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Division II  
State of Washington  
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No. 50864-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

SHAWN FITZPATRICK,

Appellant.

---

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

---

BRIEF OF APPELLANT

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## **A. INTRODUCTION**

Shawn Fitzpatrick was pulled over for speeding while driving a friend to Vancouver to visit the friend's sick mother. Mr. Fitzpatrick readily admitted to the trooper he did not have a valid license. The trooper arrested Mr. Fitzpatrick. A backup officer arrived on scene and determined the front passenger, Dustin German, was under the influence of methamphetamine and had syringes on his person. The officer then requested a K-9 unit to inspect the car.

Without a warrant, officers performed a dog search of Mr. Fitzpatrick's car, and according to the handler, the dog signaled positively for the odor of controlled substances. Using that information, the officers applied for a search warrant but failed to include the animal's track record in training or in the field. The officers also failed to state whether this particular dog had ever performed in the field at all. Despite this, a judge authorized the warrant, and the subsequent search revealed controlled substances in a container in the trunk.

The dog search of Mr. Fitzpatrick's car without a warrant and the State's failure to establish the reliability of the canine each violated article I, section 7, and this Court should reverse.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Mr. Fitzpatrick's motion to suppress the evidence obtained as a result of an illegal search.
2. The court erred in entering Finding of Fact 4. CP 80.
3. The court erred in entering Finding of Fact 5. CP 80.
4. The court erred in entering Finding of Fact 9. CP 80.

## **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. This Court has held the warrantless use of a narcotics-detection dog around the exterior of a home disturbs a private affair within the meaning of article I, section 7. The Supreme Court has also repeatedly held article I, section 7 provides greater privacy protections for vehicles than the Fourth Amendment. Did the warrantless dog search of to Mr. Fitzpatrick's car violate article I, section 7?

2. Washington courts adhere to the *Aguilar-Spinelli* test for determining the reliability of an informant's tip. Dog alerts are treated like informant tips for purposes of evaluating reliability. Did the State fail to establish the reliability of the dog alert in this case, where the affidavit in support of the search warrant contained no information about the animal's track record or whether it had ever been used to detect the odor of controlled substances in the field?

3. Findings of fact must be supported by substantial evidence.

Here, the State presented no evidence regarding air flow in Mr. Fitzpatrick's vehicle. Did the court err in finding there could be airflow between the trunk of a car and the passenger compartment?

**D. STATEMENT OF THE CASE**

Shawn Fitzpatrick was pulled over for speeding. RP 178. He had two passengers with him. *Id.* When Trooper Kyle Lindemann came to his window, Mr. Fitzpatrick readily admitted he did not have a valid license. RP 179. The trooper arrested Mr. Fitzpatrick and placed him in his patrol vehicle. RP 110, 179. Trooper Lindemann testified that Mr. Fitzpatrick told him he was going to "Portland or Vancouver." RP 110. Trooper Lindemann requested assistance with the traffic stop, and Woodland Police Officer Derek Kelley responded. CP 10; RP 179.

Once at the scene, Trooper Lindemann told Officer Kelley that Mr. Fitzpatrick was driving to Vancouver to visit his sick mother and pick up a different car. CP 10. Officer Kelley spoke to the front passenger, Dustin German. CP 11; RP 221. Upon learning Mr. German had a Department of Corrections warrant, Officer Kelley arrested him. CP 11. Mr. German appeared nervous and unable to sit still, and his eyes were droopy. CP 10-11; RP 221. Mr. German told the officer they

were traveling to Vancouver to see his mother, but later stated they were going to Newport, Oregon to pick up his girlfriend. CP 11. Based on his training as a drug recognition expert, Officer Kelley believed Mr. German was under the influence of methamphetamine, and Mr. German admitted he had “been on a weeklong methamphetamine bender” and had not during that time. CP 11; RP 221. In a search incident to his arrest, Officer Kelley found Mr. German’s wallet which contained a notebook with names, nicknames, and phone numbers. CP 11. He also located a bag of syringes. *Id.*

The rear passenger, Valerie Ray, told the officer they were going to Kelso and then to Portland. CP 11. She also told the officer she did not know anything. *Id.*

Officer Kelley then spoke with Mr. Fitzpatrick, who clarified they were driving to Vancouver to visit Mr. German’s ill mother. CP 11. Mr. Fitzpatrick also told both officers he was borrowing the car from a friend and provided the friend’s name and phone number, but the officers could not make contact with that friend. RP 196-97. Officer Kelley later discovered the car had been transferred to Mr. Fitzpatrick’s name only three days prior, and the record of the sale did not process

until June 27, 2017, the same day as the incident in question. RP 159-60.

Without obtaining a warrant, Officer Kelley requested a K-9 unit to the scene. CP 12. Deputy Ness Aguilar responded with his K-9 unit and applied the dog to Mr. Fitzpatrick's car. CP 13-14. The dog circled the vehicle three times and sat, indicating it detected the odor of drugs. *Id.*

Based on the above, Officer Kelley applied for a search warrant for Mr. Fitzpatrick's car. CP 9-16. The officer asserted there was probable cause to search the car based on the differing responses for the group's travel plans, the items located on Mr. German's person, both Mr. German and Mr. Fitzpatrick's histories of drug-related crime, and the dog search. CP 14.

Officer Kelley's affidavit in support of the warrant application incorporated Deputy Aguilar's affidavit. CP 12-14. The deputy claimed he and his K-9 were certified, but included no other information about the dog's training and performance. CP 12-13. In particular, the affidavit failed to state the canine's rates of false positives (alerts where no drugs were found) or false negatives (no alerts where drugs were present) either in training or in the field. Moreover, the affidavit did not

include how many times the canine has performed in the field and did not indicate whether the animal had ever been used in the field at all.

Although the dog search of Mr. Fitzpatrick's car occurred without a warrant, and the search warrant affidavit provided no information about the dog's reliability, a judge signed a warrant permitting officers to search Mr. Fitzpatrick's car. CP 16. The subsequent search revealed methamphetamine in a container in the trunk of the car. RP 204. The State charged Mr. Fitzpatrick with one count of possession of a controlled substance with intent to deliver. CP 3-4.

Mr. Fitzpatrick moved to suppress the evidence, alleging the search exceeded the scope of the warrant because the canine did not alert at the trunk of the car. CP 17-20. The trial court denied the motion, finding the canine exhibited a change of behavior because it "sniffed intently" at the trunk area and sat by the driver's window. CP 79-80. The court also found "There can be air transfer between the trunk of a car and the passenger compartment; something that is odiferous in the trunk could cause the passenger compartment to smell badly as well." CP 80. Notably, the warrant affidavit does not include any information about the car's internal airflow, and no testimony was

taken during the motion to suppress. The court concluded the search warrant permitted a search of the entire vehicle, including the trunk, because they are connected. CP 80.

After trial, Mr. Fitzpatrick was acquitted of possession with intent to deliver, but was convicted of simple possession. CP 53-54.

#### **E. ARGUMENT**

##### **1. The use of a drug-detection dog to detect the odors of drugs in Mr. Fitzpatrick's car was a warrantless search in violation of his right to privacy under article I, section 7.**

*a. Use of a drug-detection dog implicates Article I, section 7 because the Washington Constitution affords greater privacy protection in the vehicle context than the Fourth Amendment.*

Under both the Fourth Amendment and article I, section 7, the warrantless use of a drug-detection dog on a person's home is impermissible. *See Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 1417-18, 185 L. Ed. 2d 495 (2013); *State v. Dearman*, 92 Wn. App. 630, 636, 962 P.2d 850 (1998). This is because "using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to 'see through the walls' of the home.'" *Dearman*, 92 Wn. App. at 635 (citing *State v. Young*, 123 Wn.2d 173, 183, 867 P.2d 593 (1994)).

The U.S. Supreme Court has declined to extend this rationale in the vehicle context, finding application of a narcotics-detection dog is not a search because it does not implicate an “interest in privacy that society is prepared to consider reasonable.” *Illinois v. Caballes*, 543 U.S. 405, 408-09, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (citing *U.S. v. Jacobsen*, 466 U.S. 109, 122, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)) (internal quotation marks omitted). Article I, section 7, however, is not “grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual’s private affairs without authority of law.” *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012). Accordingly, article I, section 7 affords greater privacy protection in the vehicle context than the Fourth Amendment

Article I, section 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. Art. I, § 7. This protection is explicitly broader than that of the Fourth Amendment because “it clearly recognizes an individual’s right to privacy with no express limitations and places a greater emphasis on privacy.” *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (citing *Young*, 123 Wn.2d at 183) (internal quotation marks omitted).

These protections are also “qualitatively different from those under the Fourth Amendment.” *Snapp*, 174 Wn.2d at 187. Whereas the Fourth Amendment finds a search only where the government intrudes upon a subjective and reasonable expectation of privacy, article I, section 7’s inquiry turns on “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *Young*, 123 Wn.2d at 181 (citations and internal quotation marks omitted).

Washington has long held that individuals have a privacy interest in their cars. “From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles.” *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988); see also *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). Accordingly, while the Fourth Amendment permits an “automobile exception” to the warrant requirement, no such exception exists under article I, section 7. *See Snapp*, 174 Wn.2d at 192.

Additionally, Washington Courts have refused to permit invasions of the right to privacy in cars in other contexts. For example, article I, section 7 prohibits sobriety checkpoints even though they are

permissible under the Fourth Amendment. *Mesiani*, 110 Wn.2d at 457-58; contrast *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990). And, while police may make pretextual stops under the Fourth Amendment, such vehicle seizures offend article I, section 7. Compare *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *Ladson*, 138 Wn.2d at 352-53; accord *State v. Chacon Arreola*, 176 Wn.2d 284, 294, 290 P.3d 983 (2012). Furthermore, Washington requires a warrant to search a vehicle incident to arrest regardless of whether it contains evidence of the crime of arrest, while the Fourth Amendment would permit a warrantless search under the same circumstances. *Snapp*, 174 Wn.2d at 197.

*b. Use of a drug-detection dog to detect the odor of narcotics in a person's car disturbs a "private affair" within the meaning of article I, section 7.*

Despite Washington's heightened protection of the privacy of cars, Division One of this Court held use of a drug-detection dog on a person's vehicle was not a search within the meaning of article I, section 7. *State v. Hartzell*, 156 Wn. App. 918, 929-30, 237 P.3d 928 (2010). *Hartzell* engaged in a Fourth Amendment analysis that was inapplicable to the article I, section 7 issue before it. The Court

repeatedly referenced a “reasonable expectation of privacy” standard, concluding that “so long as the canine ‘sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred.’” *Id.* at 929 (quoting *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28 (1986)).

Article I, section 7 analysis does not rely on the “reasonable expectation of privacy” rationale. “Private affairs are not determined according to a person’s subjective expectation of privacy . . . .” *State v. Surge*, 160 Wn.2d 65, 72, 156 P.3d 208 (2007). Instead, the private affairs inquiry focuses on “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *Id.* at 71 (quoting *Young*, 123 Wn.2d at 181).

Numerous cases are in accord. For example, in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the Supreme Court held the government could not collect phone numbers dialed by an individual without a warrant because the individual privacy interest survived the conveyance of the phone numbers to the phone company regardless of reasonableness. *Id.* at 69. In contrast, the U.S. Supreme Court has held

an individual's reasonable expectation of privacy under the same circumstances is destroyed when the individual dials a phone number, voluntarily conveying it to a telephone company. *See Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). Also, our Supreme Court has found garbage is a "private affair" not to be disturbed by the government absent a warrant, even though citizens have no reasonable expectation of privacy in the trash they purposely expose to third parties under the Fourth Amendment. *Compare State v. Boland*, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990) with *California v. Greenwood*, 486 U.S. 35, 41, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988).

In *Dearman*, the Court correctly held that using a drug-detection dog "constituted a search for purposes of article I, section 7" and a warrant was required. 92 Wn. App. at 635. This is because using a dog in this manner "goes beyond merely enhancing natural human senses," exposing information to officers which they could not have detected with their own senses from a lawful vantage point. *Id.*

Although *Dearman* involved the use of a narcotics canine on a house, the same rationale should apply in the vehicle context because our Supreme Court has repeatedly held that individuals have a privacy

interest in their cars which they are entitled to hold free from warrantless government intrusion. *Snapp*, 174 Wn.2d at 191-92; *Ladson*, 138 Wn.2d at 352-53; *Mesiani*, 110 Wn.2d at 457-58. Therefore, this Court should hold the warrantless application of a narcotics-detection dog to an individual's car is a search which violates article I, section 7.

*c. Absent the dog's alert, the State lacked probable cause to support the warrant, and this Court should reverse and remand with instructions to suppress the evidence and dismiss the charge.*

Illegally-obtained information may not be used to find probable cause to issue a warrant. *State v. Coates*, 107 Wn.2d 882, 887-88, 735 P.2d 64 (1987). Where a warrant affidavit contains illegally-obtained information, that information must be excised from the warrant application, and the court must then determine whether probable cause still exists based on the remaining information. *Id.*; *State v. Eisfeldt*, 163 Wn.2d 628, 640-41, 185 P.3d 580 (2008).

Here, the dog sniff was unconstitutional, and absent the canine's alert, the evidence did not rise to the level of probable cause for a warrant to search Mr. Fitzpatrick's car. The only properly-included facts in the affidavit related to Mr. Fitzpatrick were his prior criminal history, his explanation of his travel plans, and his statement that he

borrowed the car. Unlike Mr. German, Mr. Fitzpatrick did not appear to be under the influence and did not have any drug paraphernalia on his person.

*State v. Neth*, 165 Wn.2d 177, 196 P.3d 658 (2008) is instructive here. In *Neth*, the trial court excised from the search warrant application the dog alert due to the State's failure to prove the animal's reliability.

The remaining information consisted of:

1. The defendant was overly nervous and yelling at times;
2. The defendant could not prove he owned or rented the vehicle he was driving;
3. The defendant lacked registration or insurance documents, or any transfer of ownership papers;
4. Neither occupant had identification, and the defendant did not have a wallet on him or in his vehicle;
5. Defendant was traveling from Vancouver to Goldendale;
6. Defendant made comments that he was renting a house in Goldendale but he did not know the exact location, or address of the residence, but still claimed to be working and residing in Ridgefield;
7. Defendant voluntarily stated he had money in the vehicle but did not know the exact amount. The money is in cash, was not located on his or his passenger's person, and the subject did not have a wallet;
8. Defendant's girlfriend stated they were going to rent a house in Goldendale, but she did not know that the house

was already being rented, even though she had been dating him for a year;

9. Defendant possessed clear plastic bags that drug traffickers are known to use for carrying illegal drugs; and
10. Defendant was a convicted felon for delivery charges.

*Id.* at 184-86. The Court found that although these facts were unusual and, taken together, seemed odd or suspicious, they were all “consistent with legal activity, and very few [had] any reasonable connection to criminal activity. *Id.* at 183-84.

In this case, there is even less. The information actually pertaining to Mr. Fitzpatrick is entirely consistent with legal activity and in fact has no reasonable connection to criminal activity. Rather, the only facts suggestive of criminal activity relate to Mr. German, who was neither the owner nor the driver of the car which the officers sought to search. Accordingly, this Court should reverse the convictions and remand with instructions to suppress the evidence and dismiss the charges with prejudice. *See State v. Gatewood*, 163 Wn.2d 534, 542, 182 P.3d 426 (2008).

**2. The State failed to prove the canine could reliably detect the odor of controlled substances.**

Even if this Court determines a dog sniff is not a search within the meaning of article I, sections 7, it should nonetheless reverse because the State provided no measure of the canine's reliability.

*a. Washington applies the Aguilar-Spinelli test to a dog alert, which is treated like an informant's tip.*

A dog's alert is treated like an informant's tip in the context of detecting narcotics. *See Florida v. Harris*, 568 U.S. 237, 133 S. Ct. 1050, 1056, 185 L. Ed. 2d 61 (2013). Washington adheres to the two-pronged "*Aguilar-Spinelli*"<sup>1</sup> test to determine whether an informant's tip can support probable cause. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). For an informant's tip to create probable cause, the State must show: (1) "the reliability of the manner in which the informant acquired his information," and (2) "the informant was credible or his information reliable." *Id.* The *Jackson* court made clear that for article I, section 7 purposes, "unless it can be shown that the tip came from an honest or reliable person who acquired the information in

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<sup>1</sup> See *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

the particular case in a reliable way, an arrest or search should not be permitted on the basis of the tip.” *Id.* at 442.

*b. The State failed to prove the reliability of the canine’s alerts in this case.*

Here, the State presented evidence in its search warrant application that the canine was trained and certified in 2016 and 2017. No additional information about the dog’s performance, in training or in the field, was provided to the magistrate. The affidavit does not explain what is required for certification and does not include the animal’s track record in training or in the field. In fact, the affidavit fails to indicate whether this particular dog has ever been used in the field to detect narcotics. Without this information, the evidence included in the affidavit was insufficient to show the canine’s reliability.

An informant’s track record is important for determining whether the informant is reliable or credible. *Jackson*, 102 Wn.2d at 437. In Washington, a dog sniff has been sufficient to establish probable cause where the dog’s track record was specifically included in the affidavit submitted to obtain a search warrant. *See, e.g., State v. Jackson*, 82 Wn. App. 594, 606, 918 P.2d 945 (1996) (“dog’s training and track record . . . were subsequently shown in the affidavit”

(emphasis added)); *State v. Flores-Moreno*, 72 Wn. App. 733, 741, 866 P.2d 648 (1994) (affidavit stated canine had participated in 97 searches in which narcotics were found).

Courts must not accept training and certification of a canine as a sufficient proxy for true evidence of the animal's reliability. This is because canines, like the one here, are "trained to detect the odor of controlled substance," not the actual presence of such substances. CP 13 (emphasis added). Thus, "the dog that alerts hundreds of times will be wrong dozens of times." *Caballes*, 543 U.S. at 412 (Souter, J., dissenting). Indeed, the "infallible dog" is "creature of legal fiction," "belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine." *Id.* at 411-12 (collecting cases and studies). A person's private affairs should not be disturbed simply because an animal apparently detects the odor of a substance.

Here, the government presented no information about the canine's track record of false positives or false negatives. More concerning still, the affidavit failed to even state whether this particular

animal had ever performed in the field at all. Without this information, there is insufficient evidence the canine is reliable, and its alert should not have been considered for the probable cause determination.

*c. The remedy is reversal and remand for suppression of the evidence and dismissal of the charge.*

As discussed in section (1)(c) above, after excising the dog alert from the warrant application, the remaining evidence is insufficient to support a finding of probable cause. Thus, the result is the same: this Court should reverse and remand for suppression of the evidence and dismissal of the charge. *See Neth*, 165 Wn.2d at 184-86.

**3. The court's finding that airflow could occur between the passenger compartment and the truck is not supported by substantial evidence.**

Findings of fact on a motion to suppress must be supported by substantial evidence. *State v. Kipp*, 179 Wn.2d 718, 735, 317 P.3d 1029 (2014). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Id.* (quoting *State v. Schultz*, 170 Wn.2d 746, 753, 248 P.3d 484) (internal quotation marks omitted).

Here, the record is entirely devoid of any evidence regarding airflow in any vehicle, much less the specific car at issue here. The search warrant affidavit does not mention airflow in Mr. Fitzpatrick's

car or in any car generally. Additionally, no testimony was taken during the motion to suppress. Thus, the court’s finding that “There can be air transfer between the trunk of a car and the passenger compartment; something that is odiferous in the trunk could cause the passenger compartment to smell badly as well,” is completely unmoored from any evidence in the record. This finding should be disregarded. *See City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 613-15, 398 P.3d 1078 (2017).

**F. CONCLUSION**

For the foregoing reasons, this Court should reverse Mr. Fitzpatrick’s conviction and remand with instructions to suppress the evidence and dismiss the charge.

DATED this 23<sup>rd</sup> day of March, 2018.

Respectfully submitted,

/s Tiffinie B. Ma  
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Washington Appellate Project  
Attorney for Appellant

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

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|----------------------|---|----------------|
| STATE OF WASHINGTON, | ) |                |
|                      | ) |                |
| RESPONDENT,          | ) |                |
|                      | ) | NO. 50864-8-II |
| v.                   | ) |                |
|                      | ) |                |
| SHAWN FITZPATRICK,   | ) |                |
|                      | ) |                |
| APPELLANT.           | ) |                |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23<sup>RD</sup> DAY OF MARCH, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - **DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

|   |     |               |
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| [X] RYAN JURVAKAINEN                    | ( ) | U.S. MAIL     |
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| <br>                                    |     |               |
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**SIGNED** IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF MARCH, 2018.

X \_\_\_\_\_ 

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# WASHINGTON APPELLATE PROJECT

March 23, 2018 - 4:43 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50864-8  
**Appellate Court Case Title:** State of Washington, Respondent v. Shawn J. Fitzpatrick, Appellant  
**Superior Court Case Number:** 17-1-00816-5

### The following documents have been uploaded:

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