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Court of Appeals
Division III
State of Washington

No. 32549-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID RANDALL PRIEST,
Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Henry Rawson, Judge

BRIEF OF APPELLANT (AMENDED)

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to grant Priest's motion to suppress evidence that was the product of an illegal search of the contents of his cell phone.

2. The trial court erred in entering the following findings of fact regarding its denial of the suppression motion:

16. The phone was then charged and powered up, but it did not have a service connection. Suppl CP 3.

17. Det. Sloan checked the phone settings, contacts, and viewed some photos to attempt to identify the phone's owner. Some of the photos viewed were of ATVs. Det. Sloan was unable to identify or recognize[] any persons in the photos. Suppl CP 3.

20. Det. Sloan asked Sheriff Rogers if any ATV's had been stolen in the Miller Road burglary. Suppl CP 4.

3. The trial court erred in entering the following conclusions of law regarding its denial of the suppression motion:

2. From the totality of the circumstances, the phone was abandoned at the Miller Road property. Suppl CP 5.

3. The defendant in abandoning the phone, relinquished any reasonable expectation of privacy in the phone. Suppl CP 5.

5. Law enforcement did not engage in any unlawful conduct. Suppl CP 5.

7. A search warrant was not required by law enforcement to view information on the abandoned phone. Suppl CP 5.

8. The actions by law enforcement were reasonable in their efforts to identify the owner of the abandoned phone. Suppl CP 5.

9. A search warrant would also not have been required under law enforcement's exercise of their community caretaking function of receiving and safeguarding lost or abandoned property, and attempting to identify the legitimate owner of such property. Suppl CP 5.

10. A search warrant would also not have been required where the information viewed on the phone was in plain view. The officer seeing photos that showed ATVs was incidental or inadvertent to the justifiable viewing of information sought to identify the owner possessor of the phone. Suppl CP 5.

11. There is no basis to suppress the evidence obtained from the phone. The motion to suppress is denied. Suppl CP 6.

4. The prosecutor committed misconduct by continuing to impeach its witness, Francis Edwards, despite the fact that she consistently stated she could not recall making statements to Deputy Wright.

5. The trial court abused its discretion by admitting into evidence the taped statements of Francis Edwards pursuant to ER 803(a)(5).

6. The trial court erred when it ordered Mr. Priest to pay a \$100 DNA-collection fee.

7. The record does not support the finding Mr. Priest has the current or future ability to pay the imposed legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the warrantless search of Priest's cell phone by law enforcement illegal under article 1 section 7 of the Washington Constitution, and/or the Fourth Amendment to the United States Constitution?¹

2. Did the prosecution commit misconduct by continued questioning of Francis Edwards regarding statements she allegedly made to a deputy, when Edwards consistently testified she did not recall making such statements?²

3. Did the trial court abuse its discretion in admitting into evidence Edwards' taped statements pursuant to ER 803(a)(5)?³

4. Does the mandatory \$100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine?⁴

¹ Assignments of Error 1, 2, and 3.

² Assignment of Error 4.

³ Assignment of Error 5.

⁴ Assignment of Error 6.

5. Does the mandatory \$100 DNA-collection fee authorized under RCW 43.43.7541 violate equal protection when applied to defendants who have previously provided a sample and paid the \$100 DNA-collection fee?⁵

6. Since the directive to pay LFOs was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs?⁶

C. STATEMENT OF THE CASE

In late December 2012, a three-axle race car trailer containing four ATVs⁷ was stolen from Harrell Myers' property near Pateros, Washington. RP 223–26. Myers did not know who took the property. RP 240. Two of the ATVs were located by law enforcement at the back of Shelley Priest's property. RP 253. Shelley did not know who put them there, although law enforcement declared she originally implicated the defendant, David R. Priest. RP 266–67, 285–86, 517.

A sergeant questioned Priest about the ATVs and trailer. RP 526. Priest stated he knew Josh Taylor, Nikki Windsor, and Josh Howell to be

⁵ Assignment of Error 6.

⁶ Assignment of Error 7.

⁷ "ATV" is a commonly used acronym for all terrain vehicle.

involved with the trailer and ATVs. RP 526–28. Priest denied any involvement with their criminal activity. RP 527.

Amanda VanSlyke rented a garage on her property to Priest to use for working on cars. RP 450, 458. She never saw Priest haul anything other than a car to her property. RP 461. Priest introduced Windsor and Taylor to VanSlyke. RP 451–52. VanSlyke said she heard Windsor talk about selling ATVs, and did not recall making any statements Priest had taken two of the ATVs from Taylor and Windsor. RP 454–55.

The race car trailer was recovered from Darren Morris' home. RP 256. Evidence showed the trailer had been cut apart in a shop on VanSlyke's property. RP 259–60. Morris' brother had purchased the trailer. RP 403. Morris stated when he picked up the trailer from Taylor, Priest was not present and had no part in the transaction. RP 403–05.

The two other ATVs were recovered from Charles and Melissa Nodines' residence. RP 261. The couple purchased the ATVs from a man named "Danny" and a few other individuals not knowing they were stolen. RP 319, 321, 344, 364–65, 368–71. Melissa was not present during price negotiations and could not identify Priest as being present during the transaction. RP 338. However, Charles noted Priest led the couple to the ATVs' location when they arrived to look at them. RP 366. Charles

testified he did not give purchase money to Priest, but rather another person, and Priest was not present when Charles rode the red ATV or when the ATVs were loaded onto the Nodines' trailer after purchase. RP 366, 369–71, 374–77, 380–81. It was unclear from Charles' testimony what role Priest played in price negotiations: he testified Priest was not present during negotiation, but also testified Priest offered to attempt to talk the sellers into a lower price. RP 351, 371, 381–82.

In late February 2013 Frank Andre found a cell phone by the barns on recently burglarized property on Miller Road in Omak, Washington, for which he was a caretaker. RP 551, 553; Suppl CP 1–2. The cell phone was wet from sitting in the melting snow. RP 554. He gave the cell phone to the sheriff. RP 554; Suppl CP 3. Detective Sloan received the cell phone from the sheriff and put it in a bag of rice to dry out. RP 563, 567; Suppl CP 3.

In December 2013, one year after the theft of ATVs from Myers' property, Francis Edwards made statements to law enforcement implicating Priest, which were recorded. RP 682–97. The statements indicated Priest had possession of ATVs and he intended to sell at least one of them. Id.

Also in December 2013, about ten months after receiving the cell phone, Detective Sloan attempted to turn the phone on. RP 568; CP 160. He had been processing other cell phones in another investigation when he decided to try to work on Priest's phone. RP 568; CP 160; Suppl CP 3. The detective took the sim card out of the cell phone—which had been inserted backwards—and put it into the phone in the correct direction. CP 160; Suppl CP 3. Next the detective reinserted the phone's battery and tried to turn on the phone. CP 160; Suppl CP 3. The phone would not turn on, so the detective connected the phone to a Universal Forensic Extraction Device (UFED) in order to “charge the battery and perform the data extraction from the cell phone.” RP 573–74; CP 160; Suppl CP 3.⁸ The UFED was only successful at charging the cell phone—it could not extract data from the phone because it was not compatible with the phone model. RP 574; CP 160. The detective was then able to turn on the phone. CP 160.

The detective first identified the phone number on the device. RP 572; CP 160.⁹ Then he searched through the phone and viewed

⁸ Assignment of Error 2, paragraph 16 and 17. The findings do not explain the steps the detective took to power up the cell phone and that the detective used the UFED in an attempt to extract data. CP 160.

⁹ Assignment of Error 2, paragraph 17. The findings do not include the fact that the first step the detective took when searching through the cell phone was to look at the cell phone's number. CP 160.

photographs on it. RP 570–72; CP 160–61; Suppl CP 3. Initially the detective was not certain if some of the photographs were of red and yellow snowmobiles or four-wheelers. RP 571; CP 160–61.¹⁰ The detective contacted the sheriff and asked if Mr. Andre had reported any ATVs or snowmobiles as stolen. RP 571; CP 161.¹¹ Through his conversation with the sheriff and upon further investigation, the detective realized the photographs were of stolen red and yellow ATVs recently recovered by a deputy regarding the Myers burglary investigation. RP 571–72; CP 161; Suppl CP 4. Thereafter the detective determined the cell phone’s number was registered to Priest. RP 308, 572–73, 649–50.

The detective obtained a search warrant for the cell phone based upon the photographs of the stolen ATVs. RP 308, 573; CP 161; Suppl CP 4. The cell phone also contained several incriminating text messages between Windsor’s cell phone number and Priest’s phone, as well as a .wav file (voice recording). RP 582–92, 632–42; CP 163–65. The messages were from Windsor over the course of a few days and contained information regarding a trailer. *Id.* In particular, one of the messages stated: “Yeah, I got your money. We’re waiting for dark to get the trailer.”

¹⁰ Assignment of Error 2, paragraph 17 and 20. Contrary to the findings of fact, it was not clear to the detective that the photographs were of ATVs.

¹¹ Assignment of Error 2, paragraph 20. The detective could not initially determine whether the photographs were of ATVs.

RP 586. Also, “Hey, it’s Nikki. Let’s chill for a minute. K. We will be there. I’m about an hour with truck trailer and (inaudible). – sorry we haven’t we [*sic*] made it yet. It’s my fault. I have your money and you guys are getting a pretty good payday so please stop being mad” RP 586.

Defense counsel filed a motion to suppress the cell phone evidence, which was denied. CP 152–70; RP 80; Suppl CP 6. The trial court entered findings of fact and conclusions of law. Suppl CP 1–6.

Edwards was called to testify at trial but she could not remember making any statements to law enforcement about Priest and the ATVs. RP 416–18, 425–35. The State then impeached its own witness by examining Edwards in a cross-examination style with her prior statements, during which she continuously asserted she could not recall making them. RP 425–35. Edwards acknowledged having severe anxiety, PTSD (post-traumatic stress disorder), impaired memory due to drug use, and a long prior criminal history for crimes of dishonesty. RP 435–39, 441–42. Later and over defense counsel’s objection, the trial court admitted Edwards’ taped statements as substantive evidence pursuant to the hearsay exception in ER 803(a)(5) (recorded recollection). RP 472–74, 482–84, 502–06, 682–97.

Priest was convicted by a jury of three counts of first degree trafficking in stolen property and two counts of possession of a stolen motor vehicle. CP 4, 27–28.

At sentencing the court imposed discretionary costs of \$310.50,¹² mandatory costs of \$800 and restitution of \$14,777.92, for a total Legal Financial Obligation (LFO) of \$16,888.42. CP 22–23. The Judgment and Sentence contained the following boilerplate language:

2.5 LEGAL FINANCIAL OBLIGATIONS/RESTITUTION.

The court has considered the total amount owing, the defendant’s present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. (RCW 10.01.160).

CP 20.

The court did not inquire into Priest’s financial resources or consider the burden payment of LFOs would impose on him. RP 854–60. The court authorized a Notice of Payroll Deduction and ordered LFO payments in an unspecified monthly amount of to begin immediately. CP 23.

This appeal followed. CP 3. The court signed and entered the Order of Indigency for this appeal. CP 1–2.

¹² \$20.50 Sheriff service, \$40 booking and \$250 court-appointed attorney fees. CP 27.

D. ARGUMENT

1. Priest's right to privacy was violated by the warrantless search of his cell phone contrary to article 1 section 7 of the Washington Constitution, and/or the Fourth Amendment to the United States Constitution.

The trial court erred in finding the warrantless search of Priest's cell phone was permissible under exceptions to the requirement of a search warrant. Priest's right to privacy was violated because he had a reasonable expectation of privacy in the contents of his cell phone. It was a constitutional violation to search through the contents of his phone without a warrant.

The Fourth Amendment prohibits "unreasonable searches and seizures", but allows reasonable warrantless searches and seizures. U.S. CONST. AMEND. IV; State v. Morse, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). The Fourth Amendment provides the minimum protection against warrantless searches and seizures. State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). The Washington Constitution generally provides broader protection under article 1 section 7, and any evaluation of privacy in Washington begins under this provision. Id. The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs or his home invaded, without authority of law." WASH. CONST.

ART. I, § 7. An unlawful search occurs when the State unreasonably intrudes in a person's private affairs. Carter, 151 Wn.2d at 125.

When presented with arguments under both the federal and state constitutions, the court should review the state constitutional arguments first. State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). It is well established that article 1 section 7 quantitatively differs from the Fourth Amendment and provides greater protection. Id. Accordingly, an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is unnecessary to establish that the court should undertake an independent state constitutional analysis. Surge, 160 Wn.2d at 70–71.

In determining whether there has been a search under the Washington State Constitution, the relevant inquiry is whether the State has unreasonably intruded into the person's private affairs. State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). The language of article 1 section 7 requires a two-part analysis. The first part requires a determination of whether a governmental action constituted “a disturbance into one's private affairs”. Surge, 160 Wn.2d at 71. If a valid privacy interest is disturbed, the second step asks whether the authority of law justifies the intrusion. Id. In general terms authority of law requires a warrant. Id. “A search must be conducted pursuant to a warrant, or else

meet one of the exceptions to the warrant requirement.” Carter, 151 Wn.2d at 125–26.

In reviewing a trial court’s findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. State v. Apodaca, 67 Wn. App. 736, 739, 839 P.2d 352 (1992) (citing State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a suppression motion are reviewed under the substantial evidence standard. State v. Schlieker, 115 Wn. App. 264, 269, 62 P.3d 520 (2003). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Id. Conclusions of law made by a trial court for a suppression hearing are reviewed de novo. State v. Cardenas, 146 Wn.2d 400, 407, 47 P.3d 127 (2002).

a. Priest had a privacy interest in the contents of his cell phone under the Washington State Constitution.

A reasonable expectation of privacy exists in the contents of an individual’s cell phone. State v. Roden, 179 Wn.2d 893, 906–07, 321 P.3d 1183 (2014); see also State v. Hinton, 179 Wn.2d 862, 877, 319 P.3d 9 (2014). This is because “[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal,

they hold for many Americans ‘the privacies of life....’” Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 2494–95, 189 L.Ed.2d 430 (2014).

The facts in Hinton demonstrate how the Washington Supreme Court views cell phone contents as a carefully guarded privacy concern. In particular, the Hinton court determined the defendant’s “private affairs were disturbed by the warrantless search of [another person’s] cell phone.” 178 Wn.2d at 877. Thus even though the defendant’s own cell phone was not the device from which illegal evidence was gathered, the Court still determined the defendant’s rights were violated. Id. Even more recently this court noted “private affairs include information obtained through a cell phone.” State v. Samalia, No. 31691-2-III, 2015 WL 968754, at *2 (Wash. Ct. App. Mar. 5, 2015).

Cell phones are like miniature computers and contain private, sensitive information, such as photographs, text messages, voicemails, banking information, work information, calendars, emails, health information, personal reminders and notes, and a myriad of other possible personal information. *See* Riley, 134 S. Ct. at 2491. “Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a

broad array of private information never found in a home in any form—
unless the phone is.” Id.

Herein, Priest had a privacy interest in the contents of his cell
phone which was constitutionally protected from a warrantless search and
seizure. As argued below, a warrantless exception does not apply.

**i. An abandonment exception to the warrant
requirement does not apply.**

The trial court concluded the cell phone was abandoned by Priest
and in doing so, he “relinquished any reasonable expectation of privacy” in
the contents of his cell phone. Concl. of Law Nos. 2–3, Suppl CP 5.

A privacy interest in property may be abandoned voluntarily or
involuntarily. State v. Evans, 159 Wn.2d 402, 408, 150 P.3d 105 (2007).
Involuntary abandonment applies only when property is abandoned due to
illegal police behavior. Id.¹³

By contrast, voluntary abandonment is a factual conclusion based
upon actions and intent. Evans, 159 Wn.2d at 408. Intent can be
“inferred from words spoken, acts done, and other objective facts, and all

¹³ Priest concedes the “involuntary abandonment” exception does not apply in this case.
See Conclusion of Law No. 6, Suppl CP 5. The State argued at the trial level that Priest
could not establish a privacy right unless there was involuntary abandonment of the cell
phone due to illegal law enforcement conduct. RP 66–67 . However, as noted herein,
case law holds that voluntary abandonment carries with it an expectation of privacy
depending upon a defendant’s actions and intent. State v. Evans, 159 Wn.2d at 408.

the relevant circumstances at the time of the alleged abandonment”
Id. (citing State v. Dugas, 109 Wn. App. 592, 595, 36 P.3d 577 (2001)).
“The issue is not abandonment in the strict property right sense but, rather,
whether the defendant in leaving the property has relinquished her
reasonable expectation of privacy. . . .” Evans, 159 Wn.2d at 408 (quoting
United States v. Hoey, 983 F.2d 890, 892–93 (9th Cir. 1986) (internal
quotations omitted)).

To overcome the voluntary abandonment exception to the warrant
requirement, Priest must show (1) he had a reasonable expectation of
privacy in the cell phone and (2) that he did not voluntarily abandon it.
Evans, 159 Wn.2d at 408–09. To prove his reasonable expectation of
privacy, Priest must show he had a subjective expectation of privacy and
that the expectation of privacy was objectively reasonable. Id. at 409.

Priest had a reasonable expectation of privacy. Herein, Priest had
a subjective expectation of privacy in the contents of his cell phone. Priest
was the registered user of the number on the cell phone and there was no
evidence any other persons used it, which demonstrates the contents of the
phone were not something he intended to share with law enforcement.
The fact his defense counsel filed a motion to suppress the evidence found

from the contents of his cell phone further demonstrates the intent to keep the phone private. Priest had a subjective expectation of privacy.

The recent decisions in Riley, Hinton, and Roden recognize society as a whole has an expectation of privacy in the contents of an individual's cell phone. Thus, Priest's expectation of privacy in the contents of his cell phone was objectively reasonable. *Accord*, Evans, 159 Wn.2d at 409 (holding the defendant had an objectively reasonable expectation of privacy in his briefcase because society recognized that general expectation under the Fourth Amendment) (citation omitted). Priest had a subjective and objective expectation of privacy.

Priest did not voluntarily abandon his cell phone. In general, "courts do not ordinarily find abandonment if the defendant had a privacy interest in the searched area." Evans, 159 Wn.2d at 409. On the other hand, "if the search is conducted in an area where the defendant does not have a privacy interest" then abandonment usually applies. Id. The court in Evans found the defendant did not voluntarily abandon his property despite the fact he denied ownership of a briefcase in the backseat of his car. Id. at 412–13. The court reasoned that though he denied ownership Evans did not show an intent to abandon the *contents* of his briefcase because he had "a privacy interest in the area searched, the item that was

seized—the briefcase—was locked, and he objected to its seizure.” Id. at 413.

Recently this Court held a defendant intended to abandon a vehicle and its contents—including his cell phone therein—because he fled from the stolen vehicle he was driving when law enforcement made contact with him. Samalia, No. 31691-2-III, 2015 WL 968754, at *2. The court reasoned the “status of the area where the searched item was located” was a critical factor in determining whether the phone had been abandoned. Id.

The dissent strongly disagreed with the majority’s conclusion in Samalia because of recent case law enumerating a broad privacy protection of cell phones’ contents. Id. at *5 (J. Siddoway dissent). The dissent noted that case law demonstrates the Washington State Constitution provides greater privacy protections to individuals than the Fourth Amendment, including information contained in cell phones. Id. at *5–8. In citing a series of cases, the dissent observed the protected expectation of privacy in one’s affairs is not dependent upon where the item illegally searched was found:

In my view, the . . . line of cases, together with Hinton, collectively compel the conclusion that the voluminous private information likely to be found on a cell phone remains protected by article I, section 7 of the Washington constitution *even when the phone is left behind in a place where the defendant has no privacy interest.*

Id. at *5–6, 8 (emphasis added) (citing State v. Gunwall, 106 Wn.2d at 65–66 (unreasonable intrusion into private affairs when police obtained records of a defendant’s calls without legal authority); State v. Boland, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990) (curbside garbage is protected from warrantless search because “the location of a search is indeterminative when inquiring into whether the State has unreasonably intruded into an individual’s private affairs”); State v. Jackson, 150 Wn.2d 251, 262, 76 P.3d 217 (2003) (warrant required to install GPS device on a vehicle for purposes of tracking it); State v. Jordan, 160 Wn.2d 121, 129, 156 P.3d 893 (2007) (information contained in a motel registry is a private affair under article 1, section 7)).

An individual does not relinquish a reasonable expectation of privacy in the contents of his cell phone despite the location of abandonment. In Dugas the court held a defendant did not voluntarily abandon his jacket or the contents of a closed container within his jacket pocket by placing the jacket on the hood of his car after arrest. An inventory search of the defendant’s jacket did not justify the warrantless intrusion, as “[o]pening a closed container found in the jacket was not a step necessary or reasonable to guard against a false property loss claim.” Dugas, 109 Wn. App. at 595–96, 599. Similarly, in Boland the Supreme

Court held that garbage in an individual's curbside garbage container is not "abandoned" and law enforcement need a warrant to search it: "While it may be true an expectation that children, scavengers, or snoops will not sift through one's garbage is unreasonable, average persons would find it reasonable to believe the garbage they place in their trash cans will be protected from warrantless governmental intrusion." Boland, 115 Wn.2d at 578.

In this case Priest did not voluntarily abandon the cell phone. There was no evidence that Priest intended his cell phone contents be subjected to the view of law enforcement. A search warrant was required.

In Samalia, the court held a warrant to search a cell phone is not always required, reasoning that exigent circumstances existed to justify the warrantless search of Samalia's cell phone in order to identify the fleeing driver. Id. at *3 (citing Riley, ___ U.S. ___ at ___, 134 S.Ct. 2473 at 2494, 189 L.Ed.2d 430 (noting the exigency exception to pursue a fleeing suspect might excuse a search warrant for a cell phone)). The Riley court noted qualifying exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury. 134 S. Ct. at 2494.

Here, Priest's phone was found on private property that had been burglarized in the recent months. But no exigent circumstances justified the total intrusion of privacy into his cell phone's contents without a warrant: the crime was over and completed. It took law enforcement over 10 months to take any action towards identifying the owner of the phone. Nothing prevented law enforcement from obtaining a warrant to search the contents of the phone in that lengthy amount of time. They chose not to do so.

Even assuming Det. Sloan could turn on the phone to identify its subscriber number, he was able to immediately locate the cell phone's number and thus had a means for identifying the phone's owner. However, the detective continued to search through the phone and viewed the cell phone's photographs. RP 570–72; CP 160–61; Suppl CP p. 3–4. This extra and unnecessary step of viewing the photographs on the cell phone was a second warrantless search. The detective did not have the authority of law to intrude on Priest's private affairs to search through the rest of the phone. Law enforcement invaded an area where a reasonable expectation of privacy existed. *See Boland*, 115 Wn.2d at 578; *Dugas*, 109 Wn. App. at 592.

The voluntary abandonment exception to a warrantless search does not apply.

ii. The plain view exception to the warrant requirement does not apply.

The trial court also concluded a search warrant was not required because the incriminating information found on Priest's cell phone was in plain view. Concl. of Law No. 10, Suppl CP 5.

A warrantless search may be justified under the "plain view" exception. State v. Hatchie, 161 Wn.2d 390, 395, 166 P.3d 698 (2007). A plain view search is permissible only if law enforcement officers "(1) have a valid justification to be in an otherwise protected area and (2) are immediately able to realize the evidence they see is associated with criminal activity." Id. For example, in State v. Cotton the seizure of a shotgun was not permissible under the plain view exception because "it was not immediately apparent to the FBI agents that the shotgun was evidence of any crime." 75 Wn. App. 669, 683, 879 P.2d 971 (1994).

Nor may an object be manipulated, moved, or tampered with in any way to determine whether it is evidence of a crime or the "immediately apparent" prong of the plain view test will fail. State v. King, 89 Wn. App. 612, 622 n.31, 949 P.3d 856 (1998) (citing State v. Murray, 84 Wn.2d 527, 527 P.2d 1303 (1974)). Law enforcement must connect items

to a crime based solely on what is exposed to their view; they cannot move the object even a few inches. Murray, 84 Wn.2d at 527 (police may not move a TV to view the serial number).

Here, Det. Sloan identified the subscriber number for the phone. The subscriber number is what led him to identify Priest as the phone's owner. CP 160–61; RP 573. There was no valid justification for him to continue a warrantless search through the phone's protected contents to attempt to identify the owner of the phone. Hatchie, 161 Wn.2d at 395; RP 572; CP 160–61.

Det. Sloan was also unable to immediately realize the photographs on the phone were associated with criminal activity. RP 571–72; CP 161. He first had to research. Det. Sloan spoke with the sheriff about possible stolen snowmobiles or ATVs matching the photographs on the cell phone. The sheriff could not give the detective a definitive answer but pointed him towards the investigation of a separate burglary. The detective had to search through case reports to determine whether the photographs on Priest's phone were related to that separate burglary. RP 571–72; CP 160–61. The plain view exception does not apply where the evidence of criminal activity was not immediately apparent when the detective viewed

the photographs on Priest's phone. Hatchie, 161 Wn.2d at 395; Cotton, 75 Wn. App. at 683.

In fact, the detective had to manipulate the cell phone to make it work properly before he could even view anything on the cell phone. CP 160. The sim card was in the phone backwards and the battery was not charged. Id. The detective put the sim card in the right way and charged the phone prior to turning it on. Id. Thus the detective had to take the extra steps of tampering with the cell phone in order to get it to work. Murray, 84 Wn.2d at 527. For all these reasons, the plain view exception does not apply.

iii. The community caretaking exception to the warrant requirement does not apply.

Finally, the trial court erred in finding law enforcement's warrantless search of Priest's cell phone was justified under the community caretaking function. Concl. of Law No. 9, Suppl CP 5.

Community caretaking is an exception to the warrant requirement. State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). The narrow exception permits law enforcement a limited invasion into an individual's privacy when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. Id. (citation omitted). An intrusion is justified under the community caretaking

exception only if “(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns, (2) a reasonable person in the same situation would similarly believe that there was need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place being searched.” Id. (citation omitted). The caretaking exception depends on the balancing of an individual’s freedom and privacy interests against the public’s interest in law enforcement’s community caretaking function. Id. at 802. The interests should weigh in favor of privacy. Schlieker, 115 Wn. App. at 271 (citation & quotations omitted).

Police must be motivated by “noncriminal noninvestigatory purposes.” Thompson, 151 Wn.2d at 802. Law enforcement’s actions must demonstrate more than a pretext for conducting an evidentiary search. Schlieker, 115 Wn. App. at 271. Rather, the community caretaking function must be motivated by a need to render assistance. Id. at 270 (holding search invalid when officers failed to inquire about the defendant’s safety and proceeded to search for drugs). “Consequently, the officer must be able to articulate specific facts and reasonable inferences drawn therefrom that justify the warrantless entry.” Justice Charles W. Johnson & Justice Debra L. Stephens, Survey of Washington Search and

Seizure Law: 2013 Update, 36 Seattle U. L. Rev. 1581, 1704 (2013)

(citing State v. Davis, 86 Wn. App. 414, 420, 937 P.2d 1110 (1997)).

The scope of a search must be limited to what is reasonable to conduct the community caretaking function and the necessity of the search must exist at the time it occurs. State v. Schroeder, 109 Wn. App. 30, 45, 32 P.3d 1022 (2001). For example, searching a coat pocket for identification of a suicide victim was beyond the scope of the community caretaking function because the deceased no longer needed emergency medical attention and the object of the search was not in plain view. Id.

In this case the record does not demonstrate law enforcement had a subjective or objective health or safety concern regarding the citizen who owned the cell phone found on Mr. Andre's property. There was no evidence of imminent threats to a person's health or safety.¹⁴ Det. Sloan was so unconcerned with any community caretaking function that he did not attempt to identify the cell phone's owner until over 10 months after he received the phone from the sheriff. Evidence shows the detective was processing cell phones in other criminal investigations when he decided to

¹⁴ Examples of valid intrusions under the community caretaking exception include situations where (1) persons are in imminent danger of death or harm, (2) objects are likely to burn or explode or otherwise cause harm, or (3) further information will disclose the location of a threatened victim or the existence of such threat. State v. Downey, 53 Wn. App. 543, 544-45, 768 P.2d 502 (1989).

pursue the contents of Priest's phone. RP 568, CP 160. The detective was not worried about returning the phone to a citizen. Det. Sloan was concerned with searching the cell phone for evidence of potential criminal activity. The "criminal investigatory" motivation and lack of legitimate health or safety concerns do not justify Det. Sloan's warrantless search of Priest's cell phone under the community caretaking exception. Thompson, 151 Wn.2d at 802.

As noted before, even if the initial search were justified, the scope of the search is untenable. The detective clearly indicated the first thing he did upon turning on the phone was to view the subscriber number on the phone. CP 160. This is all the information the detective needed to identify the owner and return the cell phone. There was no objective or subjective reason for the officer to continue looking through the cell phone's photographs because the scope of justification for the warrantless entry had ended. Schroeder, 109 Wn. App. at 45.

The community caretaking exception does not apply.

b. Priest's privacy rights were violated under the Fourth Amendment when his cell phone was illegally searched.

The search was also illegal under the Fourth Amendment. In United States v. Jones, ___ U.S. ___, 132 S.Ct. 945, 181 L.Ed. 911 (2012), the government attached a GPS tracking device to the defendant's vehicle

while it was parked in a public parking lot and tracked the vehicle's movements. Id. at 948. The majority held this was an illegal search under the Fourth Amendment under a trespass theory, thus expanding the "reasonable expectation of privacy" standard enunciated in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Jones, 132 S.Ct. at 949–51. In Riley v. California the Court noted that "a warrant is generally required before such a search, *even when* a cell phone is seized incident to arrest." 134 S. Ct. at 2493 (emphasis added). The court reasoned that digital data on a cell phone invokes a more substantial privacy interest than the physical items found in a person's pockets upon a search incident to arrest. Id. at 2488–91.

The Riley court held the search of a cell phone without a warrant is illegal under the Fourth Amendment unless "the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" Riley, 134 S. Ct. at 2493–94 (citing Kentucky v. King, 563 U.S. —, 131 S.Ct. 1849, 1856 (2011) (quoting Mincey v. Arizona, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978))). As discussed *supra*, Priest had a substantial privacy interest in the digital data on his phone under article 1, section 7 of the Washington Constitution and hence

under the Fourth Amendment. No exceptions to the warrant requirement apply in this case. The search of Priest's cell phone was illegal.

c. The fruits of the illegal search must be suppressed.

Evidence tainted by exploitation of the initial illegality must also be suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Here, the warrantless search of Priest's cell phone cannot be justified by an exception to the warrant requirement. The detective did not have a search warrant at the time he viewed incriminating photographs on Priest's phone—photographs which he then used as a basis to obtain a search warrant. RP 573; CP 161. Once he had an illegally obtained search warrant, the detective searched the phone and found several incriminating text messages, photographs, and a .wav file which implicated Priest in trafficking the stolen trailer and ATVs. All evidence obtained in this case as a result of the illegal cell phone search must be suppressed and the charges dismissed or remanded for retrial.

2. The prosecutor committed misconduct by impeaching Francis Edwards when she did not give substantive testimony on the factual issues and thus there was no testimony to impeach.

The prosecutor committed misconduct by continuing to impeach Edwards when her testimony was not a fact of consequence to the action

due to the fact she repeatedly testified she could not recall making a tape-recorded statement to a deputy.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). If the defendant fails to object “at the time the misconduct occurred, he must establish that no curative instruction would have obviated any prejudicial effect on the jury...” and that “prejudice resulted that had a substantial likelihood of affecting the jury verdict.” Id. at 455; see also State v. O’Donnell, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007).

ER 607 provides that “[t]he credibility of a witness may be attacked by any party, including the party calling the witness.” However, “[a]lthough the State may impeach its own witness, it may not call a witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible.” State v. Hancock, 109 Wn.2d 760, 763–64, 748 P.2d 611 (1988) (citing and quoting State v. Lavaris, 106 Wn.2d 340, 345, 721 P.2d 515 (1986) and

State v. Barber, 38 Wn. App. 758, 770–71, 689 P.2d 1099 (1984), *rev. denied*, 103 Wn.2d 1013 (1985)). To do so “would be tantamount to convicting a defendant on the basis of hearsay. . . .” United States v. Ince, 21 F.3d 576, 580 (4th Cir. 1994) (quotations and citations omitted). This is because in general, a jury cannot properly distinguish between impeachment and substantive evidence, thus a limiting instruction cannot cure the error. Id. at 580; Lavaris, 106 Wn.2d at 343–44.

The concern is that the State may abuse the rule by calling a witness it knows “will not provide useful evidence for the primary purpose of introducing hearsay evidence against the defendant” thereby exploiting “a jury's difficulty in making the subtle distinction between impeachment and substantive evidence.” Hancock, at 763 (citing United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984)). The Hancock court noted that “[t]he motivation in such instances is less to impeach the witness than to introduce hearsay as substantive evidence, contrary to ER 802.” Id.

Moreover, extrinsic evidence of a witness’s prior inconsistent statement is inadmissible unless the witness is given the opportunity to explain or deny the same and the opposing party is permitted to interrogate the witness on the matter. ER 613(b). “[A] person may be impeached if his or her credibility is a fact of consequence to the action, but not

otherwise.” State v. Allen S., 98 Wn. App. 452, 464, 989 P.2d 1222 (1999). “[A] person's credibility is *not* a fact of consequence when he or she fails to say anything pertinent to the case, regardless of whether he or she takes the witness stand.” Id. (emphasis in original). This includes a person who refuses to testify, or “claims not to remember anything pertinent to the case.” Id. In Allen, a witness consistently testified he did not recall making any statements to law enforcement that the defendant had sexually abused his children. Id. at 457–58. The court granted the defendant a new trial because the witness “said nothing from the witness stand that either party could have used for its truth to prove a fact of consequence to the action.” Id. at 469.

Generally, prior statements are admissible for impeachment purposes if they are inconsistent with a witness’s trial testimony. State v. Newbern, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). Yet using a witness’s prior statement for impeachment requires that the witness remember the prior event. Id. Specifically:

If the witness claims a total lack of memory and gives no substantive testimony on the factual issue at hand, a prior statement by the witness is inadmissible regardless of whether the lapse of memory is genuine because . . . there is simply no testimony to impeach.

Id. (citations omitted). If a witness “does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach.” Id. at 293 (citation omitted).

After Edwards testified as to her inability to recall making tape-recorded statements to law enforcement, the State should not have been allowed any continued questioning of Edwards regarding the content of those statements. RP 416–25.¹⁵ The State did so in a cross-examination style, throughout which Edwards again asserted she did not remember making statements to a deputy about Priest and his possession of ATVs. RP 425–35.

Because Edwards consistently testified she did not recall making statements to a deputy, there was no testimony of Edwards’ to impeach. RP 416–18, 425–35; *see* Newbern, 95 Wn. App. at 292–293; *see* also Allen S., 98 Wn. App. at 464–65. Since Edwards could not remember pertinent facts of the case her credibility was not a fact of consequence to the action. *See* Allen S., 98 Wn. App. at 464. The State continued to question Edwards for the primary purpose of impeaching her and putting

¹⁵ Once Edwards asserted she could not recall making the statements the State moved for admission of the tape-recorded statements. RP 419. Instead the trial court ruled the State could question Edwards as to each statement she had allegedly made to law enforcement. RP 423–25.

her otherwise hearsay¹⁶ declarations before the jury. RP 426–35. It was improper for the State to introduce impeachment evidence in this manner. Hancock, 109 Wn.2d at 763–64.

Edwards’ statements were highly prejudicial. The statements implicated Priest by showing he had possession of ATVs and intended to sell at least one of them to others. RP 426–35. Without Edwards’ statements the evidence was not overwhelming to prove Priest possessed or trafficked ATVs. There is a reasonable probability that, but for the State’s improper presentation of evidence, the result of the trial would have been different. A limiting instruction would not have cured the error as a jury could not have distinguished between impeachment and substantive evidence.

The errors were so serious as to deprive Priest of a fair trial and he should receive a new trial. Allen, S., 98 Wn. App. at 469 (granting a new trial after trial court erred in admitting witness’s statements).

3. The trial court abused its discretion by admitting the taped statements of Frances Edwards as substantive evidence pursuant to ER 803(a)(5).

After improperly impeaching Edwards, the State again introduced her previously recorded statements through the testimony of Deputy

¹⁶ As argued in detail in the next issue Priest asserts Edwards’ recorded statements were inadmissible hearsay.

Wright. RP 472–73. Defense counsel objected several times to the admission of her taped statements pursuant to ER 613 and Allen S., 98 Wn. App. at 464. RP 472–74, 502–03, 682. The trial court overruled the objections and admitted the recorded statements pursuant to ER 803(a)(5) (recorded recollection) and State v. Alvarado, 89 Wn. App. 543, 949 P.2d 831 (1998). RP 482–84, 503–06. The trial court abused its discretion by finding the foundational requirements of ER 803(a)(5) were met. In the alternative, although the trial court applied the correct legal standard, it adopted an untenable position by allowing impeachment evidence in as substantive evidence under ER 803(a)(5) when the witness did not acknowledge her prior statement. RP 482–83.

Out-of-court statements of witnesses to prove the truth of the matter asserted are generally inadmissible at trial. ER 801(c). The Rules of Evidence contain specific exceptions to this general presumption of inadmissibility. ER 803; ER 804. The interpretation of an evidentiary rule is reviewed *de novo* on appeal. State v. DeVincentis, 150 Wn.2d 11, 16, 74 P.3d 119 (2003). A trial court abuses its discretion in admitting evidence when it uses the wrong legal standard, rests its decision upon facts unsupported by the record, or reaches an unreasonable conclusion. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). “A decision is

manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take . . . and arrives at a decision outside the range of acceptable choices.” Id. (citations and quotations omitted).

Although hearsay, ER 803(a)(5) permits admission of a statement of “recorded recollection”:

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

ER 803(a)(5).

A recorded recollection may only be admitted as an exception to the hearsay rule under the following circumstances: “(1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately.” Alvarado, 89

Wn. App. at 548, 949 P.2d 831 (1998) (citing State v. Mathes, 47 Wn. App. 863, 867–68, 737 P.2d 700 (1987); ER 803(a)(5)).

Here, the foundational requirements of ER 803(a)(5) were not met. Under the first element of the rule, concerning the witness's previous knowledge about the matter, the declarant must have had firsthand knowledge of the facts when the statement was made. Accord, ER 602. The evidence presented at trial did not establish Ms. Edwards' firsthand knowledge of events through her testimony. The second element, concerning insufficient recollection, appears satisfied. The third requirement, that the record was made while the matter was fresh in the witness's memory, is not met. While the rule establishes no fixed time limit, one year elapsed between the alleged activities and the making of Ms. Edwards' statement. At trial she testified to a host of past and ongoing drug and mental problems. She testified she has a habit of making up stories at times and that her memory or recollections made in the statement should not be trusted. RP 445. Under these facts there is no assurance that events were fresh (or even accurately stored) in Ms. Edwards' memory a year after they allegedly took place.

The foundational requirement as to the fourth prong, that the record accurately reflect the witness's prior knowledge, has recently been

expanded in scope to include circumstantial evidence of a prior statement's accuracy. In Alvarado, a murder witness, Lopez, made three tape recorded statements to law enforcement about the crime. Alvarado, 89 Wn. App. at 546. Lopez denied any knowledge of the crime during the first recording, but identified the defendants as the assailants in the second and third recordings. Id. In later pretrial hearings, Lopez claimed he could not remember making some of the statements, denied making others, and also did not "really remember" being at the scene of the crime. Id. At trial Lopez testified he could not remember the murder, and although he knew he had made taped statements he could not "verify that his statements had been accurate." Id. at 545. The trial court then admitted the statements pursuant to ER 803(a)(5) as recorded recollections. Id. at 547.

Because Lopez's testimony about his prior statements was unclear, Division I held the fourth foundational requirement of ER 803(a)(5) (whether the record accurately reflects the witness' prior knowledge) could be satisfied by a totality of the circumstances test. Id. 551–52. To satisfy this prong, Division I determined a trial court should consider:

- (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

Alvarado, 89 Wn. App. at 552. Pursuant to these factors, Division I held Lopez's taped statements were admissible because Lopez never recanted or disavowed accuracy of the statements, asserted accuracy at the time he made them, there was no indication the recording process was inaccurate, and two of the three statements contained consistent details of the crime and were corroborated by physical evidence and testimony of other witnesses. Id. at 552.

After Alvarado, Division I further relaxed its foundational requirements to allow admission of a recorded statement despite the fact a witness could not remember making it. State v. Derouin, 116 Wn. App. 38, 46, 64 P.3d 35 (2003). The court reasoned admission was proper because the witness signed the statement under penalty of perjury, the recording process was not ideal but sufficient, and indicia of reliability existed since other testimony corroborated the recorded statement. Id. at 46–47. Similarly, this Court affirmed the trial court's admission of recorded recollections simply where the statements were acknowledged by the witnesses and the witnesses vouched for their accuracy during recording. State v. Nava, 177 Wn. App. 272, 296, 311 P.3d 83 (2013) rev. denied, 179 Wn.2d 1019, 318 P.3d 279 (2014).

Here, the trial court relied upon the Alvarado factors to admit the taped statements of Frances Edwards. RP 482–86, 503–06. The court noted Edwards (1) could not recall making the statements and could not verify their accuracy (RP 504) and (2) had acknowledged in the recording that the deputy had permission to tape her statement (RP 504). Also, the court (3) appears to have found the tape recording process reliable (RP 505), and (4) determined the taped statements contained facts consistent with other evidence already admitted at trial—for example, that the ATVs had been moved, that money exchanged hands for the ATVs, and that the ATVs had been covered by tarps. RP 503–05.

The facts do not support the trial court’s conclusion that the Alvarado factors were properly satisfied. Unlike in Alvarado, Edwards (1) could not remember making the taped statements, (2) did not assert accuracy at the time the statements were made (RP 486–501), and (4) Edwards testified extensively as to her inability to tell the truth, her long history of prior crimes of dishonesty, that she had severe anxiety, PTSD, and that her memory was impaired due to heavy drug use. RP 435–39, 441–42, 486–501. Regarding the third Alvarado factor, there is no evidence to indicate the recording process was reliable.

Alvarado, Derouin, and Nava are fundamentally distinguishable from the present case. In each one of these cases the witnesses identified their prior statements in some manner. In Alvarado, Lopez testified he remembered making the recorded statements. Id. at 547. In Derouin the witness acknowledged her signature on a statement despite her inability to recall making it. 116 Wn. App. at 37. In Nava the witnesses admitted to making the recorded statements. 177 Wn. App. at 296. In the present case Edwards never acknowledged or identified a taped statement. RP 417–18, 425–35, 436.

The facts do not support the trial court’s conclusion that the Alvarado factors were met as to the fourth prong of the foundational requirements of ER 803(a)(5). The requisite reliability inherent in the admissibility of past recollection recorded is further undermined when the foundational requirements of firsthand knowledge and a statement made while the matter was fresh in the witness’s memory are unsupported in the record. As the proponent of the evidence at issue, the State had the burden of proving its admissibility. State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289 (1993). The State failed to meet its burden in this case. The court abused its discretion by admitting the taped statement.

Not harmless error. The tape-recorded statements contain much of the same information as the State elicited when it improperly impeached Edwards during direct examination. The admission of the taped statements was not harmless error.

Untenable Reasoning. In the alternative, the trial court abused its discretion in applying the correct legal standard but for untenable reasons. ER 803(a)(5) should not be used as a method to circumvent ER 613.

Other jurisdictions have determined recollections recorded are inadmissible when a witness does not affirm their accuracy.¹⁷ In Florida, a witness must acknowledge recorded statements' accuracy for admission under the recorded recollection rule. Montano v. State, 846 So.2d 677, 682 (Fla. Ct. App. 2003), approved sub nom. Polite v. State, 116 So.3d 270, 271 (Fla. 2013).¹⁸ The court noted that “[u]nlike exceptions to the rule against hearsay which derive their reliability from the circumstances that surround the making of an out-of-court statement, the reliability of a recorded recollection *depends on the credibility of its maker.*” Id.

¹⁷ “In most jurisdictions, the foundation testimony must come from the same declarant who gave the out-of-court statement. In other words, the hearsay exception applies only if the out-of-court declarant is present in court and testifies to the probable accuracy of the statement in question.” 5C Wash. Prac., Evidence Law and Practice § 803.29 (5th ed.).

¹⁸ “Generally . . . if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded.” Bartholomew v. Florida, 101 So.3d 888, 893 (Fla. Dist. Ct. App. 2012).

(emphasis added). An Alabama court refused to admit a recorded statement for lack of foundation because the witness claimed he was drunk and could not recall the statement he signed. State v. Lundley, 728 So.2d 1153, 1155 (Ala. 1998). In Maryland, courts adhere to the rule that even if the witness's lack of memory is suspicious, when the witness does not recall making the statement it cannot be admitted as a recorded recollection. Ringold v. State, 367 A.2d 35, 39 (Md. Ct. Spec. App. 1976); see also Cain v. State, 492 A.2d 652, 655 (Md. Ct. App. 1985).

In United States v. Mornan, a federal court found insufficient indicia of reliability when a witness made a statement to police but later suffered a car accident and, in part due to the injury, claimed she could not recall the earlier statement and whether it was accurate. 413 F.3d 372, 375 and 378 (3rd Cir. 2005). The Mornan court found that the rule of evidence “expressly requires” the witness to have adopted the statement as true at some point, either during its making or thereafter, and without such an affirmation it is inadmissible as a recollection recorded. Id. at 378.¹⁹

Alvarado's relaxation of the foundation requirements for ER 803(a)(5) extends recorded recollection beyond what the rule intended. At the very least a witness should acknowledge making a recording prior to

¹⁹ Fed. R. Evid. 803(5) is nearly identical to the Washington rule, ER 803(a)(5).

its admission into evidence. Mornan, 413 F.3d at 378. Otherwise, the lack of foundation calls into question the reliability of the recording and undermines the firmly rooted hearsay exception. Hearsay exceptions are based on evidence that is generally deemed reliable, and the purpose of allowing an exception to the hearsay rule is due to the fact that as a firmly rooted exception the statement establishes its own reliability.²⁰ Alvarado removes that reliability by comparing it to other indicia of reliability outside of the statement itself.²¹ The United States Supreme Court has squarely rejected the notion that hearsay can be deemed reliable due to corroborating evidence—rather, hearsay evidence must be reliable due to its own “inherent trustworthiness.” Lilly v. Virginia, 527 U.S. 116, 137–38, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) (quotations omitted) (citing Idaho v. Wright, 497 U.S. 805, 822, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)).

²⁰ “Hearsay, the [United States Supreme] Court has said more than once, is ‘presumptively unreliable’ for constitutional purposes, so what is required by the confrontation clause is ‘an affirmative reason,’ in the ‘circumstances in which the statement was made’ that rebuts this presumption.” Mueller & Kirkpatrick, 4 Federal Evidence § 8:30 (4th ed.).

²¹ See Idaho v. Wright, which held hearsay evidence “must possess indicia of reliability by virtue of its inherent trustworthiness” and not from other corroborating evidence at trial. 497 U.S. 805, 822, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), overruled on other grounds recognized by Desai v. Booker, 732 F.3d 628, 631-32 (6th Cir. 2013) cert. denied, 134 S. Ct. 2708, 189 L. Ed. 2d 742 (2014) (noting Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) progeny has essentially restructured the definition of admissible hearsay and does not support a “freestanding” due process claim).

Here, the taped statement was demonstrably unreliable. Edwards consistently testified she did not recall making recorded statements to a deputy. RP 416–18, 425–35. She never claimed the statements were accurate while making them. Edwards also admitted to a lengthy host of reasons why her memory was faulty. The expansion of ER 803(a)(5)’s foundational requirements should not become a basis for a party to admit into evidence statements that cannot be verified as accurate.²²

Alvarado carved out an exception to the firmly rooted hearsay rules by relaxing the foundational standards for admitting recorded recollections. However, such an exception can allow impeachment evidence to impermissibly come into trial as substantive evidence when a witness cannot recall or identify a prior statement. Allowing such evidence to come in at Priest’s trial under the guise of ER 803(a)(5) was untenable and the trial court abused its discretion. The error was not harmless.

²² “[T]he drafting history of the Evidence Rules suggests the rules were intended to discourage, if not prohibit, the courts from creating new hearsay exceptions by case law.” 5B Wash. Prac., Evidence Law and Practice § 802.3 (5th ed.).

4. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory \$100 DNA collection fee.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V, XIV; Wash. Const. art. I, § 3. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Id. at 218–19. It requires that “deprivations of life, liberty, or property be substantively reasonable;” in other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the State must show its

regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test “is not a toothless one.” Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, “the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Here, the statute mandates all felony offenders pay the DNA-collection fee. RCW 43.43.7541²³. This ostensibly serves the State’s

²³ RCW 43.43.7541 provides:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability or likely future ability to pay. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." State v. Blazina, ___ Wn.2d ___, 344 P.3d 680, 684 (March 12, 2015). When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the \$100 DNA collection fee is of such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is “payable by the offender after payment of all other legal financial obligations included in the sentence.” RCW 43.43.7541. Thus the fee is paid only after restitution, the victim’s compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by an indigent defendant.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See, Blazina, 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State’s interest in funding the collection, testing, and retention of an individual defendant’s DNA. Thus RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Priest’s indigent status, the order to pay the \$100 DNA collection fee should be vacated.

5. RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA-collection fee multiple times, while others need pay only once.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. amend. XIV; Wash. Const., art. I, § 12; Bush v. Gore, 531 U.S. 98, 104–05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000); State v. Thorne, 129 Wn.2d 736, 770–71, 921 P.2d 514 (1994). A valid law administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection. State v. Gaines, 121 Wn. App. 687, 704, 90 P.3d 1095 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. Gaines, 121 Wn. App. at 704. In this case, the relevant group is all defendants subject to the mandatory DNA-collection fee under RCW 43.43.7541. Having been convicted of a felony, Mr. Priest is similarly situated to other affected persons within this affected group. See, RCW 43.43.754, .7541.

On review, where neither a suspect/semi-suspect class nor a fundamental right is at issue, a rational basis analysis is used to evaluate the validity of the differential treatment. State v. Bryan, 145 Wn. App.

353, 358, 185 P.3d 1230 (2008). That standard applies here.

Under rational basis scrutiny, a legislative enactment that, in effect, creates different classes will survive an equal protection challenge only if: (1) there are reasonable grounds to distinguish between different classes of affected individuals; and (2) the classification has a rational relationship to the proper purpose of the legislation. DeYoung, 136 Wn.2d at 144. Where a statute fails to meet these standards, it must be struck down as unconstitutional. Id.

The Legislature has declared that collection of DNA samples and their retention in a DNA database are important tools in “assist[ing] federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons.” Laws of 2008 c 97, Preamble. The DNA profile from a convicted offender’s biological sample is entered into the Washington State Patrol’s DNA identification system (database) and retained until expunged or no longer qualified to be retained. WAC 446-75-010; WAC 446-75-060. Every sentence imposed for a felony crime must include a mandatory fee of \$100. RCW 43.43.754, .7541.

The purpose of RCW 43.43.754 is to fund the collection, analysis, and retention of an individual felony offender's identifying DNA profile for inclusion in a database of DNA records. Once a defendant's DNA is collected, tested, and entered into the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. The statute itself recognizes this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). There is no further biological sample to collect with respect to defendants who have already had their DNA profiles entered into the database.

Here, RCW 43.43.7541 does not apply equally to all felony defendants because those who are sentenced more than once have to pay the fee multiple times. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law, which is to fund the collection, analysis, and retention of an individual felony offender's identifying DNA profile.

RCW 43.43.7541 discriminates against felony defendants who have previously been sentenced by requiring them to pay multiple DNA-collection fees, while other felony defendants need only pay one DNA-collection fee. The mandatory requirement that the fee be collected from such defendants upon each sentencing is not rationally related to the

purpose of the statute. As such, RCW 43.43.7541 violates equal protection. The DNA-collection fee order must be vacated.

6. Since the directive to pay LFOs was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.

a. This court should exercise its discretion and accept review.

Mr. Priest did not object below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. Blazina, ___ Wn.2d ___, 344 P.3d at 683. In Blazina the Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand ... reach[ing] the merits” Blazina, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the State’s interest in accomplishing rehabilitation and reducing recidivism. Blazina, 344 P.3d at 684. Availability of a statutory remission process down the road does

little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the Blazina Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” Blazina, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. Blazina, 344 P.3d at 685.²⁴ This requirement applies to the sentencing court in Mr.

²⁴ Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev’d in part sub nom. Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405, 164 Wn.2d 199, 189 P.3d 139 (2008)(The principle of stare decisis—“to stand by the thing decided”—binds the appellate court as well as the trial court to follow Supreme Court decisions).

Priest's case regardless of his failure to object.²⁵ The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. Blazina, 344 P.3d at 685. Post-Blazina, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Priest respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. Blazina, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument.*

There is insufficient evidence to support the trial court's finding that Mr. Priest has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915–16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a

²⁵ See, Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”) (citations omitted).

scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment. Fuller v. Oregon, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. Blazina, 344 P.3d at 685. "This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a

defendant's ability to pay.” Id. The remedy for a trial court’s failure to make this inquiry is remand for a new sentencing hearing. Id.

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. Id. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. Id. (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. Id. (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. Id. Although the ways to establish indigent status remain non-exhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. Id.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” Curry, 118 Wn.2d at 916. However, Curry recognized that both RCW

10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915–16. The individualized inquiry must be made on the record. Blazina, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement the the trial court has “considered” Mr. Priest’s present or future ability to pay legal financial obligations. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ”

Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Priest's financial resources and the potential burden of imposing LFOs on him. LFOs were imposed in at least some of his thirteen (13) prior adult felony convictions. CP 19; Appendix A,²⁶ B,²⁷ C,²⁸ and D²⁹. Mr. Priest was ordered to pay \$15,000 in restitution in connection with his 2004 conviction (Appendix B) and \$15,777.92 in restitution in connection with the present conviction. CP 23. His other theft and burglary convictions may reasonably have also generated restitution obligations. CP 19. The court sentenced Mr. Priest to 84 months of confinement. CP 21. Yet the court did not inquire into Mr. Priest's financial resources or consider the burden payment of LFOs would impose on him in light of debt, incarceration or other relevant factors identified in Blazina. RP 854–60. Despite finding him indigent for trial

²⁶ Sentencing screen from SCOMIS, regarding Okanogan County Superior Court No. 03-1-00157-9.

²⁷ Sentencing screen from SCOMIS, regarding Okanogan County Superior Court No. 04-1-00100-3.

²⁸ Sentencing screen from SCOMIS, regarding Okanogan County Superior Court No. 04-1-00360-0.

²⁹ Sentencing screen from SCOMIS, regarding Okanogan County Superior Court No. 13-1-00282-3.

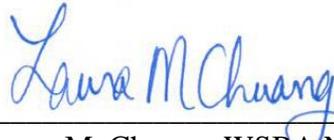
and this appeal, the sentencing court without inquiry ordered LFO payments in an unspecified amount to begin immediately. SCOMIS #3 (filed 2/25/13); CP 23.

Since the boilerplate finding that Mr. Priest has the present or future ability to pay LFOs is simply not supported by the record, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Priest 's current and future ability to pay before imposing LFOs. Blazina, 344 P.3d at 685.

E. CONCLUSION

For the reasons stated, the trial court's denial of the suppression motion must be reversed and the convictions dismissed and/or remanded for a new trial. Alternatively this Court should vacate the order assessing the \$100 DNA collection fee and remand for the trial court to make an individualized inquiry into Mr. Priest's current and future ability to pay before imposing LFOs.

Respectfully submitted April 27, 2015,



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PROOF OF SERVICE

I, Susan M. Gasch, do hereby certify under penalty of perjury that on April 27, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief (amended):

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JSM059 DISPLAY SENTENCE OKANOGAN SUPERIOR 04-21-15 14:02 1 OF 2
CASE#: 03-1-00157-9 DEF01 PRIEST, DAVID RANDALL
NOTE1: ** AFF PREJ / JUDGE BURCHARD **
JUDGMENT#: NO

----- SENTENCE INFORMATION -----

SENTENCE DATE: 09 03 2003 SENTENCED BY: COMM EDWARDS

SENTENCING DEFERRED:	APPEALED TO:	DATE:
PRISON SERVE : X	FINE	:\$ \$600
PRISON SUSPENDED :	RESTITUTION	:\$
JAIL SERVE :	COURT COSTS	:\$ 130.50
JAIL SUSPENDED :	ATTORNEY FEES	:\$ 250
PROB/COMM. SUPERVISION :	DATE DUE	: PAID:

----- SENTENCE DESCRIPTION -----

PRISON: 22 MONTHS, COUNT I; 12 MONTHS COUNT II; 3 MONTHS COUNT III. TOTAL CONFINEMENT 22 MONTHS.

FINES: \$500 CRIME VICTIM; \$100 DNA

01-30-2012 ORDER WAIVING INTEREST ON LFO \$479.82

? F1=Help ENTER=Process F7=Bwd F8=Fwd PA1=Cancel

APPENDIX "A"

JSM059 DISPLAY SENTENCE OKANOGAN SUPERIOR 04-21-15 14:03 1 OF 2
CASE#: 04-1-00100-3 DEF01 PRIEST, DAVID RANDALL
NOTE1: ** AFF PREJ / JUDGE BURCHARD **
JUDGMENT#: 04-9-00420-6

----- SENTENCE INFORMATION -----

SENTENCE DATE: 08 12 2004 SENTENCED BY: JUDGE BURCHARD
SENTENCING DEFERRED: APPEALED TO: DATE:
PRISON SERVE : FINE :\$ 500 CV
PRISON SUSPENDED : RESTITUTION :\$ 15,000
JAIL SERVE : COURT COSTS :\$ 130.50
JAIL SUSPENDED : X ATTORNEY FEES:\$ 250
PROB/COMM. SUPERVISION : DATE DUE : PAID:

----- SENTENCE DESCRIPTION -----

JAIL: 365 DAYS EACH COUNT II,III & VI. 90 DAYS COUNT IV. CREDIT FOR 109 DAYS
SERVED EACH COUNT II,III & VI. CREDIT TIME SERVED COUNT IV 90 DAYS. 256 DAYS
EACH COUNT II,III * VI SUSPENDED FOR 2 YRS. 0 DAYS COUNT IV SUSPENDED FOR 1 YR.
UNSUPERVISED PROBATION
PAYMENTS: \$100 BEGINNING 10/04/04 AND THE 4TH OF EA MONTH
JUNE 14, 2005 OR MODIFYG SENTENCE 1) DEF SRV 75 DAYS IN OKCO JAIL/CREDIT FOR TI
ME SRVDAS OF THE ABV HRG DATE 75 DAYS TO RUN CONCURRENT W/SENTCG IN CASE 4-1-00
360-0 2) DEF SHALL PAY \$100.00 AS HIS PAYMNT TOWRDS LFO AS STATED IN ORGNL ORDE
FOR SUSPENDED SENTENCE

? F1=Help ENTER=Process F7=Bwd F8=Fwd PA1=Cancel

APPENDIX "B"

JSM059 DISPLAY SENTENCE OKANOGAN SUPERIOR 04-21-15 14:04 1 OF 2

CASE#: 04-1-00360-0 DEF01 PRIEST, DAVID RANDALL

NOTE1: ** AFF PREJ / JUDGE BURCHARD

JUDGMENT#: 05-9-00332-1 OSOS: 09/21/2007 Felony Conviction Notification

----- SENTENCE INFORMATION -----

SENTENCE DATE: 06 14 2005 SENTENCED BY: JUDGE JOHN BRIDGES

SENTENCING DEFERRED: APPEALED TO: DATE:

PRISON SERVE : X FINE :\$ 500.00

PRISON SUSPENDED : RESTITUTION :\$ TBD

JAIL SERVE : COURT COSTS :\$ 230.50

JAIL SUSPENDED : ATTORNEY FEES:\$ 250.00

PROB/COMM. SUPERVISION : DATE DUE : PAID:

----- SENTENCE DESCRIPTION -----

SENTENCED TO 57 MONTHS ON COUNT 3 AND 29 MONTHS ON COUNT 2 TO RUN CONCURRENT
WILL RUN CONCURRENTLY WITH CASE 03-1-157-9 AND WILL PAYMENTS TO BE SET BY DOC
08/31/2005 ORDER TO CORRECT JUDGMENT & SENTENCE SECTION 2.3: CT 3-OFFENDER
SCORE 10.5, SERIOUSNESS LEVEL IS II, STANDARD RANGE 43-57 MOS/ CT 4: OFFENDER
SCORE IS 10.5, SERIOUSNESS LEVEL IS I, STANDARD RANGE IS 22-29 MOS

***** 09-13-2007 RESENTENCING*****

CT 3: PRISON-57 MOS, CT 4: PRISON-29 MOS, TOTAL CONFINEMENT 57 MOS, CONSECUTIVE
W/ CASE #03-1-00157-9

CT 1 & 2: NOT GUILTY

FEES: \$500.00 PCV, \$110.00 FRC, \$20.50 SFR, \$250.00 PUB, \$100.00 CLF

? F1=Help ENTER=Process F7=Bwd F8=Fwd PA1=Cancel

JSM059 DISPLAY SENTENCE OKANOGAN SUPERIOR 04-27-15 12:30 1 OF 2
CASE#: 13-1-00282-3 DEF01 PRIEST, DAVID RANDALL
NOTE1: DOB: 11-15-1968
JUDGMENT#: 14-9-00048-8

----- SENTENCE INFORMATION -----
 SENTENCE DATE: 01 13 2014 SENTENCED BY: JUDGE CHRIS CULP
 SENTENCING DEFERRED: APPEALED TO: DATE:
 PRISON SERVE : X FINE :\$ 500.00PCV
 PRISON SUSPENDED : RESTITUTION :\$ [REDACTED]
 JAIL SERVE : COURT COSTS :\$ 220.50
 JAIL SUSPENDED : ATTORNEY FEES:\$ 250.00
 PROB/COMM. SUPERVISION : DATE DUE : PAID:

----- SENTENCE DESCRIPTION -----
 CT 1: PRIS-50 MOS, CT 2: PRIS-364 DS
 FEES: \$100.00 DNA, \$40.00 BOOKING
 PAYMENT: \$50.00 PER MO, BEGIN 60 DS FROM RELEASE, NO INTEREST WHILE INCARCTD

? F1=Help ENTER=Process F7=Bwd F8=Fwd PA1=Cancel

GASCH LAW OFFICE

April 27, 2015 - 5:50 PM

Transmittal Letter

Document Uploaded: 325491-brief of appellant AMENDED Appendices A, B, C and D 4-27-15
Priest, David 32549-1.pdf

Case Name: State v. David Randall Priest

Court of Appeals Case Number: 32549-1

Party Represented: appellant

Is This a Personal Restraint Petition? Yes No

Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Response/Reply to Motion: ____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic 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
- Other: Appendices A, B, C and D to brief of appellant - amended

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to ksloan@co.okanogan.wa.us, sfieldlarson@co.okanogan.wa.us, and laurachuang@gmail.com.

Sender Name: Susan M Gasch - Email: gaschlaw@msn.com