

No. 48183-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Keith Davis,**

Appellant.

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Thurston County Superior Court Cause No. 15-1-00526-3

The Honorable Judge Erik D. Price

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Davis's conviction for assault with a deadly weapon violated his Fourteenth Amendment right to due process.
2. The evidence was insufficient to prove that Mr. Davis intentionally assaulted Lee with a deadly weapon.

**ISSUE 1:** Under one of the charged alternative means of committing assault, conviction required proof of an assault committed with a deadly weapon. Did the state fail to prove that Mr. Davis, when smashing the driver's side window with a rock, intended to touch, strike, inflict bodily injury upon, or create apprehension and fear of bodily injury in the passenger of the car?

3. The deadly weapon enhancement was imposed in violation of Mr. Davis's right to due process and his right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.
4. The deadly weapon enhancement was not authorized by the jury's verdict.
5. The deadly weapon enhancement was improper because of errors in the court's instructions to the jury.
6. The court's instructions failed to make manifestly clear the jury's duty in answering the special verdict on the deadly weapon enhancement.
7. The evidence was insufficient to prove that Mr. Davis was armed with a deadly weapon for any assault that took place after he smashed the car window.

**ISSUE 2:** A deadly weapon enhancement may not be imposed unless the state presents sufficient evidence of a nexus between the weapon and the offense. Was the evidence insufficient to prove a nexus between the rock and any assault that took place after Mr. Davis smashed the car window?

**ISSUE 3:** A deadly weapon enhancement may not be imposed absent a jury finding that the accused person was armed and that there was a nexus between the weapon and the offense. Did the court's imposition of the enhancement without

instructing jurors on the “armed” and “nexus” requirements violate Mr. Davis’s right to a jury trial under the Sixth and Fourteenth Amendments and art. I, §§ 21 and 22?

**ISSUE 4:** A deadly weapon enhancement may not be imposed unless the state presents sufficient evidence that the offender was armed. Was the evidence insufficient to prove that Mr. Davis was armed during any assault that took place after he smashed the car window?

8. The trial court erred by giving Instruction No. 4.
9. The trial court’s reasonable doubt instruction violated Mr. Davis’s right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.
10. The trial court’s reasonable doubt instruction violated Mr. Davis’s right to a jury trial under the Sixth and Fourteenth Amendments and art. I, §§ 21 and 22.
11. The trial court’s reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
12. The trial court’s instruction improperly focused jurors on “the truth of the charge” rather than the reasonableness of their doubts.

**ISSUE 5:** A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with “an abiding belief in the truth of the charge,” did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Davis’s constitutional right to a jury trial?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Keith Davis suffers from multiple sclerosis. He can walk at times, but more often needs a cane, a walker, or even a wheelchair. His muscles are prone to painful cramping, and his symptoms become more and less severe unpredictably. RP (9/28/15) 33, 38-42, 50; RP (9/29/15) 93-94, 156-158. Mr. Davis also suffers from attention deficit hyperactivity disorder. RP (9/29/15) 166.

Mr. Davis came from Seattle to Olympia, with the goal of expressing some concerns to the state legislature. RP (9/29/15) 171-172. Instead, he used methamphetamine and suffered the consequences. RP (9/29/15) 140, 160-162, 180.

He found himself walking near a grocery store parking lot and became very frightened. RP (9/29/15) 159-162, 172. He saw a man in a car parked in the lot and went over to him. The man, 91 year old Willoughby Lee, was seated in the passenger seat, and the driver's seat was empty. RP (9/28/15) 57-60; RP (9/29/15) 160. Mr. Davis tried to talk to Lee through the closed windows. RP (9/28/15) 61-62; RP (9/29/15) 174. Then he went around to the driver side, found a rock and broke the driver's side window. RP (9/28/15) 62. The glass and the rock fell inside the car. RP (9/28/15) 75-76; RP (9/29/15) 164.

Then Mr. Davis got in the car. RP (9/28/15) 62. He wanted to ask Lee to take him out of the area; Mr. Davis turned to Lee and Lee punched him. RP (9/28/15) 63; RP (9/29/15) 164-165. Lee later noticed a cut on his arm, which he assumed was from the broken window. RP (9/28/15) 74-75, 84-85.

The state charged Mr. Davis with malicious mischief in the third degree, as well as assault in the second degree with a deadly weapon enhancement. Information filed 4/20/15, Supp. CP. The means by which the assault allegedly occurred was “with a deadly weapon.” Information filed 4/20/15, Supp. CP.

Mr. Davis wanted to represent himself, and after repeated efforts, was finally allowed by the court to do so. RP (6/8/15) 5-32; RP (7/16/15) 4-13; RP (9-3-15) 6-7; RP (9/17/15) 3-5; RP (9/28/15) 9-25.

The morning that trial began, the prosecutor filed an Amended Information. RP (9/28/15) 4-9. This added another means by which the assault could have occurred: “with intent to commit a felony.”<sup>1</sup> CP 81. The court granted the amendment over Mr. Davis’s objection. RP (9/28/15) 4-9, 56; RP (9/29/15) 100-103, 127-132.

Lee testified about the incident. RP (9/28/15) 57-68. He did not say that he was afraid, nor did he present any ideas about what Mr. Davis

may have been doing. He also said that he did not see the rock at all. RP (9/28/15) 57-68.

The state proposed, and the court gave, jury instructions regarding the assault and the enhancement. Instruction 14 defined a deadly weapon as “any weapon, device, instrument, substance or article, which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or substantial bodily harm.” CP 97. This instruction did not direct the jury to apply the definition only to the assault charge, only to the enhancement, or both.

Instruction 21 addressed the special verdict:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Count I. A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. CP 104.

The court used the pattern jury instruction regarding reasonable doubt, which included the following: “If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” CP 87.

In her closing argument, the prosecutor urged the jury to convict on the assault charge by finding that Mr. Davis threw the rock and broke

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<sup>1</sup> The state’s theory was that Mr. Davis intended to steal the car. RP (9/29/15) 128.

the glass on the car, or that Mr. Davis assaulted Lee once inside the car in order to steal the car they were in. RP (9/30/15) 247-261, 270-281, 298-305. The state further argued that the rock was a deadly weapon. RP (9/30/15) 271-273.

The jury convicted Mr. Davis as charged, including marking “yes” on the special verdict. CP 107-110. After sentencing, Mr. Davis timely appealed. CP 111-133.

### **ARGUMENT**

**I. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. DAVIS OF ASSAULT WITH A DEADLY WEAPON.**

Due process requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). In challenging sufficiency,<sup>2</sup> the appellant admits the truth of the state’s evidence and all reasonable inferences that can be drawn from it. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

However, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). To prove even a *prima facie* case, the state’s evidence

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<sup>2</sup> A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3).

must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (addressing *prima facie* evidence in the *corpus delicti* context).

Here, Mr. Davis broke the driver's side window while Lee sat in the passenger seat. RP (9/28/15) 62. He had previously addressed Lee through the passenger side door. RP (9/28/15) 61-62.

There is no indication that Mr. Davis intended a "touching or striking of" Lee when he smashed the driver's side window with the rock. CP 95. Nor is there any evidence that he intended "to inflict bodily injury upon" Lee, either with the rock or the broken glass. CP 95. Nor does the evidence show that he intended "to create in [Lee] apprehension and fear of bodily injury" by smashing the window. CP 95.

Mr. Davis may have been reckless as to the effect of his actions on Lee when he smashed the window. He may even have acted with knowledge of a likely impact on Lee. However, recklessness and knowledge are insufficient to prove intent. *See* RCW 9A.08.010; CP 90, 101.

The evidence was insufficient to prove the required intent.<sup>3</sup> The jury's special verdict finding Mr. Davis guilty under the first alternative means must be set aside. CP 109.<sup>4</sup>

**II. THE TRIAL COURT SHOULD NOT HAVE IMPOSED A DEADLY WEAPON ENHANCEMENT ON COUNT I.**

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amends. VI, XIV; art. I, §§ 21, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Imposition of an enhanced sentence without a proper jury finding on the underlying facts violates an accused person's right to due process and to a jury trial. *Id.*; *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008).

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<sup>3</sup> Ordinarily, this would require reversal and dismissal of the charge. However, in this case, the jury unanimously found Mr. Davis guilty under the second alternative means charged: that Mr. Davis assaulted Lee "with intent to commit theft of a motor vehicle." CP 109.

<sup>4</sup> The error is significant, because the state failed to prove beyond a reasonable doubt that Mr. Davis was armed with a deadly weapon when he allegedly assaulted Lee with intent to commit theft of a motor vehicle, as charged under the second alternative means.

A. The trial judge failed to instruct jurors on the state’s burden to prove that the rock was easily accessible and readily available, and that there was a nexus between the defendant, the crime, and the weapon.

1. The court’s instructions relieved the prosecution of its burden to prove the elements of the deadly weapon enhancement.

Before imposing a sentencing enhancement, the trial court must instruct the jury on the state’s burden to prove the elements required in order for the jury to return a “yes” verdict relating to the enhancement. *Blakely*, 542 U.S. at 303. A deadly weapon enhancement may be imposed only if a person is “armed” with a deadly weapon. *See* RCW 9.94A.533(4); RCW 9.94A.825.

A person is “armed” if the weapon is easily accessible and readily available and there is “a nexus between the defendant, the crime, and the weapon.” *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). Mere possession is insufficient to establish that a person is “armed,” and cannot support imposition of an enhancement. *Id.*

Although instructions need not use the word “nexus,” the language used must, when taken as a whole, “inform[ ] the jury that it must find a relationship between the defendant, the crime, and the deadly weapon.” *State v. Willis*, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005).<sup>5</sup>

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<sup>5</sup> In both *Willis* and a subsequent Supreme Court case, the trial court instructed jurors that a defendant is armed if the weapon is readily available for offensive or defensive purposes at

Here, the court did not instruct jurors on any of the enhancement's elements. The court did not instruct jurors to determine whether the rock was easily accessible and readily available. CP 104, 108; *cf. Willis*, 153 Wn.2d at 374; *Eckenrode*, 159 Wn.2d at 498 (Madsen, J. concurring). Nor did the court explicitly mention the state's burden to prove some connection between the defendant, the crime, and the weapon.<sup>6</sup> CP 104, 108.

This relieved the prosecution of its burden to prove the enhancement, and violated Mr. Davis's Fourteenth Amendment right to due process. *Blakely*, 542 U.S. at 303; *Recuenco*, 163 Wn.2d at 440-442. Accordingly, the enhancement must be vacated and the case remanded to the trial court for correction of the judgment and sentence. *Recuenco*, 163 Wn.2d at 440-442.

2. The jury's verdict does not support imposition of a deadly weapon enhancement because it does not reflect a jury finding on all facts necessary to the enhancement.

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the time of the commission of the crime. *Willis*, 153 Wn.2d at 374; *see also State v. Eckenrode*, 159 Wn.2d 488, 498, 150 P.3d 1116 (2007) (Madsen, J., concurring) (quoting instruction). No such instruction was given in this case. CP 104, 108. Furthermore, the approach taken by the *Eckenrode* court is of dubious validity following *Recuenco* and its progeny. *See Eckenrode*, 159 Wn.2d at 498.

<sup>6</sup> As noted in *Willis* and *Eckenrode*, an explicit "nexus" instruction will not be necessary in most cases where the instructions as a whole communicate the need to find a relationship between the defendant, the crime, and the deadly weapon. *Willis*, 153 Wn.2d at 374.

The deadly weapon special verdict cannot support imposition of an enhancement for another reason as well. Because the jury was not properly instructed, the special verdict form does not reflect a jury finding that Mr. Davis was armed with a deadly weapon. Imposition of an enhancement without a jury determination of the underlying facts violates *Blakely* and *Recuenco*.

The jury did not find that Mr. Davis was armed with a deadly weapon that was readily accessible and easily available. Nor did it find a connection between the rock, Mr. Davis, and the offense. Accordingly, the sentencing court was without authority to impose the enhancement. *Blakely*, 542 U.S. at 303; *Recuenco*, 163 Wn.2d at 440-442. This error is not subject to harmless error review. *State v. Williams-Walker*, 167 Wn.2d 889, 901, 225 P.3d 913 (2010).

The deadly weapon enhancement must be vacated, and the case remanded for sentencing within the standard range. *Id.*

3. The court's deficient instructions may be addressed for the first time on review.

Manifest error affecting a constitutional right can be raised for the first time on appeal.<sup>7</sup> RAP 2.5(a)(3). To raise a manifest error, an appellant

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<sup>7</sup> In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This

need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).<sup>8</sup> An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here, the trial judge knew that the prosecution was seeking a deadly weapon enhancement. Accordingly, the court “could have corrected” the deficient instructions. *Id.* The error can be reviewed for the first time on appeal.<sup>9</sup> *Id.*

B. The state failed to prove that Mr. Davis was armed with a deadly weapon during any assault that took place after he’d smashed the driver’s side window.

After Mr. Davis smashed the driver’s side window, the rock lay on the floorboards of the car. RP (9/28/15) 62, 75-76. There is no evidence that Mr. Davis realized where the rock went. Nor is there any indication that he could have reached it after he got into the car.

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includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

<sup>8</sup> The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

<sup>9</sup> The complete absence of any instruction on the issue distinguishes this case from *Eckenrode*. In that case, the trial court gave the same instruction approved by the Supreme Court in *Willis*. See *Willis*, 153 Wn.2d at 374; *Eckenrode*, 159 Wn.2d at 498 (Madsen, J. concurring).

Under these circumstances, the state failed to prove that the rock remained easily accessible and readily available after the window was broken. Furthermore, the state failed to prove the required nexus to any assault that occurred after the window was broken.

Because the evidence was insufficient, the enhancement must be vacated and the case remanded for sentencing within the standard range. *State v. Pierce*, 155 Wn. App. 701, 714-715, 230 P.3d 237 (2010).

**III. THE COURT’S “REASONABLE DOUBT” INSTRUCTION INFRINGED MR. DAVIS’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR “THE TRUTH.”**

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

A jury’s role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012).

Here, the trial court instructed jurors to convict if they had “an abiding belief in the truth of the charge.” CP 87. This was improper. Rather than determining the truth, a jury’s task “is to determine whether

the State has proved the charged offenses beyond a reasonable doubt.”

*Emery*, 174 Wn.2d at 760.

In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 87. This was error, stemming from the inclusion of optional language found in the pattern instruction. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d Ed).

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury. CP 87.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 87. Jurors were obligated to follow the instruction.

Without analysis, Division I has twice rejected a challenge to this language. *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 *review*

*denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014). Both *Kinzle* and *Fedorov* erroneously cite *Bennett*, 161 Wn.2d 303. *Bennett* does not support the challenged language.

In *Bennett*, the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called *Castle* instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.<sup>10</sup> *Id.*

*Fedorov* also cites *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In *Pirtle*, as in *Bennett*, the defendant favored the “truth of the charge” language. *Id.*, at 656 n. 3. The appellant challenged a sentence (added by the trial judge) which inverted the pattern language. *Id.*, at 656.<sup>11</sup> The *Pirtle* court was not asked to rule on the constitutionality of the language at issue here.

Neither *Bennett* nor *Pirtle* should control this case. Division II should not follow Division I’s decisions in *Kinzle* and *Fedorov*.

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<sup>10</sup> The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.*, at 318.

<sup>11</sup> The challenged language in *Pirtle* read as follows: “If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.” *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction “invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit.” *Id.*, at 656.

Improper instruction on the reasonable doubt standard is structural error.<sup>12</sup> *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Davis his constitutional right to a jury trial. Mr. Davis’s conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

### **CONCLUSION**

Mr. Davis’s convictions must be reversed because of the error in the court’s “reasonable doubt” instruction.

If the convictions are not reversed, Special Verdict 1B (Question 1) must be vacated for insufficient evidence. In addition, the deadly weapon enhancement must be vacated, and the case remanded for sentencing within the standard range.

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<sup>12</sup> RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is “a special category of manifest error affecting a constitutional right.” *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) (“If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a ‘manifest error affecting a constitutional right.’”)

Respectfully submitted on February 10, 2016.

**BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Keith Davis, DOC #936379  
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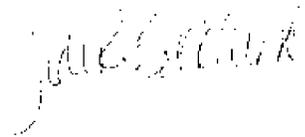
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 10, 2016.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**February 10, 2016 - 3:34 PM**

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Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes:

Hearing Date(s):

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other:

### Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: [backlundmistry@gmail.com](mailto:backlundmistry@gmail.com)

A copy of this document has been emailed to the following addresses:

[paoappeals@co.thurston.wa.us](mailto:paoappeals@co.thurston.wa.us)

[Lavernc@co.thurston.wa.us](mailto:Lavernc@co.thurston.wa.us)