

**FILED
Court of Appeals
Division II
State of Washington
9/27/2018 2:45 PM**

NO. 51277-7-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JENNIFER A. BROCKETT,

Appellant.

RESPONDENT'S BRIEF

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Representing Respondent**

**HALL OF JUSTICE
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I. ISSUES

1. WAS THE APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER TRIAL ATTORNEY DID NOT PURSUE AN INTOXICATION DEFENSE?
2. DID THE TRIAL COURT ABUSE ITS DISCRETION IN EXCLUDING TESTIMONIES REGARDING THE APPELLANT'S STATE OF MIND.
3. WAS THERE SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF RESIDENTIAL BURGLARY?

II. SHORT ANSWERS

1. NO. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND WAS NOT PREJUDICED BY HER TRIAL ATTORNEY'S DEICION TO NOT PURSUE AN INTOXICATION DEFENSE.
2. NO. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING TESTIMONIES REGARDING THE APPELLANT'S STATE OF MIND.
3. YES. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF RESIDENTIAL BURGLARY BECAUSE THE ATTACHED GARAGE WAS A PORTION OF THE DWELLING.

III. FACTS

Jack Owens resided at 2749 Fir Street, Longview, WA 98632. Two of his children lived at the residence with him half of the time. RP 55-56. The residence is two storied with an attached garage. RP 55-56, 72, 93, 95, and 138. The garage is accessible through either the front rollup garage door or a rear man door. The garage's rear man door leads to a back covered deck and across from the garage's rear man door is a

man door into the house, as depicted in Exhibit # 6. RP 55-56, 59-60, 72, 93-95, and 138. Outside the garage's rear man door is an exterior light that Mr. Owens does not turn on to avoid disturbing his neighbor. RP 87. The garage's rear man door did not always latch properly. RP 132. The man doors into the garage and house are inside a fenced back yard. RP 57-58 and 94.

On May 2, 2015, sometime between 10 and 11 PM, Mr. Owens parked his 1999 BMW 318I inside the garage. RP 60-61. The garage was organized with tools neatly put away on racks. There was no blood in the garage or his vehicle. RP 61. Inside the garage, there were three bikes, tools, camping supplies, and another vehicle. RP 62, 76, and 83. Inside his car, Mr. Owens had his wallet, an attached factory stereo, a stereo faceplate, a popup tent, a folding chair, and a backpack. RP 60, 63, and 74. Inside the wallet, Mr. Owens had his credit cards and drivers license. RP 62-63. Mr. Owens secured the garage for the night. RP 64.

On May 3, 2015, Mr. Owens went to the garage and found the front rollup garage door was half open. RP 63-64. When he went inside, he noticed there was blood inside the garage and his vehicle, and his car's factory stereo had been torn out. RP 64-65, 69, 96, and 98-102. Mr. Owens was missing some tools and his bike from inside the garage. Mr. Owens was missing a wallet and its contents, a stereo faceplate, a popup

tent, a backpack, and a folding chair from inside his car. RP 66-68. Mr. Owens immediately called to cancel all his credit cards. RP 70.

On May 3, 2015, at approximately 2:30 PM, Officer McNew arrived on scene and contacted Mr. Owens. RP 93 and 106. Officer McNew collected a sample of the blood inside the garage and submitted the blood to the crime laboratory for analysis. RP 103-104. There were no known witnesses and no signs of forced entry. RP 111 and 132. Mr. Owens speculated that entry was possibly gained through the garage's rear man door because the garage's rear man door did not always latch properly. RP 132. Mr. Owens' stolen properties were never recovered. RP 69-70.

On July 22, 2015, the crime laboratory developed a DNA profile for the blood collected from Mr. Owens' garage. The profile was from a single source and was found to be human blood for a woman. RP 182-185. Subsequently, Officer McNew received information connecting the appellant to the crime. RP 108-110. Mr. Owens does not know the appellant and the appellant did not have Mr. Owens' permission to be in garage or take his properties. RP 70-71.

On October 18, 2015, Officer McNew located and arrested the appellant for the incident involving Mr. Owens. RP 108-110. Initially, the appellant denied knowing or being involved with the burglary of

Mr. Owens' residence. RP 113 and 115. Upon being confronted with the DNA profile obtained from the crime laboratory, the appellant admitted to being inside garage and taking things from inside the garage and car. The appellant told Officer McNew that she had been drinking at Hung Far Low with her boyfriend and walked barefooted to Mr. Owens' residence. To access the garage, the appellant indicated she cut through the backyard and accessed the garage through the rear man door. RP 115-118.

Once inside the garage, the appellant admitted to accessing the car and loading Mr. Owens' backpack with his tools, wallet, and stereo faceplate. RP 119-121 and 151. The appellant's admissions to taking Mr. Owens' backpack and wallet were information she offered on her own, unprompted by Officer McNew. RP 118-119, 121, and 151. The appellant denied taking the popup tent and folding chair. RP 124. The appellant indicated that she left with the stolen property on Mr. Owens' bike. RP 123. The appellant remembered cutting her foot and bleeding, but she did not remember when or how she had cut her foot. RP 122. The appellant indicated she acted alone. RP 123.

Officer McNew collected the appellant's DNA sample and submitted it to the crime laboratory for comparison to the DNA profile obtained from Mr. Owens' garage. RP 125-127. The crime laboratory

later found the appellant's DNA matched the DNA profile of the blood recovered from Mr. Owens' garage. RP 188.

In a second amended information, the State charged the appellant with residential burglary, theft in the second degree, vehicle prowling in the second degree, and identity theft in the second degree. CP 21-22 and RP 20, 51-52, and 309-313

On May 23, 2017, the Honorable Gary Bashor presided over the appellant's jury trial. RP 3-372. During trial, the appellant testified to drinking with her boyfriend, having a fight with her boyfriend, and walking barefoot to Mr. Owens' residence. RP 208-210. Along the way, the appellant cut her toe and entered Mr. Owens' garage to seek refuge and get something to wrap her feet. RP 208-210, 217, and 234. Appellant testified she did not know the owner and knew she should not have gone into his garage. RP 210. Appellant testified to entering the garage through the rear man door. RP 234-237.

Once inside the garage, the appellant fell asleep for a brief period of time inside Mr. Owens' car. RP 211 and 242. The appellant testified that there are parts of that night that she does not remember because she had blacked out due to her intoxication. RP 215. After falling asleep, the appellant sobered up a little and woke up. RP 211 and 215. Once she woke up, the appellant knew what she did was wrong and had to get out of

the garage because she did not want to be caught and get into trouble. RP 211, 215, 218, 222, and 226. Appellant exited the garage by pressing a button on the car's visor to open the garage's front rollup door. RP 211-212 and 216. Appellant admitted to knowing how to ride a bike and being in the garage for 20 minutes. RP 223 and 242. Appellant denied taking anything from the garage and going to a friend of her mother's house at 243 20th Avenue. RP 211-212 and 215-217.

Mary Brockett, the appellant's mother, testified to not seeing the appellant on the night of the burglary and only seeing the appellant the next day. RP 258-260. Mary Brockett had no idea where appellant was or what she did on the night of the burglary. RP 258-259 and 263. Mary Brockett's only involvement that night was to retrieve the appellant's car, which was parked on Ocean Beach in the area of Hung Far Low. RP 258 and 285-286. During trial, the State objected to the following series of questions asked of Mary Brockett by the appellant's trial attorney:

“Q: She was staying there at the time? Do you know - - how to do this question. Let's see. Do you know - - I know you know a lot about Jennifer. Is she like everybody else?

A: No.

Mr. Nguyen: Objection to the form of the question.

The Court: Sustained.

Q: What's different about Jennifer?

Mr. Nguyen: Objection; relevancy, form of the question.

The Court: Sustained without foundation.

Q: Okay. You've raised Jennifer. Has it been an easy thing to do?

A: No.

Mr. Nguyen: Objection; relevancy, your Honor.

The Court: Sustained.

Ms. Michalek: Actually, I'm going towards what would be Jennifer's state of mind that night when she was under the stress of being beat up by her boyfriend and so where her state of mind might have been when she's under that stress.

Mr. Nguyen: Objection; foundation, relevancy. This witness didn't see the defendant.

The Court: I'm not sure that that - - there may be some relevancy, but I don't think this witness would be able to testify to that.

Ms. Michalek: Not as to her frame of mind actually that night but how she gets under situations of stress.

Mr. Nguyen: Objection; relevancy.

The Court: I'll sustain the objection." RP 260-261.

At the conclusion of the trial, the jury found the appellant guilty of residential burglary, vehicle prowling in the second degree, and identity

theft in the second degree, and not guilty of theft in the second degree. RP 369-370. The appellant now appeals her convictions.

IV. ARGUMENTS

1. **THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND WAS NOT PREJUDICED BY HER TRIAL ATTORNEY'S DECISION TO NOT PURSUE AN INTOXICATION DEFENSE.**

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 693 (1984) and State v. McFarland, 127 Wash.2d 322, 335 (1995). An appellant must show both deficient performance and resulting prejudice to prevail in an ineffective assistance claim. State v. McNeal, 145 Wash.2d 352, 362 (2002). To establish deficient performance, an appellant must show that his attorney's performance fell below an objective standard of reasonableness. Id. To establish prejudice, an appellant must demonstrate that, but for the deficient representation, the outcome of the trial would have differed. Id.

Deference will be given to counsel's performance in order to "eliminate the distorting effects of hindsight" and the reviewing appellate court must indulge in a strong presumption that counsel's performance is within the broad range of reasonable professional assistance. Id. at 689 and State v. Lopez, 107 Wash.App. 270, 275 (2001). A decision

concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wash.2d 61, 77-78 (1996), State v. Garrett, 124 Wash.2d 504, 520 (1994), and McFarland, 127 Wash.2d at 335.

In the present case, the appellant was not denied effective assistance of counsel because she suffered no prejudice from her trial attorney's decision to not present an intoxication defense. While there was evidence from the appellant of her being intoxicated and blacking out a various points prior to getting to the garage and while being in the garage, that evidence would not have changed the jury verdicts in the case because there was evidence to show that she later sobered up enough to form the necessary intent to commit the crimes.

At trial, the appellant admitted to knowingly and unlawfully entering Mr. Owens' garage because she did not know Mr. Owens and did not have his permission to enter the garage. After entering the garage, the appellant claimed her intoxication caused her to black out and fall asleep inside Mr. Owens's car for a brief period. Subsequently, the appellant sobered up a little and woke up. Upon waking up, the appellant knew what she did was wrong and had to get out of the garage because she did not want to be caught and get into trouble. To exit the garage, the appellant pressed a button on the car's visor to open the garage's front

rollup door. The appellant left the garage and went to a friend of her mother's house at 243 20th Avenue.

The appellant's trial testimony about sobering up and waking up is detailed and shows at that point, the appellant was aware of her unlawful actions and was able to form the necessary intent to commit crimes while being unlawfully inside the garage. It is undisputed that Mr. Owens' tools, backpack, wallet, stereo faceplate, and bike were stolen from the garage, and the garage rollup door was found partially open. Combined with her admissions to Officer McNew that she acted alone, loaded Mr. Owens' backpack with his tools, wallet, and stereo faceplate, and left with the stolen property on Mr. Owens' bike through the garage rollup door, the jury verdicts would have remained the same with or without the intoxication defense. Therefore, the appellant was not prejudiced by her trial attorney and was not denied effective assistance of counsel.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING TESTIMONIES REGARDING THE APPELLANT'S STATE OF MIND.

Appellate courts review the trial courts' decisions to admit or exclude evidence under an abuse of discretion standard. State v. Swan, 114 Wash.2d 613, 658 (1990), Reese v. Stroh, 128 Wash.2d 300, 310 (1995). In keeping with the right to establish a defense, "a criminal defendant has no constitutional right to have irrelevant evidence admitted

in his or her defense.” State v. Hudlow, 99 Wash.2d 1, 15 (1983). The threshold issue for admission of any evidence is relevancy. Only relevant evidence is admissible. ER 402. “Evidence is relevant if it has a tendency to make the existence of any fact of consequence more probable or less probable than it would be without the evidence.” State v. Darden, 145 Wash.2d 612, 624 (2002). A trial court's relevancy determinations are matters within the trial court’s discretion and should be overturned only if no reasonable person could take the view adopted by the trial court. State v. Russell, 125 Wash.2d 24, 78 (1994), State v. Hudlow, 99 Wash.2d 1, 17 (1983), State v. Castellanos, 132 Wash.2d 94, 97 (1997). “When a trial court makes an erroneous evidentiary ruling, the question on appeal becomes ‘whether the error was prejudicial, for error without prejudice is not grounds for reversal.’ ” Mut. Of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 178 Wash.App. 702, 728-29 (2013) (quoting Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wash.2d 188, 196 (1983). If an error affects the outcome of the case, it is prejudicial and not harmless. Peralta v. State, 191 Wash.App. 931, 951 (2015).

ER 602 allows a witness to testify concerning facts within his or her personal knowledge. “[A] witness may testify about the state of mind of another, so long as the witness personally witnessed events or heard statements that are relevant to prove the other person’s state of mind.”

State v. Contreras, 57 Wn.App. 471, 477 (1990) quoting 5A Karl B. Tegland, Washington Practice: Evidence sec. 602.4, at 286 (4th ed.1997) (footnotes omitted), In re Estate of Black, 153 Wash.2d 152, 167 (2004). Without an adequate factual basis, however, testimony about another's state of mind is inadmissible. "The burden of laying a foundation that the witness had an opportunity to observe the facts to which he testifies is upon the proponent of the testimony." State v. Vaughn, 101 Wn.2d 604, 611 (1984).

In the present case, Mary Brockett testified that she did not see the appellant the night in question. Mary Brockett's only involvement that night was to retrieve the appellant's car, which was parked on Ocean Beach in the area of Hung Far Low. Mary Brockett did not see the appellant until the following day. When Mary Brockett saw the appellant the next day, there was no evidence presented to show that Mary Brockett observed anything or heard anything to apprise her that the appellant had been assaulted the night before. When the appellant's trial attorney asked Mary Brockett about the appellant's state of mind, no evidence was introduced to show that Mary Brockett was aware the appellant had been assaulted on the night in question. RP 256-261.

Initially, the appellant's trial attorney sought to have Mary Brockett give an opinion about the appellant's state of mind on the night

of the burglary and stated, “[a]ctually, I’m going towards what would be Jennifer’s state of mind that night when she was under the stress of being beat up by her boyfriend and so where her state of mind might have been when she’s under that stress.” RP 261. The State objected for, “foundation, relevancy. This witness didn’t see the defendant.” RP 261. The court sustained the objection and noted that, “I’m not sure that that - - there may be some relevancy, but I don’t think this witness would be able to testify to that.” RP 261. The trial court correctly excluded Mary Brockett from testifying to the appellant’s state of mind on the night of the burglary as no foundation was laid to justify such testimony. Mary Brockett did not personally witness events or hear statements that were relevant to prove the appellant’s state of mind on that night.

Subsequently, the appellant’s trial attorney sought to admit testimony about the appellant’s general state of mind while under stress and stated, “[n]ot as to her frame of mind actually that night but how she gets under situations of stress.” RP 261. The State proceeded to object for, “relevancy.” RP 261. The trial court then stated, “I’ll sustain the objection.” RP 261. Contrary to the appellant’s current claim, the trial court did not say anything about the appellant’s general state of mind being relevant. The appellant mistakes the trial court’s ruling:

“Defense counsel explained the testimony was relevant to how Brockett responds to situations of stress, such as the stress of being beaten up by her boyfriend on the evening of the incident. RP 261. The State objected, arguing Christine did not observe Brockett on the evening of the incident. RP 261. Counsel responded she was not seeking testimony regarding Brockett’s mental state at the time of the incident, but rather ‘how [Brockett] gets under situations of stress.’ RP 261. The trial court noted, ‘there may be some relevancy’ but sustained the State’s objection reasoning, ‘I don’t think this witness would be able to testify to that.’ RP 261.” Appellant’s Brief 9.

In State v. Stubsjoen, 48 Wash.App. 139 (1987), the defendant met and joined Jerry Johnson, Donald Ponis, and Jeanna Bomber to drink beer, talk, and smoke marijuana in a car. Also inside the car was Jeanna’s 6-month old daughter. Id. at 141-142. After some time, an argument broke out causing Jeanna, Jerry, and Donald to exit and walk away from the vehicle. When they returned to the car, the defendant and Jeanna’s daughter were gone. Id. at 142. While the defendant admitted to taking the baby, she disputed the circumstances and motives that led her to take the baby. About an hour and a half after taking the baby, the defendant called a friend, Eric Jonsson, for help. Id. at 142-143. The defendant was ultimately charged with kidnapping in the second degree. “At trial, [defendant] called Jonsson as a witness. However, the court only permitted him to testify that he had received the phone call, ruling that [defendant’s] statements were self-serving and that [defendant’s] testimony would be inadmissible hearsay.” Id. at 143. The defendant was

convicted of kidnapping in the second degree and appealed her conviction.

Id.

On appeal, the defendant contended “that the contents of her telephone conversation with Jonsson, which took place about 1 ½ hours after she removed the baby from the automobile, should have been admitted since it would have shown her state of mind.” Id. at 146. The appellate court found the trial court was correct to exclude the content of that telephone call because “[w]hile statements offered as circumstantial evidence of the declarant’s state of mind are not hearsay, such statements must be relevant to be admissible. 5A K. Tegland, Wash.Prac S 336 (2d ed. 1982). Jonsson’s testimony would only have been relevant insofar as it might have corroborated [defendant’s] contention that she did not intend to abduct the baby. However, the relevant state of mind was when she left the car with the baby in Federal Way, not her state of mind 1 ½ hours later when she was speaking on the phone to Jonsson.” Id. at 146.

Like the defendant in the Stubbsjoen case, the appellant too disputed the circumstances and motives behind her actions. While she admitted to unlawfully entering the garage, the appellant was permitted and did testify to being assaulted, going into the garage to seek refuge, and not having an intent to commit a crime upon unlawfully entering the garage. The appellant was allowed to put on her defense.

Like the Stubsjoen case, testimony about the appellant's general state of mind while under stress is not relevant and the trial court correctly sustained the State's objection. One of the issues in this case was the appellant's intent on May 2, 2015, either when she unlawfully entered Mr. Owens' garage or as she unlawfully remained in the garage. Testimony regarding the appellant's general state of mind while under stress at other periods of time does not help the jury to determine whether the appellant had intent to commit crimes on May 2, 2015.

Even if the trial court had been wrong in excluding Mary Brockett's testimony regarding the appellant's general state of mind while under stress, the error would have been harmless and would not have affected the jury verdicts. As previously stated, the appellant admitted to unlawfully entering Mr. Owens' garage. While in the garage unlawfully, the appellant sobered up a little and knew what she did was wrong. What the appellant admitted to doing was acting alone to load Mr. Owens' backpack with his tools, wallet, and stereo faceplate, and leaving with the stolen property on Mr. Owens' bike through the garage rollup door. It is undisputed that Mr. Owens' tools, backpack, wallet, stereo faceplate, and bike were stolen from the garage, and the garage rollup door was found partially open. The jury verdicts would have remained the same with or

without the excluded testimony from Mary Brockett. Therefore, the appellant was not prejudiced and her convictions should not be reversed.

3. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF RESIDENTIAL BURGLARY BECAUSE THE ATTACHED GARAGE WAS A PORTION OF THE DWELLING.

When determining the sufficiency of evidence, the standard of review is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, State v. Jones, 63 Wn.App. 703, 708, 821 P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State’s evidence. Jones, 63 Wn.App. at 707-08. All reasonable inferences must be drawn in the State’s favor and

interpreted most strongly against the defendant. State v. Joy, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

There was sufficient evidence to show that the attached garage was part of a dwelling. The trial court instructed the jury that dwelling means any building or structure or portion thereof which is used or ordinarily used by a person for lodging. RP 309.

In State v. Moran, 324 P.3d 808 (2014), the defendant was charged and convicted of residential burglary after tampering with a sewage pipe at the house of his ex-wife. Id. at 809. To carry out his act of sabotage, the defendant crawled underneath the deck, went through an access door set in the house's foundation, and ended up in a lighted area beneath the house with access to the house's sewage pipes. Id. "To reach the only access door to the area in which the pipe was located, it is necessary to first remove the lattice that hangs down from the deck to the ground and then crawl under the deck a short distance." Id. at 810. "Once through the access door, the area is lighted and there is enough space to stand. The floor is covered with plastic, nothing is stored there, and the space cannot be accessed from inside the house." Id. at 810. On appeal, the appellate court affirmed the defendant's conviction for residential burglary and noted that "[clearly,] this enclosed area beneath the living space, regardless of what moniker is assigned to it, was a portion of the house."

Id. at 811. “Therefore, when [defendant] entered the area, he entered a portion of the house.” Id. at 811.

In State v. Neal, 161 Wash.App. 111 (2011), the defendant was caught inside the tool room of an apartment building putting tools into several bags. The defendant was charged and convicted of residential burglary. Id. at 112. On appeal, the appellate court affirmed the defendant’s conviction for residential burglary and noted the tool room was part of an apartment building “used for lodging. It was an apartment building. Because [defendant] entered a building used for lodging, the evidence was sufficient to convict him of residential burglary.” Id. at 114.

In State v. Murbach, 68 Wash.App. 509 (1993), the defendant was charged and convicted of residential burglary for entering the victim’s attached garage and scratching the victim’s car with a sharp object. Id. at 510. On appeal, the appellate court affirmed the defendant’s conviction because “the definition of dwelling in RCW 9A.04.110(7) includes the [victim’s] attached garage. Such garage is a ‘portion’ of a building used as lodging.” Id. at 513.

Similarly, the attached garage in the present case is a portion of Mr. Owens’ dwelling. Mr. Owens who resided at the residence described the garage as an attached garage. The attached garage is physically attached to the rest of the residence as depicted in Exhibits # 1, # 2, and #

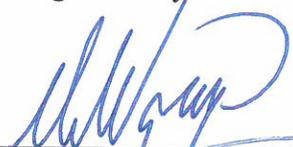
6, and was used by Mr. Owens to store his belongings such as his tools, cars, bikes, camping supplies, and wallet. Therefore, there was sufficient evidence to show that the appellant entered a dwelling because she entered an attached garage that is a portion of a dwelling.

V. CONCLUSIONS

The appellant's appeal should be denied because the appellant received effective assistance of counsel, the trial court did not abuse its discretion in excluding testimonies regarding the appellant's state of mind, and the evidence was sufficient to prove the attached garage was a portion of a dwelling.

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

Signed at Kelso, Washington on September ^{27th} 2018.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

September 27, 2018 - 2:45 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51277-7
Appellate Court Case Title: State of Washington, Respondent v. Jennifer A. Brockett, Appellant
Superior Court Case Number: 15-1-01194-1

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