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NO. 52993-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN GANTT,  
Appellant.

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

The Honorable Stanley J. Rumbaugh, Judge

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BRIEF OF APPELLANT

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LISE ELLNER, WSBA No. 20955  
ERIN C. SPERGER, WSBA No. 45931  
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it gave the jury a permissible inference instruction for malicious mischief.
2. The state failed to prove beyond a reasonable doubt that Gantt committed malicious mischief in the third degree.
3. The trial court erred when it failed to instruct the jury on voluntary intoxication.

B. ISSUES PRESENTED ON APPEAL

1. Did the trial court err when the trial court instructed the jury it could infer malice from an act done in willful disregard of the rights of another even though there was no rational connection between Gantt's presence in the apartment and the bent windshield wiper or the broken lock on the sliding glass door?
2. Did the state fail to prove beyond a reasonable doubt that Gantt committed malicious mischief in the third degree when the only evidence the state submitted was Gantt's presence in the apartment and exculpatory testimony from C.S. that she believed the lock was broken prior to Gantt's presence?

3. Did the trial court err in failing to instruct the jury on voluntary intoxication when: (a) violation of a protection order, residential burglary, malicious mischief, and obstructing an officer all have mens rea; (b) there was substantial evidence Gantt had been drinking prior to the alleged violation of a protection order, malicious mischief, and residential burglary and had used drugs prior to obstructing law enforcement; and (c) Gantt's physical behavior including his incoherent rambling, his attempted suicide, and his inability to stand, evidenced his inability to form the required mental state for the crimes charged?

C. STATEMENT OF THE CASE

1. Procedural History

Brian Gantt was charged by amended information with Count III Domestic Violence Court Order Violation (RCW 26.50.110(5)); Count V Residential Burglary (RCW 9A.52.025); Count VI Obstructing a Law Enforcement Officer (RCW 9A.76.020(1)); and Count VII Malicious Mischief in the Third Degree (RCW 9A.48.090(1)(a) and 9A.48.090(2)(a)). CP 38-41.

After a trial, the jury convicted Gantt as charged.<sup>1</sup> CP 84, 86-90.

This timely appeal follows. CP 159.

2. Substantive Facts

Brian Gantt and C.S. were in a relationship and share a now three-year-old son C.N.S. RP 72. On August 8, 2017, Pierce County Superior Court entered an Order Prohibiting Contact against Gantt, which prohibited Gantt from contacting C.S. and from knowingly being within 1,000 feet of C.S. and/or her residence. RP 184-86; Exh. 1. This order expired on August 8, 2022. RP 186. On October 6, 2017 the Puyallup Municipal Court entered a no-contact order against Gantt, which prohibited Gantt from knowingly entering or remaining or coming within 1,000 feet of C.S.'s residence and from contacting C.S. except through text messages for the sole purpose of arranging child exchange. RP 190-91; Exh. 2. This order expired on October 6, 2019. RP 190; Exh. 2.

On May 1, 2018 C.S. moved into a newly constructed apartment, where she was the first tenant to live in that unit. RP 74, 131, 135-36. Each night C.S. locked the sliding glass door in her

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<sup>1</sup> A jury convicted Gantt of Counts VI and VII. However, the judgment and sentence filed on January 23, 2019 states Gantt pled guilty. CP 130.

living room, but she did not test it to make sure the lock worked correctly. RP 140-41.

Before C.S. went to bed on May 6, (year throughout) she locked the sliding glass door in the living room. RP 96. Sometime on May 7 C.S. heard a noise in her living room and when she entered the room, she observed Gantt who was “upset, distraught, practically crying, mumbling stuff.” RP 86. Gantt was rambling and C.S. could not understand him and assumed he was intoxicated. RP 129, 130. C.S. told Gantt to leave so he did not get into trouble but instead he took a bottle of pills out of his pocket and swallowed them. RP 86. Gantt indicated he did not want C.S. to call 911 because he wanted to die. RP 93. Gantt’s condition became worse after he swallowed the pills. RP 130.

Gantt laid down on the couch and started to lose consciousness. RP 89. C.S. became worried and went outside and called 911. RP 89. When C.S. stepped outside, she noticed her windshield wiper bent and she reported it to the 911 operator. RP 88-89.

Deputies Adam Pawlak and Ryan Olivarez were dispatched to C.S.’s residence. When they arrived just before 5:00 a.m. they

observed a man lying on the couch. RP 192, 210. When the officers asked the man if he was Gantt, he said that he was not. RP 193. As Pawlak and Olivarez turned to C.S. who indicated the male was Gantt. Gantt ran out the sliding glass door. RP 194. The deputies chased Gantt while identifying themselves as police and commanding him to stop. RP 194. Gantt fell to the ground when Olivarez shot Gantt with his taser. RP 196-97. Pawlak asked Gantt if he had taken anything to harm himself, to which Gantt responded that he took 30 Benadryl to end his life. RP 155-56.

Later C.S. noticed the lock to the sliding glass door was on the floor. RP 97. After the police left, C.S. attempted to put the lock back on the door, but it was missing a screw and did not function properly. RP 131. C.S. searched everywhere in the apartment for the missing screw but did not find it. RP 131. When C.S. tested the lock without that screw, the handle opened as normal even though the lock was engaged. RP 131. C.S. testified that she believed the lock was broken when she moved in because the building was newly constructed and there were other defects in the unit that maintenance had to repair. RP 131.

Over the defense's objection, the court submitted instruction

no. 30 to the jury which stated in part as follows:

Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

Supp. CP (Jury Instruction No. 30); RP 237.

The defense requested a voluntary intoxication instruction, but the court refused to submit it to the jury. RP 257.

#### D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT GAVE THE JURY A PERMISSIBLE INFERENCE INSTRUCTION FOR MALICIOUS MISCHIEF

a. The permissible inference instruction was not warranted

The trial court erred when it gave the jury a permissible inference instruction for malicious mischief. In a criminal prosecution, the state must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (*citing, In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (quotations omitted)).

To convict Gantt of Malicious Mischief in the Third Degree the state had to prove beyond a reasonable doubt that on or about May 7, 2018 Gantt either (a) knowingly and maliciously caused

physical damage to the property of another in an amount not exceeding \$750, in willful disregard of that person's rights or (b) defaced another's property without their permission. RCW 9A.48.090. Malice means an "evil intent, wish, or design to vex, annoy or injure another person." RCW 9A.04.110(12).

In a criminal case, the court may give a "permissible inference" instruction, which "allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one." *County Court of Ulster Cty., N. Y. v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

In the context of malicious mischief, a permissible inference allows the jury to infer malice from an act done in willful disregard of the rights of another. WPIC 2.13 (*citing, State v. Ratliff*, 46 Wn. App. 325, 730 P.2d 716 (1986)). However, this permissible inference is valid only if there is a rational connection between the inferred fact and the proven fact, and the inferred fact flows "more likely than not" from the proven fact. *Allen*, 442 U.S. at 165; *State v. Johnson*, 100 Wn.2d 607, 674 P.2d 145 (1983), *overruled on other grounds, State v. Bergeron*, 105 Wn.2d 1, 19-20, 711 P.2d 1000 (1985). Otherwise, the permissive inference instruction violates the

due process requirement that the state prove every element beyond a reasonable doubt. *Allen*, 442 U.S. at 157.

Thus, the permissible inference instruction is not appropriate if, under the facts of the case, “there is no rational way the trier could make the connection permitted by the inference.” *Allen*, 442 U.S. at 157.

In Washington, an inference requires as a condition precedent proof of certain other facts.

A presumption is an **inference**, affirmative or disaffirmative, of the truth of a proposition of fact which is drawn by a process of reasoning from some one or more matters of **known fact**.

(Emphasis added) *State v. Jackson*, 112 Wn.2d 867, 873, 774 P.2d 1211 (1989). “[I]nferences deal with mental processes.” *Id.*

To be entitled to give a permissive inference instruction in a criminal case, the “presumed fact must follow beyond a reasonable doubt from the proven fact”. *Jackson*, 112 Wn.2d at 876. “A presumption is only permissible when no more than one conclusion can be drawn from any set of circumstances.” *Id.* In other words, if there is more than one reasonable conclusion that could flow from the circumstances, the inference instruction may not be given. *Id.*

In *Jackson*, a burglary case and malicious mischief case, the Supreme court held that the court erred by giving the instruction because, there were two possible inferences:(1) attempted burglary or (2) vandalism or malicious destruction. The Court held specifically, an “inference could not follow that there was intent to commit a crime *within* the building just by the defendants' shattering of the window in the door. This evidence is consistent with two different interpretations; one indicating attempted burglary, a felony; and the other malicious mischief, a misdemeanor.” *Jackson*, 112 Wn.2d at 876.

Under a harmless error analysis, an error is only harmless if it is ‘ “*trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.*” ’ ” *Jackson*, 112 Wn.2d at 877 (Emphasis in original, citations omitted). In *Jackson* the error was not harmless because it tended to prove an element of the commission of a crime- that the defendant had entered the building and did so with the intent to commit a crime against the property therein. *Id.*

"[I]ntent may not be inferred 'from conduct that is patently equivocal.'" *Jackson*, 112 Wn.2d at 876 (quoting *Bergeron*, 105 Wn.2d at 19-20).

Here, similar to *Jackson*, regarding the lock on the door, there were two possible inferences: either the lock was already broken and Gantt simply opened the door or Gantt continued to pull on the door until the lock broke. However, just like in *Jackson*, an inference of malice does not flow just by Gantt's presence in the apartment because Gantt's presence in the apartment is open to two reasonable interpretations: one indicating a crime and the other indicating no crime.

Further, there were no reasonable inferences regarding the windshield wiper because simply being present in the apartment does not imply Gantt maliciously damaged C.S.' property outside the apartment. Because there was no known fact from which to infer malice, the permissible inference instruction was given in error. *Jackson*, 112 Wn.2d at 873, 876.

*Ratliff*, is another case that supports Gantt's position that the permissible inference instruction was given in error because there was no evidence to first support the jury finding Gantt committed

the act. *Ratliff*, 46 Wn. App. at 328-31.

In *Ratliff*, the defendant was arrested and placed into the back of a police van used to transport prisoners. *Ratliff*, 46 Wn. App. at 326. The two arresting officers left Ratliff in the van for ten to fifteen minutes. When they returned the viewing window between the prisoner holding area and the cab was broken, the radio inside the cab was damaged, and an officer's jacket had been pulled through the broken window into the prisoner holding area. *Ratliff*, 46 Wn. App. at 326. Ratliff also confessed to being frustrated while trying to pull out the radio. The court also found that Ratliff pulling the officer's jacket through the window was more consistent with malice than not. *Ratliff*, 46 Wn. App. at 331.

The Court of Appeals held the confession to being frustrated while pulling radio wires, coupled with the damage that only Ratliff could have committed, was sufficient to establish a rational connection between Ratliff's acts and an inference of malice. *Ratliff*, 46 Wn. App. at 330.

Here, the state alleged two separate acts that could constitute malicious mischief: bending C.S.'s windshield and damaging the lock on the sliding glass door. RP 317. Neither C.S.

nor any other witness saw Gantt bend C.S.' windshield wiper. The only evidence regarding damage the sliding door was exculpatory, where C.S. believed the door had been defective since she moved into the apartment. RP 131.

In contrast to *Ratliff*, the evidence presented in this case does not establish a rational connection between Gantt's presence in the apartment and the bent windshield or the damaged door. In other words, the state did not provide adequate evidence to establish the "proven fact"- that Gantt damaged property. *Ratliff*, 46 Wn. App. at 331. This is a necessary condition precedent to permitting the instruction allowing the jury to "infer malice '**from an act done** in willful disregard of the rights of another'". (Emphasis added) *Ratliff*, 46 Wn. App. at 330.

In *Ratliff*, the state presented evidence to support the jury finding beyond a reasonable doubt that he destroyed the property. That evidence was the "rational connection" which permitted the malice instruction. *Ratliff*, 46 Wn. App. at 331.

Here by contrast, Gantt did not admit to bending C.S.'s windshield wiper and there was no evidence that Gantt committed any act consistent with malicious intent. Here, unlike in *Ratliff*, there

was only one fact proven – Gantt was in the apartment. This does not imply in any way that he bent C.S.’s windshield wiper.

Likewise, the only evidence Gantt broke the lock on the sliding glass door was that the lock was in place when C.S. went to bed and it was on the floor when she discovered Gantt in the apartment. RP 114. Even if the jury believed Gantt broke the lock it would have to also believe Gantt broke the lock in willful disregard of C.S.’s rights.

However, C.S. testified that she believed the lock was already broken because there were other defects in the unit. RP 131. She was the first tenant in that unit so there was no historical documentation of whether the locks functioned properly. RP 123. Unlike in *Ratliff*, here there was no evidence Gantt pulled the door out of frustration and broke the lock. Even after Gantt entered the apartment, he did not initially try to contact C.S. or go any further into the apartment than the couch. RP 94. Under those circumstances, there is no rational way the jury could connect Gantt’s presence in the apartment to damaging the lock with evil intent, wish, or design to vex, annoy or injure C.S..

Because there was no rational connection between the

proven facts and the inference of malice, instruction number 30 improperly relieved the state from having to prove every element beyond a reasonable doubt. *Allen*, 442 U.S. at 157.

b. Giving the permissible inference instruction was not harmless

Giving the permissible inference instruction was not harmless because the instruction tended to prove an element of the commission of the crime. *Jackson*, 112 Wn.2d at 877.

Instructional error may be subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 4, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). However, an error is only harmless if it is trivial, it was not prejudicial to the substantial rights of the party assigning it, and it did not affect the final outcome of the case. *State v. Flora*, 160 Wn. App. 549, 554, 249 P.3d 188 (2011) (*quoting, State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)).

Instruction number 30 indicated that by entering the apartment through a door that may or may not have been locked, the jury could infer malice and reckless disregard for C.S.'s property. Further, the instruction allowed the jury infer malice, without evidence that Gantt bent the windshield wiper. Instruction

number 30 improperly relieved the state of its burden to prove every element of the crime charged and likely affected the outcome of the case. Without this instruction the jury likely would not have found malicious intent and, thus, acquitted Gantt of malicious mischief. Therefore, the permissible inference instruction was not harmless and this court should reverse Gantt's conviction for malicious mischief and remand for a new trial. *Jackson*, 112 Wn.2d at 877.

2. THE STATE FAILED TO PROVE  
BEYOND A REASONABLE DOUBT  
THAT GANTT COMMITTED  
MALICIOUS MISCHIEF IN THE THIRD  
DEGREE

The state failed to prove beyond a reasonable doubt that Gant committed malicious mischief in the third degree. This Court must reverse the conviction if there is insufficient evidence to prove an element of a crime. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005); *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salina*, 119 Wn.2d 192, 201,

829 P.2d 1068 (1992).

Here, the only evidence the state submitted to prove malicious mischief was Gantt's presence in the apartment and exculpatory evidence from C.S. that she believed the lock was already broken. RP 131. Even in the light most favorable to the state this is insufficient to prove malicious mischief because the evidence does not show any act was done let alone that it was done with malicious intent.

"A defendant whose conviction has been reversed due to insufficient evidence cannot be retried." *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (*citing, State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (*citing, Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981))). Therefore, this court should reverse Gantt's conviction for malicious mischief and remand for dismissal with prejudice.

3. THE COURT ERRED WHEN IN  
FAILED TO GIVE A VOLUNTARY  
INTOXICATION INSTRUCTION

a. Gantt was entitled to a voluntary intoxication instruction

Gantt was entitled to a voluntary intoxication instruction. A defendant is entitled to present his theory of the case if it is

supported by substantial evidence. *State v. Washington*, 36 Wn. App. 792, 793, 677 P.2d 786, review denied, 101 Wn.2d 1015 (1984) (citing, *State v. Griffith*, 91 Wn.2d 572, 574, 589 P.2d 799 (1979)).

To submit a voluntary intoxication instruction to the jury a defendant must show (1) the crime charged has as an element of a particular mental state, (2) there is substantial evidence of drinking or drug use, and (3) evidence that the drinking or drug use affected the defendant's ability to acquire the required mental state. *Washington*, 36 Wn. App. at 793; *State v. Finley*, 97 Wn. App. 129, 135, 982 P.2d 681 (1999) (impairment to support voluntary intoxication may be caused by alcohol or drugs)

While the defendant's testimony about his impairment is "most effective" a defendant may exercise his right to remain silent and still be entitled to this instruction by relying on the state's evidence and cross-examination of the state's witnesses. *Finley*, 97 Wn. App. 134–35 (citing, *State v. Gabryschak*, 83 Wn. App. 249, 253, 921 P.2d 549 (1996)).

A defendant's inability to form the required mens rea may be inferred by evidence of his or her physical manifestations. *State v.*

*Walters*, 162 Wn. App. 74, 83, 255 P.3d 835 (2011) (citing, *Gabryschak*, 83 Wn. App. at 253).

In *State v. Kruger*, testimony the defendant blacked out, vomited at the station, had slurred speech, and was imperviousness to pepper spray, was sufficient evidence the defendant's level of intoxication affected his mental state. *State v. Kruger*, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003).

Similarly, in *Walters*, even though there was no direct evidence that intoxication affected Walters' mental state, a police officer testified that during the initial contact Walters had slurred speech, droopy, bloodshot eyes, and swayed back and forth. *Walters*, 162 Wn. App. at 83. The Court of Appeals held the defendant was entitled to an involuntary intoxication based on this sufficient physical evidence of intoxication. *Walters*, 162 Wn. App. at 84.

Here, Violation of a Domestic Violence Protection Order, Residential Burglary, Obstructing Law Enforcement, and Malicious Mischief all require a specific mens rea. RCW 26.50.110(1)(a)(iii); *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005) (Residential burglary requires a person to knowingly enter or

remain unlawfully in a building); *State v. Contreras*, 92 Wn. App. 307, 315–16, 966 P.2d 915 (1998) (The crime of obstructing a law enforcement officer requires the mens rea of “willfulness”); *State v. Snapp*, 119 Wn. App. 614, 621, 82 P.3d 252 (2004) (The terms “knowingly” and “intentionally” are the functional equivalents to “willfully.”); RCW 9A.48.090(a).

Gantt’s physical manifestations on May 7 were similar to those displayed in *Kruger* and *Walters*. When C.S. first encountered Gantt on May 7 she described him as “out of it” and “unstable.” RP 129. C.S. had never seen Gantt in that state before. Gantt was in that state of mind at the time of the alleged malicious mischief, residential burglary and violation of the no contact order.

After Gantt was in the apartment, he swallowed 30 Benadryl pills and similar to Kruger’s and Walters’ slurred speech, Gantt was rambling to the extent C.S. could not understand what he was saying. RP 86, 129-30, 155-56. Gantt’s condition worsened after he ingested the pills and started to lose consciousness. RP 89, 129-30, 133. Under the influence of the alcohol and drugs, Gantt was unable to form act willfully, the required mental state. RP 133.

Although Gantt’s mental process continued to deteriorate

after he was present in the apartment, there was substantial evidence from which the court could infer Gantt was unable to form the mens rea of knowledge or willfulness even before he entered the apartment. *Walters*, 162 Wn. App. 83. Therefore, failing to instruct the jury on voluntary intoxication was error. *Walters*, 162 Wn. App. 84.

b. The trial court's failure to instruct the jury on voluntary intoxication was not harmless error

The trial court's failure to instruct the jury on voluntary intoxication was not harmless error because it affected the verdict. *Cf. Flora*, 160 Wn. App. at 554 (*quoting, Britton*, 27 Wn.2d at 341) (An error is only harmless if it is trivial, it was not prejudicial to the substantial rights of the party assigning it, and it did not affect the final outcome of the case).

In *Walters*, the Court of Appeals held the failure to give the voluntary intoxication instruction was not harmless as to the theft charge because there was sufficient physical evidence of intoxication from which the jury could have inferred Walters' intoxication affected his mental processing. *Walters*, 162 Wn. App. at 79, 82, 83-84.

In contrast, the assault and resisting arrest were committed

well after Walters stopped consuming alcohol and there was direct evidence Walters' mental state was not impaired. When Walters was arrested his attitude changed from being cooperative to resisting to the point a stun gun was repeatedly employed and culminated in Walters announcing his intention to kick the officer before he did so. *Walters*, 162 Wn. App. at 84.

Here, the effect of the trial court's failure to instruct the jury on voluntary intoxication is similar to the theft charge in *Walters*.

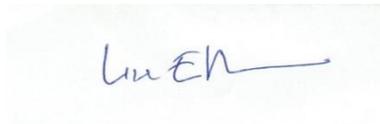
The jury heard evidence Gantt was intoxicated and that he took at least 30 Benadryl pills. However, the jury did not know it could consider evidence of Gantt's intoxication to determine whether he had the required mental state to commit each crime. Had the jury been properly instructed on the law of voluntary intoxication it likely would have found Gantt was unable to form the required mental state to commit any of the crimes charged. Therefore, this Court should reverse Gantt's convictions and remand for a new trial where the court can properly instruct the jury. *Walters*, 162 Wn. App. at 83-84.

E. CONCLUSION

Brian Gantt respectfully request that this Court reverse his conviction for Malicious Mischief and remand for dismissal with prejudice or, in the alternative, remand for a new trial where the jury is properly instructed on voluntary intoxication. Gantt further requests that this Court reverse his convictions for Violation of a Court Order, Residential Burglary, and Obstructing an Officer and remand for a new trial where the jury can be properly instructed on the law of voluntary intoxication.

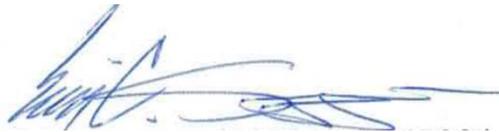
DATED this 20<sup>th</sup> day of September 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

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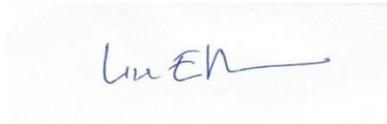
LISE ELLNER, WSBA No. 20955  
Attorney for Appellant

A handwritten signature in blue ink, appearing to read "Erin C. Sperger", is written on a light-colored rectangular background.

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ERIN C. SPERGER, WSBA No. 45931  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcef@co.pierce.wa.us and Brian Gantt/DOC#401414, Monroe Corrections Center, PO Box 777, Monroe, WA 98272 a true copy of the document to which this certificate is affixed on September 20, 2019. Service was made by electronically to the prosecutor and Brian Gantt by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

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Signature

**LAW OFFICES OF LISE ELLNER**

**September 20, 2019 - 10:01 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52993-9  
**Appellate Court Case Title:** State of Washington, Respondent v. Brian S. Gantt, Appellant  
**Superior Court Case Number:** 18-1-01795-7

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Address:  
PO BOX 2711  
VASHON, WA, 98070-2711  
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