COUNTY

STATE OF WASHINGTON,	)	No. 14-1-04849-8 SEA
)	
Plaintiff,	)	Court of Appeals No. 74416-0-I
)	
v.)	
	)	RESTITUTION STATUS SHEET
DONALD GOSNEY,	)	WITH VICTIM IMPACT STATEMENT
	)	(ATTACHED)
Defendant/Appellant.)	

DECLARATION OF APPELLATE COUNSEL RE ATTACHED DOCUMENT(S):

ATTACHED HERETO IS A TRUE COPY OF THE SIGNED AND DATED
 RESTITUTION STATUS SHEET WITH ATTACHED VICTIM IMPACT STATEMENT
 PRESENTED BY THE OFFICE OF THE PROSECUTING ATTORNEY AT THE
 SENTENCING HEARING HELD ON 6/05/2015.

s/ Jan Trasen
 State Bar Number 41177
 Washington Appellate Project
 1511 Third Ave, Ste 701
 Seattle, WA 98101
 Telephone: (206) 587-2711
 Fax: (206) 587-2711

King County Cause No. 14-1-04849-8 KNT

VICTIM IMPACT STATEMENT

State vs. Donald David Gosney

Charge (s):

Assault In The Third Degree, Attempting To Elude A Pursuing Police Vehicle

I will be present for the sentencing hearing

Yes No

I do want to write a letter to the judge (below or attached) *

Yes No

DUE TO MY INJURIES FROM BEING HIT BY THE DEFENDANTS VEHICLE, I WAS OFF WORK FOR 3 DAYS. I HAVE HAD MULTIPLE DOCTOR APPOINTMENTS SINCE THEN FOR BACK, NECK AND SHOULDER PAIN. I HAVE AN MRI SCHEDULED NEXT WEEK FOR MY SHOULDER AND WILL LIKELY NEED SURGERY TO REPAIR THE DAMAGE CAUSED BY THE DEFENDANTS ACTIONS. I HAVE CHRONIC BACK, NECK AND SHOULDER PAIN FROM BEING INJURED BY THE DEFENDANT.



 Signature

 Business Name (if applicable)

SCOTT OAK

 Print Name

* A copy of this letter will be given to the judge, defense and prosecutor.
 This form and all attachments are subject to Public Disclosure Laws.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

STATE OF WASHINGTON,)	
)	
RESPONDENT,	)	NO. 74416-0-I
)	
v.	)	KING COUNTY
	)	SUPERIOR COURT NO.
DONALD GOSNEY,	)	14-1-04849-8 SEA
)	
DEFENDANT/APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA ANA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 20TH DAY OF JULY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **RESTITUTION STATUS SHEET WITH VICTIM IMPACT STATEMENT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT [paoappellateunitmail@kingcounty.gov] KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(((X)	U.S. MAIL HAND DELIVERY E-MAIL
---	---------------	--------------------------------------

SIGNED IN SEATTLE, WASHINGTON, THIS 20TH DAY OF JULY, 2016.

X _____

Washington Appellate Project
 701 Melbourne Tower
 1511 Third Avenue
 Seattle, Washington 98101
 Phone (206) 587-2711
 Fax (206) 587-2710

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
	)	NO. 74416-0-I
v.)	
)	
DONALD GOSNEY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JULY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] DONALD GOSNEY	(X)	U.S. MAIL
629835	()	HAND DELIVERY
STAFFORD CREEK CORRECTIONS CENTER	()	_____
191 CONSTANTINE WAY		
ABERDEEN, WA 98520		

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JULY, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710