

No. 33136-9-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

FILED
Jun 19, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

CALEB LOUTZENHISER

Appellant.

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

The Honorable Judge Michael Price

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Witnesses testified that Caleb Loutzenhiser drove a stolen vehicle into an officer's vehicle when the officer tried to block his path of travel, and then Mr. Loutzenhiser drove into a fence before abandoning the vehicle and running off. The officer indicated that he feared he would be injured when Mr. Loutzenhiser rammed the stolen vehicle into the police vehicle while the officer stood only inches away. Mr. Loutzenhiser was convicted of (1) second-degree assault of a law enforcement officer, (2) possession of a stolen vehicle, (3) first-degree malicious mischief for damage done to the stolen vehicle, (4) second-degree malicious mischief for damage done to a police vehicle, (5) hit and run of an attended vehicle or other property, and (6) hit and run of an unattended vehicle.

Mr. Loutzenhiser should be retried, because the court erred by providing a misleading instruction in response to the jury's inquiries regarding intent and the definition of assault, which also constituted an impermissible comment by the court. Mr. Loutzenhiser should also be retried, because he was prejudiced when defense counsel failed to object to officer testimony, which implied that the defendant was among Spokane's worst, most prolific criminals. Additionally, count six should be reversed and dismissed, because there is no evidence that Mr. Loutzenhiser drove into an unattended vehicle.

Next, there are several issues that should be reviewed at a resentencing hearing. First, the State failed to offer evidence supporting the amount of restitution ordered in this case. Also, the court entered the restitution schedule without conducting its requisite inquiry, and it improperly entered a boilerplate finding on Mr. Loutzenhiser's ability to pay legal financial obligations without inquiring on the same. And, the court imposed a community custody condition that was not crime related.

Finally, there are two scrivener's errors that should be corrected, including when the clerk of the court mistakenly listed Mr. Loutzenhiser's time of confinement for count six as 90 months instead of 90 days, and when the court neglected to indicate on Mr. Loutzenhiser's misdemeanor judgment and sentence that his confinement was to be served concurrent rather than consecutive to his felony counts.

B. ASSIGNMENTS OF ERROR

1. The court erred in its response to the jury's question at CP 168. The court's response was misleading and constituted an improper comment.
2. Defense counsel was ineffective for failing to object when, and the court erred by permitting, an officer to imply that the defendant was among the "worst, most prolific Spokane criminals."
3. The court erred by convicting Mr. Loutzenhiser of count six absent sufficient evidence that he drove into an "unattended" vehicle.
4. The court erred by entering the restitution order absent sufficient supporting evidence.

5. The court erred by setting the restitution schedule without considering the proper statutory inquiry and by entering an unsupported boilerplate finding on the defendant's ability to pay legal financial obligations.
6. The court erred by imposing the community custody condition prohibiting Mr. Loutzenhiser from using or possessing marijuana or products containing THC as it was not crime-related.
7. The court erred by failing to specify in Mr. Loutzenhiser's judgment and sentence that his misdemeanor counts were to run concurrent with his felony counts.
8. The clerk of the court erred by documenting that Mr. Loutzenhiser was ordered to serve 90 months rather than the ordered 90 days on one of the misdemeanor counts.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court's response to the jury questions on the definitions of assault and intent, given over defense objection, was misleading and constituted an improper comment by the court so that reversal is required.

Issue 2: Whether retrial is warranted due to an officer's irrelevant and unduly prejudicial, opinion testimony, which inferred the defendant's guilt by implying he was one of the "worst, most prolific Spokane criminals."

Issue 3: Whether count six – failure to remain at the scene of an accident involving an "unattended vehicle" – must be reversed and dismissed for insufficient evidence.

Issue 4: Whether the restitution order should be vacated because the State failed to present substantial evidence of the amount of loss.

Issue 5: Whether the court erred by entering an unsupported, boilerplate finding on Mr. Loutzenhiser's ability to pay Legal Financial Obligations (LFOs) and by setting a minimum monthly payment of \$25 per month toward LFOs, including restitution of \$16,480.91, without considering the total amount of restitution owed, Mr. Loutzenhiser's present, past and future ability to pay, and any assets he may have.

Issue 6: Whether the community custody condition that the defendant not use or possess Marijuana and or products containing THC must be stricken as it is not authorized under the Sentencing Reform Act (SRA).

Issue 7: Whether this court should remand for correction of a scrivener's error in the court administrator's certificate, which erroneously lists Mr. Loutzenhiser's sentence for count six as 90 months rather than 90 days, and to correct the scrivener's error in the judgment and sentence that neglected to specify that Mr. Loutzenhiser's misdemeanor counts shall be served concurrent to his felony counts.

D. STATEMENT OF THE CASE

On February 4, 2014, officers saw a Mazda3 vehicle, which had been reported stolen, travelling on streets in Spokane. (1RP¹ 26-27, 55, 73) Officers in unmarked vehicles began following the Mazda3 in a tactical, inconspicuous manner while waiting for backup to arrive and help stop the car. (1RP 27-28, 55)

While following the Mazda3, Officer Dustin Howe met the vehicle at an intersection and, when the driver waved him forward, Officer Howe pulled his vehicle in front of the Mazda3 within three inches and stopped. (1RP 31) Officer Howe exited his vehicle and approached the driver of the Mazda3, repeatedly yelling "Police! Get out of the car!" (1RP 31-32, 34, 39) Officer Howe was wearing an approved tactical vest that read "police" and a police badge. (1RP 31, 34, 49-50, 61)

¹ "1RP" refers to the transcript of the trial on October 21, 2014.

"2RP" refers to the transcript of the jury's questions and verdict on October 22nd.

"3RP" refers to the transcript for the sentencing hearing on January 20, 2015.

The driver of the Mazda3, later identified as the defendant Caleb Loutzenhiser (1RP 37, 68), met Officer Howe's eyes so that the officer believed the driver knew he was the police and had decided to flee. (1RP 31, 32, 34, 39, 49-50, 57) The driver then accelerated forward and repeatedly rammed into the officer's vehicle. (*Id.*) Officer Howe was within six to eight inches of the Mazda3 and said he was afraid he would be clipped, pinched or pinned between the vehicles had he not moved out of the way a split second in time. (1RP 32, 34, 40, 50)

After pushing the officer's car out of the way with the Mazda3, the driver then sped away, and Officer Howe got back in his vehicle in pursuit. (1RP 32, 33) The Mazda3 then slid on the compact snow and ice into a rock pile and fence before continuing on. (1RP 27-28, 33) Meanwhile, Officer Howe's vehicle slid into the same rock pile and became stuck and undriveable. (1RP 33, 35) Officer Howe testified that the defendant never attempted to leave his information with the officer after hitting the officer's car, or to contact the owners of the fence that he hit before driving away. (1RP 38)

Shortly thereafter, the Mazda3 was found abandoned in the front yard of a home with the engine still running and doors open. (1RP 35, 57-58, 64) Footprints in the snow showed tracks leading from the Mazda3. (1RP 35, 59) A neighbor saw a man in this area running, and the man

tried unsuccessfully to enter this neighbor's vehicle for a ride. (1RP 65-66) The neighbor and Officer Howe eventually identified the man who was running and driving the Mazda3 as the defendant, Mr. Loutzenhiser, when he was arrested at a nearby mini mart. (1RP 36, 37, 66-68)

Mr. Loutzenhiser was charged as follows: (count 1) second-degree assault with the aggravating factor of being committed against a law enforcement officer; (count 2) possession of a stolen motor vehicle; (count 3) first-degree malicious mischief for damage to the Mazda3; (count 4) second-degree malicious mischief for interruption and impairment to the police service vehicle; (count 5) failure to remain at the scene of an accident – attended vehicle or other property; and (count 6) failure to remain at the scene of an accident – unattended vehicle. (CP 40-42)

In addition to testimony regarding the above events, the court heard from Benjamin West, a close friend of Mr. Loutzenhiser, who had arranged for Mr. Loutzenhiser to purchase the Mazda3 from an acquaintance named "Josh" for \$200. (1RP 79-80, 83, 102, 110-11) Mr. West said that he knew Josh was addicted to methamphetamine and likely to sell something of greater value in order to satisfy his addiction. (1RP 92, 110-11) Mr. West said that he and Mr. Loutzenhiser verified that the vehicle had not been stolen by twice contacting the Department of Licensing and checking the "hot sheet" for stolen vehicles. (1RP 85, 100,

101-03, 114) Mr. West told a detective who investigated the case that Josh either told them he had prowled the car or that Mr. West believed it was possible that Josh had prowled the car. (1RP 95, 111-12) The vehicle's owner, Jarrod Meade, testified that he bought the nearly new 2012 Mazda3 for \$22,000, and it cost approximately \$6,500 for repairs after it was returned to him. (1RP 76)

Another law enforcement officer, Sergeant Kurt Vigesaa, testified as to his investigation in the case, including having followed the stolen vehicle in a tactical manner, finding the abandoned vehicle and seeing footprints in the snow. (1RP 55-58) Sergeant Vigesaa prefaced his testimony by explaining that he was the sergeant for the patrol anticrime team (PACT), which identifies and builds cases on the "worst, most prolific Spokane criminals, usually specifically property crimes, burglars, stolen vehicles, et cetera." (1RP 53-54) Sergeant Vigesaa then immediately segued from this statement and testified that his investigation on February 4, 2014, led to the defendant. (*Id.*)

In closing, Mr. Loutzenhiser argued, *inter alia*, that there was insufficient evidence that he "knowingly" possessed a stolen vehicle and knew Officer Howe was an officer when they initially met in the intersection, and that he lacked the requisite intent for assault or malicious mischief. (1RP 154-56, 158-59, 163) Mr. Loutzenhiser argued that his

intent in the above actions was to get away from an unknown man brandishing a weapon, rather than injure, cause fear of injury, harm, vex or annoy. (1RP 156-57, 160-61)

The jury submitted several questions to the court during its deliberations. (2RP 4-11; CP 164-69) Three of their questions focused on the definitions of intent and assault, and the court's last response was given over defense objection:

Jury Inquiry: Is indifference different from intent under the law?

Court's Response: Please refer to your instructions.

Jury Inquiry: On Instruction #9- need clarification. How do we decide intent?

Court's Response: Please refer to instruction #6 which defines intent.

Jury Inquiry: Last line of 2nd Paragraph of instruction 9 is being interpreted by some jurors to mean that it is assault whether defendant intended to cause bodily injury or not- is this correct?

Court's Response [over defense objection]: "It is not necessary for the actor (defendant) to actually intend to cause bodily injury."

(CP 165-66, 168; 2RP 5-6, 11)

The jury convicted Mr. Loutzenhiser as charged, and it entered a special verdict that the assault was committed against a law enforcement officer. (2RP 14-16; CP 113-19)

Mr. Loutzenhiser's criminal history included 17 felonies, not counting the current offenses in this case. (CP 189-92) Based on its

finding that some crimes would go unpunished with a standard range sentence, and on the aggravating factor that the assault was committed against a law enforcement officer (CP 240-41), the court imposed an exceptional sentence of 120 months on counts one through three and 60 months on count four, all run concurrently (CP 119, 250-64). The court imposed 90 days for each of the misdemeanor convictions, to run concurrent to the felony convictions. (3RP 21; CP 267-68²) The court then imposed 18 months of community custody, with conditions that the defendant not use or possess marijuana or products containing Tetrahydrocannabinol (THC). (CP 256-57)

The court also imposed legal financial obligations (LFOs), including mandatory court costs and restitution of \$16,480.91, with a payment schedule of \$25 per month. (CP 258-59, 265) The court entered a typical boilerplate finding that it had considered the defendant's ability to pay LFOs, though the record does not reflect this consideration. (CP 254; *see* 3RP 1-22)

Finally, the clerk of the court created a certificate for court administrator that was sent to several State agencies, mistakenly listing

² At the sentencing hearing, the court ordered the misdemeanor counts to run concurrent to the felony counts. (3RP 21; *see* CP 267-68) But the court neglected to check the box or select whether the sentences were to run concurrent or consecutive on the misdemeanor judgment and sentence itself, leaving the form to read: “[] The sentence herein to run (concurrently) (consecutively) with the sentence in I, II, III, IV.”

Mr. Loutzenhiser's time to serve on count six as 90 months rather than 90 days. (CP 268, 279)

Mr. Loutzenhiser timely appealed. (CP 280-81)

E. ARGUMENT

Issue 1: Whether the court's response to the jury questions on the definitions of assault and intent, given over defense objection, was misleading and constituted an improper comment by the court so that reversal is required.

Errors in jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Jury instructions are generally "sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (citing *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999)). "Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *Bennett*, 161 Wn.2d at 307. Instructions must make the relevant legal standard manifestly apparent to the average juror and must not be misleading or confusing. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). To this end, instructions must be "manifestly clear." *LeFaber*, 128 Wn.2d at 902.

A judge may not make an improper comment on the evidence, including when instructing the jury. *State v. Winings*, 126 Wn. App. 75, 90, 107 P.3d 141 (2005). “The Washington Constitution forbids a judge from conveying to a jury the court’s opinion about the merits or facts of a case.” *Id.* (citing Wash. Const. art. 4, §16, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”) The purpose of this constitutional prohibition is to prevent the jury from being unduly influenced by the court’s opinion regarding the credibility, weight, or sufficiency of the evidence. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

“A statement by the court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). “A judge need not expressly convey his or her personal feelings on an element of the offense; it is sufficient if they are merely implied.” *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). While a trial court “may supplement an instruction with an explanatory instruction if the meaning of the language is unclear or if the language might mislead persons of ordinary intelligence,” *State v. Young*, 48 Wn. App. 406, 415, 739 P.2d 1170 (1987), an instruction “improperly comments on the evidence if it resolves

a disputed issue of fact that should have been left to the jury.” *State v. Becker*, 132 Wn.2d 54, 64–65, 935 P.2d 1321 (1997). An instruction that assumes any material fact is true or untrue is a prohibited comment on the evidence. *State v. McDonald*, 70 Wn.2d 328, 330, 422 P.2d 838 (1967).

An erroneous instruction is only harmless, thus avoiding reversal, if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002).

Where an improper comment has been made, a reviewing court will presume the comment was prejudicial. *State v. Lane*, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995). Reversal is mandated unless the record affirmatively shows no prejudice could have resulted. *Jackman*, 156 Wn.2d at 745). The Supreme Court has explained:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact of well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

Lane, 125 Wn.2d at 838 (quoting *State v. Crotts*, 22 Wn. 245, 250-51, 60 P. 403 (1990)).

Mr. Loutzenhiser was convicted of second-degree assault, which occurs where a person, under circumstances not amounting to assault in the first degree, assaults another with a deadly weapon. RCW

9A.36.021(1)(c). Washington recognizes three definitions of assault

derived from common law:

(1) an attempt to inflict bodily injury upon another with unlawful force [which requires that the defendant “specifically intended to cause bodily injury”]; (2) an unlawful touching with criminal intent; and (3) [an act done, with unlawful force, intentionally] putting a person in apprehension of harm with or without the intent to present ability to inflict harm.

State v. Baker, 136 Wn. App. 878, 151 P.3d 237 (2007); *State v. Hartzell*, 156 Wn. App. 918, 947-48, 237 P.3d 928 (2010).

The two means of assault that were instructed in this case were the first and third forms identified above – assault by intent to cause bodily injury, or assault by intentionally putting another in fear or apprehension of harm regardless of intent to actually inflict harm. CP 94. *See, e.g., State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996), *overruled on other grounds by Brown*, 147 Wn.2d 330 (“To prove assault by attempt to cause injury, the State must show specific intent to cause bodily injury but need not provide evidence of injury or fear in fact... Assault by attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury.”) In *Eastmond*, the Court reversed where it found, *inter alia*, due to instructional deficiency, the jury could have “misunderstood the distinct findings required for a conviction under each type of assault...” 129 Wn.2d at 504.

Ultimately, “[t]here must be an actual intention to cause apprehension unless there exists the morally worse intention to cause bodily harm.” *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Some other intent, such as to only intimidate another person rather than actually cause present apprehension in that person, would be insufficient to support second-degree assault. *Id.* at 715-16 (“Even where an act is done unlawfully and the result is reasonable apprehension in another, it is still not sufficient to convict because the act must be accompanied by an actual intent to cause that apprehension.”)

The defense theory of the case in closing argument was that Mr. Loutzenhiser never intended to injure or cause apprehension in anyone, and that, at most, his intent was to get away. The jury here was confused as to whether Mr. Loutzenhiser’s actions met the definition of assault and submitted several questions to the court. (CP 165-66, 168) The jury inquired: “Is indifference different from intent under the law?... On Instruction #9- need clarification. How do we decide intent?... Last line of 2nd Paragraph of instruction 9 is being interpreted by some jurors to mean that it is assault whether defendant intended to cause bodily injury or not- is this correct?” (CP 168)

Over defense objection, rather than responding that the jury should return to and review their instructions as a whole, the court responded as

follows: “It is not necessary for the actor (defendant) to actually intend to cause bodily injury.” (CP 168) This narrowed response on the law was misleading, presumed that a charged means of committing assault had already been resolved factually, detracted from the actual legal inquiry before the jury, and amounted to an improper comment by the court.

Instructions to the jury must not be misleading. The court’s narrow response to the jury’s inquiry was misleading and failed to direct the jury back to the definition of assault that included a full statement of the law on both means charged, including that the defendant must either have intent to inflict bodily injury or intent to create apprehension or fear. Misleading jury instructions are not proper. *LeFaber*, 128 Wn.2d at 903.

The court is prohibited from commenting on the case and therein improperly influencing the jury. Wash. Const. art. 4 §16. The jury should not be influenced by the court’s view of the sufficiency of the evidence. *Jacobsen*, 78 Wn.2d at 495. By responding in such a direct and limited fashion to the jury’s inquiry— that “it is not necessary for the actor (defendant) to actually intend to cause bodily injury” – the problem is two-fold. First, the court is presuming and implying to the jury that the court believes a fact has been proven and exists: that the “defendant” was in fact the “actor” in this charged crime. This was a determination for the jury to make. The defendant did not testify, and the judge’s response to the

inquiry implied that the officer's identification of the defendant was credible and true.

Second, the court's response implied that the first means of committing assault did not exist and implied that the jury should return a verdict anyway even if the defendant did not intend bodily injury. The court's response in this case suggested the court's attitude toward the merits of the case (that the defendant was the "actor" and that the jury could return a verdict of guilty if the defendant did not intend to cause bodily injury, without referring the jury back to its legal inquiry on intent to create fear or apprehension of harm). A court's comment is improper when the court's attitude toward the merits of the case can be inferred, even if only impliedly, from the court's statement. This is what occurred here.

Moreover, the court's explanatory instruction to the jury was wholly unnecessary. The jury had already been instructed on the two charged means of committing assault in this case, and the instruction was complete and not misleading. On the other hand, when the court submitted its response on the jury's inquiry, narrowing the jury's determination on its required factual matter, the court improperly commented by impliedly resolving factual issues and suggesting its view

on the merits of the case, which should have been left exclusively to the jury.

In proving assault, it is not enough to prove that the defendant intended to intimidate. *Byrd*, 125 Wn.2d at 713. Similarly, it would not be sufficient for the jury to convict after merely finding that the defendant was indifferent in his actions, as the jury suggested at CP 165. If the jury did not find that the defendant intended to cause bodily injury, the jury was required to find that the defendant intended to create reasonable apprehension and imminent fear of bodily injury. CP 94. The court's response was misleading in that it detracted from or impliedly encouraged the jury to overlook this legal inquiry. The court's response constituted an improper comment by resolving factual issues or implying its attitude toward the merits of the case on the various means charged of committing assault.

Finally, the error in this case was presumptively, and actually, prejudicial. Harmless error is only established where no prejudice "could have resulted" from the instructional error or comment. *Jackman*, 156 Wn.2d at 745. The jury was clearly unsure whether Mr. Loutzenhiser acted with the intent necessary for assault, or had merely acted with indifference. CP 164-66, 168. The jury could have found that Mr. Loutzenhiser lacked both the intent to inflict bodily injury and the intent to

cause apprehension or fear of bodily injury, and it could have instead found that the defendant (with indifference) intended to flee. The jury was eager to receive guidance from the court, but the risk is too great in this case that the court's improper guidance contributed to the verdict. Mr. Loutzenhiser's assault conviction should be reversed and he should receive a new trial.

Issue 2: Whether retrial is warranted due to an officer's irrelevant and unduly prejudicial, opinion testimony, which inferred the defendant's guilt by implying he was one of the "worst, most prolific Spokane criminals."

Defense counsel was ineffective for failing to object to irrelevant and unduly prejudicial, opinion testimony by Sergeant Vigesaa, which improperly suggested to the jury that the defendant was among the "worst, most prolific Spokane criminals..." (1RP 53-54)

As a threshold matter, a criminal defendant has the constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is ineffective where (1) the representation was deficient, i.e., fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) counsel's deficient representation prejudiced the defendant, i.e., there is reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251

(1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

“Relevant evidence” is that “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401; *State v. Mee*, 168 Wn. App. 144, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011 (2012). Irrelevant evidence is inadmissible. ER 402. Even relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Mee*, 168 Wn. App. at 157; ER 403. “The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response.” *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013).

Ultimate guilt determinations are questions for the jury. *State v. Welchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); 5D WAPRAC ER 704(6), (9) and (11). Neither a lay nor expert witness can testify that a defendant is guilty. *State v. We*, 138 Wn. App. 716, 725, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (citing *State v. Olmedo*,

112 Wn. App. 525, 530, 49 P.3d 960 (2002)). “Improper opinion testimony violates a defendant’s right to a jury trial and invades the fact-finding province of the jury.” *We*, 138 Wn. App. at 730 (J. Schultheis dissenting).

A witness’s opinion regarding the defendant’s guilt “is irrelevant and invades the defendant’s right to a jury trial and invades the jury’s exclusive fact-finding province.” *State v. Notaro*, 161 Wn. App. 654, 661, 255 P.3d 774 (2011). “To determine whether a statement is impermissible opinion testimony or a permissible opinion pertaining to an ultimate issue, courts must consider ‘the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.’” *We*, 138 Wn. App. at 723 (internal quotation omitted).

“Opinions on guilt are improper whether made directly or by inference.” *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014) (internal cites omitted). Opinions from law enforcement officers are especially problematic because it is more likely to influence the jury. *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (internal quotations omitted) (“A law enforcement officer’s opinion testimony may be especially

prejudicial because the officer's testimony often carries a special aura of reliability.")

Here, the following exchange of questions occurred during Sergeant Vigesaa's testimony, which should have prompted a defense objection at the emphasized portions below:

A I'm a sergeant of the patrol anticrime team.

Q Is that what is commonly known as the PACT team?

A Correct.

Q What are the duties of the PACT team?

A We identify and build cases on the worst, most prolific Spokane criminals, usually specifically property crimes, burglars, stolen vehicles, et cetera.

Q Were those your duties on or about February 4th of this year?

A Yes

Q Now on February 4th of this year at approximately 2:00 in the afternoon, were you working in that capacity?

A Yes.

Q And did you have at that point in time cause to come into contact with anyone in the courtroom today?

A The investigation led to the defendant, correct.

(1RP 53-54) (emphases added).

The emphasized portion of the sergeant's testimony was not relevant to prove or disprove a fact in issue and instead prejudicially

suggested that the defendant was among the “worst, most prolific Spokane criminals...” (1RP 53-54) The testimony created unfair prejudice to Mr. Loutzenhiser and was likely to stimulate an undue emotional response in the jury, suggesting that the defendant was a “bad guy” who was investigated by the officer. The guilt determination is for the jury, not for an officer who tells the jury that it is his job to build cases on and attain the worst of the criminals.

A law enforcement officer’s opinion that a defendant is a criminal (or even worse, among Spokane’s worst, most prolific criminals) is particularly prejudicial. The officer carries a special aura of reliability with the jury, such that the jury would be more inclined to convict if the officer implies to them that the defendant is a guilty criminal. Defense counsel should have objected to this testimony, and his failure to do so was both ineffective and prejudiced the defendant. Given the jury’s questions and difficulty deciding this case, as discussed in Issue One above, it is much more likely that the jury would have returned a different verdict absent the officer’s improper testimony. The officer’s irrelevant and unduly prejudicial opinion testimony made it more likely that the jury would return a guilty verdict because the officer implied to them that the defendant was among Spokane’s worst, most prolific criminals. This error

warrants reversal and retrial of all counts (except count six, which lacks sufficient evidence, as set forth in the next issue below).

Issue 3: Whether count six – failure to remain at the scene of an accident involving an “unattended vehicle”– must be reversed and dismissed for insufficient evidence.

There was no evidence that Mr. Loutzenhiser failed to remain at the scene of an accident involving an “unattended vehicle,” as charged and found by the jury in count six. (CP 42, 118) The conviction should be reversed and dismissed.

The State must prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). To determine whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the State to determine whether “any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Romero*, 113 Wn. App. 779, 797, 54 P.3d 1255 (2002) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); *State v. Wilson*, 141 Wn. App. 597, 608-09, 171 P.3d 501 (2007) (citing *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). In determining sufficiency, circumstantial evidence is considered equally as reliable as direct evidence. *Romero*, 113 Wn. App. at 798; *Wilson*, 141 Wn. App at 608. “Credibility determinations are

for the trier of fact and cannot be reviewed on appeal.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 202. Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

Mr. Loutzenhiser was charged with count six as follows:

COUNT VI: FAILURE TO REMAIN AT THE SCENE OF AN ACCIDENT – UNATTENDED VEHICLE, committed as follows: That the defendant, CALEB E. LOUTZENHISER, in the State of Washington, on or about February 4, 2014, did drive a vehicle which collided with another unattended vehicle, and knowing that s/he had been involved in such collision, did fail to stop immediately and locate the operator or owner of the vehicle striking the unattended vehicle and did fail to leave in a conspicuous place in the vehicle struck a written notice, giving the operator’s and owner’s name and address of the vehicle striking such other vehicle.

CP 42 (emphases added).

The corresponding statute to this crime, as identified on the charging document (CP 40), is RCW 46.52.010, which provides that:

(1) The operator of any vehicle which collided with any other vehicle which is unattended shall immediately stop and shall then

and there either locate and notify the operator or owner of such vehicle of the name and address of the operator and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck a written notice, giving the name and address of the operator and of the owner of the vehicle striking such other vehicle.³

RCW 46.52.010.

Mr. Loutzenhiser was charged with two separate counts of “failure to remain at the scene of an accident” (counts five and six in the amended information). (CP 42) For count six, the State alleged that Mr. Loutzenhiser failed to remain at the scene of an accident involving an unattended vehicle pursuant to RCW 46.52.010. (CP 40, 42 (emphasis added)). The jury then found Mr. Loutzenhiser “guilty of the crime of FAILURE TO REMAIN AT THE SENCE OF AN ACCIDENT – UNATTENDED VEHICLE as charged in Count VI.” (CP 118) But the jury was never instructed on this crime involving an “unattended vehicle” (c.f. jury instructions at CP 105-06, 108-09), and there was no evidence that Mr. Loutzenhiser ever drove into an “unattended vehicle.”

While the evidence may have been sufficient to support the jury’s verdict on count five – failure to remain at the scene of an accident involving an attended vehicle (the police car attended by Officer Howe who was inches from the vehicle, 1RP 32) **or** other property (the fence,

³ The second subsection of this statute involves an accident resulting in damage to property, but it is not applicable here since it was never charged and the jury instead found the defendant guilty of the “unattended vehicle” subsection of the statute for count six. See CP 42 and 118.

1RP 33) (see verdict for count five, CP 117) (emphasis added)⁴– there was not sufficient evidence that Mr. Loutzenhiser also drove into an “unattended vehicle” so as to support count six as charged and as found by the jury. Other than the police vehicle that Mr. Loutzenhiser drove into, which was attended by Officer Howe (see count five), Mr. Loutzenhiser never collided with any other vehicle, let alone an unattended vehicle. There was insufficient evidence to support count six – failure to remain at the scene of an accident involving collision with an “unattended vehicle,” as charged and as found by the jury. (CP 42, 118)

Issue 4: Whether the restitution order should be vacated because the State failed to present substantial evidence of the amount of loss.

The court ordered restitution in this case totaling \$16,480.91, which included \$500 to Jarrod Meade (owner of the stolen Mazda), \$8,967.58 to USAA insurance, and \$7,013.33 to the City of Spokane. The State did not present evidence to support these amounts and simply offered the court a restitution schedule, which the court adopted. (3RP 3, 6, 20, 21) The only evidence to support the amount in the restitution schedule was testimony from Mr. Meade that his vehicle required \$6,500 in repair costs. (1RP 76-77, 151, 168) The remaining restitution was not

⁴ The jury’s verdict for hit and run– attended vehicle or other property – only supported count five as a single unit of prosecution. *Accord State v. Ustimenko*, 137 Wn. App. 109, 117-19, 151 P.3d 256 (2007) (noting that where a defendant drove into another vehicle, injuring two passengers, and then the defendant drove into a sign outside of a business, only one unit of prosecution existed rather than three counts of hit and run.)

supported by substantial evidence. Remand for resentencing to fix the proper amount of restitution is the proper and just remedy in this case. *See e.g. State v. Dedonado*, 99 Wn. App. 251, 258, 991 P.2d 1216 (2000).

“Restitution is an integral part of sentencing, and it is the State’s obligation to establish the amount of restitution.” *Dedonado*, 99 Wn. App. at 257. A restitution order must be based on “easily ascertainable damages.” RCW 9.94A.753(3). In relevant part:

Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender’s gain or the victim’s loss from the commission of the crime.

RCW 9.94A.753(3).

While the claimed loss need not be established with specific accuracy, it must be supported by substantial, credible evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Although the rules of evidence do not apply at restitution hearings, the State’s proof must meet due process requirements, such as providing the defendant with an opportunity to refute the evidence presented and being reasonably reliable. *State v. Strauss*, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992); *State v. Pollard*, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992).

On appeal, restitution orders are reviewed for abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). The record must permit a reviewing court to determine “exactly what figure is established by the evidence.” *Pollard*, 66 Wn. App. at 785. “Otherwise the case must be remanded for resentencing based on an appropriate finding establishing the actual amount the victim lost.” *Id.* (citing *State v. Tindal*, 50 Wash.App. 401, 405, 748 P.2d 695 (1988)).

Where a defendant fails to object to a restitution order at the trial court, review may be precluded on appeal because the issue is deemed waived. *State v. Branch*, 129 Wn.2d 635, 651, 919 P.2d 1228 (1996); *but see State v. Moen*, 129 Wn.2d 535, 537-38, 919 P.2d 69 (1996). However, each appellate Court may choose to exercise its discretion to review an issue otherwise waived pursuant to RAP 2.5(a). *See, e.g.*, RAP 2.5(a)(2) (“a party may raise the following claimed error[] for the first time in the appellate court: ... (2) failure to establish facts upon which relief can be granted.”) *See also State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015) (Our Supreme Court discussed the numerous and significant concerns when LFOs are imposed erroneously or without consideration to an indigent defendant’s ability to pay, including precluding a defendant from ever successfully reentering society: “National and local cries for

reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.”)

The record herein does not contain any evidence supporting the ordered restitution of \$16,480.91. Mr. Meade testified that his Mazda required about \$6,500 in repair work (1RP 76-77), but there was no evidence that higher amounts were spent either by Mr. Meade or his insurance company. Likewise, there was no evidence as to what the costs were to repair the officer’s damaged vehicle. The ordered restitution was more than double the proven restitution amount, contrary to RCW 9.94A.753(3). The restitution order should be vacated because the State failed to meet its burden to prove the amount of restitution by a preponderance of the evidence. *Dedonado*, 99 Wn. App. at 257.

Mr. Loutzehiser is an indigent defendant who faces 120 months of incarceration with little to no opportunity to pay the restitution amount, which the court reminded the defendant would be accruing interest until it is paid in full. 3RP 20-21. This will significantly impact Mr. Loutzenhiser’s ability to successfully reenter society upon his release. He will face ongoing supervision by the court system until his fines are paid, and this will likely create negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 836-37 (citing studies). In addition, the ability to collect from indigent offenders is so low that the court should

proceed with caution when imposing LFOs. *See id.* at 838-39. For purposes of the restitution order here, this need for caution suggests that the court should at least require some evidence to support the amount of restitution. Mr. Loutzenhiser respectfully requests that this Court exercise its discretion and accept review of this issue pursuant to RAP 2.5(a)(2) and remand for proof of the alleged restitution amounts.

Issue 5: Whether the court erred by entering an unsupported, boilerplate finding on Mr. Loutzenhiser’s ability to pay Legal Financial Obligations (LFOs) and by setting a minimum monthly payment of \$25 per month toward LFOs, including restitution of \$16,480.91, without considering the total amount of restitution owed, Mr. Loutzenhiser’s present, past and future ability to pay, and any assets he may have.

The court imposed LFOs, including mandatory court costs that are not challenged herein, along with \$16,480.91 in restitution, all of which Mr. Loutzenhiser was ordered to pay at a rate of \$25 per month starting April 1, 2015. CP 258-59, 265; 3RP 20-21. The court included a boilerplate finding in the judgment and sentence that it had “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 254. But the court erred by imposing the restitution payment schedule without actually considering the defendant’s ability to pay and by entering an unsupported boilerplate finding.

Although Mr. Loutzenhiser did not make this argument below, “an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5.” *Blazina*, 182 Wn.2d at 834-35. Mr. Loutzenhiser requests this Court exercise its discretion and accept review of this claimed error. *See* RAP 2.5(a); *see also Blazina*, 182 Wn.2d at 830-31; *and see* RAP 1.2(a) (liberally construing rules to promote justice). As our state Supreme Court recognized “[n]ational and local cries for reform of broken LFO systems” demand this result. *Blazina*, 182 Wn.2d at 836. “Washington’s LFO system carries problematic consequences[,]” which particularly affect indigent offenders. *Id.* at 835.

When setting a minimum monthly payment an offender is required to pay towards restitution ordered, “[t]he court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.” RCW 9.94A.753(1); *see also State v. We*, 138 Wn. App. 716, 728, 158 P.3d 1238 (2007) (acknowledging this requirement).

Here, the trial court imposed restitution of \$16,480.91. (CP 265; 3RP 20-21). The trial court ordered Mr. Loutzenhiser to make a minimum monthly payment of \$25 per month towards his LFOs, including this restitution. (CP 259; 3RP 20-21). When setting this minimum monthly payment, the trial court did not consider the total amount of the restitution

owed, Mr. Loutzenhiser's present and future ability to pay, or any assets he may have, as required by RCW 9.94A.753(1). *C.f. State v. Lohr*, 130 Wn. App. 904, 911-12, 125 P.3d 977 (2005) (the trial court complied with RCW 9.94A.753(1) in setting monthly restitution payments by considering the defendant's financial situation).

The Judgment and Sentence does contain boilerplate language addressing the factors set forth in RCW 10.01.160. (CP 254). However, this is insufficient to meet the requirements set forth in RCW 9.94A.753(1). The boilerplate language addresses the requirements of RCW 10.01.160, not the applicable statute, RCW 9.94A.753(1). Even if the boilerplate language addressed the applicable statute, the fact that the trial court signed a judgment and sentence with boilerplate language is insufficient to prove the trial court engaged in an individualized inquiry into Mr. Loutzenhiser's ability to pay restitution at a rate of \$25 per month. *See Blazina*, 182 Wn.2d at 838-39; *see also* RCW 9.94A.753(1). Findings must have support in the record. Specifically, 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)). Here, the record does not support the court's finding regarding Mr. Loutzenhiser's ability to pay.

Because the monthly minimum payment of \$25 per month towards LFOs was set without considering the total amount of the restitution owed, Mr. Loutzenhiser's present, past, and future ability to pay, and any assets he may have, as required by RCW 9.94A.753(1), the monthly minimum payment of \$25 per month should be stricken from the Judgment and Sentence and the case remanded for resentencing. *See Blazina*, 182 Wn.2d at 839 (setting forth this remedy).

Issue 6: Whether the community custody condition that the defendant not use or possess Marijuana and or products containing THC must be stricken as it is not authorized under the Sentencing Reform Act (SRA).

There was no evidence that the defendant's use or possession of Marijuana or any Tetrahydrocannabinol (THC) products contributed to the offenses. Thus, the community custody condition prohibiting Mr. Loutzenhiser from possessing or using Marijuana or THC products during community custody was not crime-related or authorized by law and must be stricken.

As a threshold matter, defendants can object to community custody conditions for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). "Unauthorized conditions of a sentence may be challenged for the first time on appeal." *State v. Wilson*, 176 Wn. App. 147, 151, 307 P.3d 823 (2013), *review denied*, 179 Wn.2d 1012 (2014) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

The trial court may impose a sentence only if it is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999).

Pursuant to RCW 9.94A.703, in pertinent part, the court may order an offender to “[p]articipate in crime-related treatment or counseling services;” “[r]efrain from consuming alcohol;” or “[c]omply with any crime-related prohibitions.” Former RCW 9.94A.703(3)(c), (e), (f) (2009).⁵ “Crime-related prohibition” means:

an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted....

RCW 9.94A.030(10).

Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

⁵ This statute, which was effective at the time of Mr. Loutzenhiser’s sentencing, has been amended by 2015 Wash. Legis. Serv. Ch. 81 (S.B. 5104), effective 7/24/2015. The revisions will permit a court to include a prohibition on use or possession of controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense. RCW 9.94A.505 and RCW 9.94A.607(1) (eff. 7/24/2015). Even if the amendments had been effective at the time of Mr. Loutzenhiser’s sentencing, which they were not, the court here did not find that the defendant had a chemical dependency that contributed to the offense. *See* CP 252.

In *State v. Jones*, the court found the trial court erred by ordering the defendant to participate in alcohol counseling as a condition of community custody, because there was no evidence that alcohol contributed to his crimes or that the alcohol counseling requirement was crime-related. 118 Wn. App. at 207-08. The court further found that “alcohol counseling ‘reasonably relates’ to the offender’s risk of reoffending and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.” *Id.* at 208.

Here, Mr. Loutzenhiser may challenge any offensive community custody conditions for the first time on appeal. *See, e.g., Wilson*, 176 Wn. App. at 151. In this case, the court erred by imposing the following condition of community custody:

The court orders that during the period of supervision the defendant shall... no use or possession of Marijuana and or products containing Tetrahydrocannabinol (THC)...

CP 256-57.

This community condition prohibiting Mr. Loutzenhiser from using or possessing Marijuana or THC products is not related to the crimes of conviction. There was no evidence that marijuana or THC contributed to Mr. Loutzenhiser’s convictions of assault, possession of a stolen vehicle, malicious mischief, or hit and run. At most, there was some discussion that Mr. Loutzenhiser had a history of methamphetamine use,

but there is no indication that even this drug contributed to the offenses listed. Significantly, the court did not find that Mr. Loutzenhiser had any chemical dependency that contributed to the offenses. *See* CP 252. *C.f.*, RCW 9.94A.505 and RCW 9.94A.607(1) (eff. 7/24/2015) (permitting prohibitions on use or possession of controlled substances where any chemical dependency contributed to the offense) (emphasis added).

Ultimately, for purposes here, marijuana or THC were not shown to have contributed to the offenses, so the prohibition on their use or possession during community custody was not reasonably crime-related and must be stricken.

Issue 7: Whether this court should remand for correction of a scrivener’s error in the court administrator’s certificate, which erroneously lists Mr. Loutzenhiser’s sentence for count six as 90 months rather than 90 days, and to correct the scrivener’s error in the judgment and sentence that neglected to specify that Mr. Loutzenhiser’s misdemeanor counts shall be served concurrent to his felony counts.

The clerk of the court erroneously submitted a “Certificate for Court Administrator” that incorrectly lists Mr. Loutzenhiser’s time to be served as “90 months” on count six rather than 90 days. *See* CP 279 (90 months), *c.f.* CP 269 (90 days). Copies of this document were sent to AFC in Olympia (Financial Services, Administrative Office of the Courts), the County Auditor’s Office, and placed in the court file. CP 279. In order that the various agencies receive accurate information for their records,

Mr. Loutzenhiser requests that the apparent scrivener's error be corrected at this time. *See State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remanded to correct scrivener's error in judgment and sentence that incorrectly stated the terms of confinement imposed).

Additionally, the court appears to have neglected to check the appropriate box and circle the proper term to specify that Mr. Loutzenhiser's misdemeanor counts shall be served concurrent to his felony counts. (C.f., 3RP 21 (court ordering concurrent sentences) and CP 268 (court neglecting to specify between concurrent verses consecutive sentences on the judgment and sentence.)) Mr. Loutzenhiser requests that this error also be corrected to eliminate any confusion in the time he was ordered to serve. *See Healy*, 157 Wn. App. at 516.

F. **CONCLUSION**

Based on Issues One and Two above, Mr. Loutzenhiser respectfully requests that his convictions be reversed and retried. As to count six, this conviction should be reversed and dismissed for insufficient evidence. At a minimum, Mr. Loutzenhiser should be resentenced to address the restitution, community custody and scrivener's error issues.

Respectfully submitted this 19th day of June, 2015.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 33136-9-III
vs.) No. 14-1-00438-0
)
CALEB EARL LOUTZENHISER) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 19, 2015, I deposited for mail by U.S. Postal Service, first-class and prepaid, a copy of the opening brief to the Defendant/Appellant at:

Caleb Loutzenhiser, DOC #881709
11919 W. Sprague Avenue
PO Box 1899
Airway Heights, WA 99001-1899

Having obtained prior permission, I also served the same on the Respondent by email using Division III's e-filing e-service feature at scpaappeals@spokanecounty.org.

Dated this 19th day of June, 2015.

/s/ Kristina M. Nichols
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