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Court of Appeals  
Division III  
State of Washington  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35183-1-III

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STATE OF WASHINGTON, Respondent,

v.

JASON LEE PRIEST, Appellant.

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**APPELLANT'S BRIEF**

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## **I. INTRODUCTION**

Jason Priest was convicted of second degree burglary, first degree theft, and first degree malicious mischief arising from his participation with several individuals to break into an unused cell tower and steal copper wire to sell as scrap. Trial testimony established that the primary participants visited the tower on multiple occasions, causing damage and removing materials, while Priest only visited on a single occasion and was not shown to be part of the larger conspiracy. Based on this testimony, the evidence failed to establish that Priest caused property damage exceeding \$5,000 as required to establish the charges of first degree theft and malicious mischief, and that Priest committed the charged conduct within the time frame the State alleged. At sentencing, the State asserted that his offender score was a "9" for the burglary over the defense objection that Priest's prior convictions washed out, based upon unproven assertions as to Priest's intervening history and term of imprisonment. Because the State failed to meet its burden to prove the offender score, the sentence is unauthorized and must be vacated.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** The evidence was insufficient to prove the charges of second degree burglary, first degree theft, and first degree malicious mischief as a matter of law.

**ASSIGNMENT OF ERROR NO. 2:** The evidence was insufficient to prove Priest's offender score.

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

**ISSUE NO. 1:** When the evidence at trial indicated that the primary actors in stripping the cell tower of wire visited and removed materials on multiple occasions, no evidence tended was introduced to show how much of the wire was taken or how much property damage was done on the day when Priest was present, and Priest was not shown to be a conspirator or an accomplice to the larger undertaking, does evidence of the total damage done fail to establish the amount of damage cause by Priest on the day in question as required to prove essential elements of first degree theft and first degree malicious mischief?

**ISSUE NO. 2:** When the evidence at trial failed to provide a reasonable basis for estimating the date when Priest visited the cell tower, did the

State meet its burden to prove beyond a reasonable doubt that the incident occurred within the specific time frame set forth in the jury instructions?

ISSUE NO. 3: When the State alleges, but submits no evidence to support, that the defendant's prior convictions do not wash out because of intervening unproven misdemeanor history and incarceration, has the State failed to meet its burden to establish the offender score?

#### **IV. STATEMENT OF THE CASE**

On May 8, 2015, Travis Blake, a field operations technician for American Tower Corporation, visited one of the company's wireless towers in Sprague. I RP (Sitter)<sup>1</sup> at 17-18. He had last visited the site weeks or months prior. I RP (Sitter) at 24. When he arrived and entered the building, he found it had been extensively vandalized. I RP (Sitter) at 18. Hundreds of feet of copper wire had been cut and removed, equipment cases were tipped over, and everything had been rifled through. I RP (Sitter) at 18-20. There was a large amount of insulation that had

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<sup>1</sup> The verbatim reports of proceeding in this case consist of the following: Two volumes, non-consecutively paginated, prepared by Court Reporter Betty Sitter, containing trial proceedings held on March 22 and March 23, 2017; and one volume, non-consecutively paginated to the Sitter volumes, prepared by transcriptionist Susan Anderson, containing pretrial hearings held on March 7, 17, and 21, 2017, one day of trial proceedings held on March 24, 2017, and the sentencing hearing held on March 28, 2017. For clarity, this brief shall reference the reports by the name of the reporter who transcribed it and, in the case of Ms. Sitter's volumes, by volume number, as (Vol. no.) RP (Transcriptionist) at (page no.).

apparently been stripped from the wire left in the building. I RP (Sitter) at 19, 72. Because of the length of time since his last site visit, Blake did not know when the damage occurred. I RP (Sitter) at 24.

Police recovered items from the scene that they were able to trace to specific individuals. A small mini-mag flashlight yielded a fingerprint that police identified as belonging to Cory Butler. I RP (Sitter) at 64. Garbage, beer cans, and cigarette butts were strewn about, and one of the beer cans also yielded a fingerprint linked to Cory Butler. I RP (Sitter) at 71-72, 77. DNA was obtained from a cigarette butt that belonged to another person named Cory West. I RP (Sitter) at 74, 78.

Police then contacted Butler and West to try to obtain information about the burglary. I RP (Sitter) at 79. West initially denied being inside the tower, but eventually told police he was there with Butler, two other males, and a female. I RP (Sitter) at 80-81. He named the female as Patricia Doree and one of the males as Justin Gallas. I RP (Sitter) at 81. He also directed police to a house where the wire was taken to be stripped for resale to a scrap yard. I RP (Sitter) at 81. Police confirmed that the house was where Doree lived. I RP (Sitter) at 82.

Priest initially came to the attention of police when he was identified as Doree's boyfriend. I RP (Sitter) at 89. Several months later,

in February 2016, police interviewed Butler, who told them Priest was there with the others. I RP (Sitter) at 90. During their interviews, West and Butler claimed to have visited the cell tower three times. I RP (Sitter) at 102, 107. Police obtained a search warrant for Doree's house but located nothing of evidentiary value. I RP (Sitter) at 97, 108. Eight months later, police visited the property again and found wire insulation between Doree's house and the neighbor's fence. I RP (Sitter) at 93-95. But when police compared the wire insulation found at Doree's house to the insulation from the cell tower, the materials did not match. I RP (Sitter) at 93, 97.

Armed with this information, the State charged Priest with second degree burglary, first degree theft of commercial metal, and malicious mischief in the first degree. CP 1-2. Priest's case was consolidated with Doree's for trial, and the matter was submitted to a jury. RP (Anderson) at 6. Both West and Butler testified for the State. Butler's testimony was inconsistent in several key respects. He testified that he first visited the cell tower in 2015 when "it was just getting into springtime." I RP (Sitter) at 28. But Butler also said the events happened in 2014. I RP (Sitter) at 38, 40. He stated that he went there several times, the first time with Priest, Doree, and West, and on other occasions after that with West and a woman named Shirley. I RP (Sitter) at 28-29. Admitting that they

intended to steal copper wire, Butler testified that on the first visit, they took copper outside of the building, and the second time, they went inside the building. I RP (Sitter) at 29-30. They took the wire to Doree's house and stripped it there, as well as in other places, before taking the wire to different recyclers in Spokane. I RP (Sitter) at 33-34. But later, Butler clarified that the first two times he went to the site and the first time he entered the building was only with West. I RP (Sitter) at 38-39. The third time was the occasion when Priest and Doree also went, and Butler said he went back with West a fourth time. I RP (Sitter) at 39. According to Butler, Priest provided the tools they used to go into the facility and cut wire. I RP (Sitter) at 41.

West testified that he visited the cell tower probably 20 times, with multiple people, including several whom Butler did not name. I RP (Sitter) at 42-43. West claimed that the first time he went to the cell tower he was only with Butler, who had already cut away wire on the outside of the building. I RP (Sitter) at 44. His initial involvement was to evaluate the situation and try to help Butler clean up and cover up the damage he had already done. I RP (Sitter) at 44. Later, according to West, Priest and Doree rode out to the site with him and helped load material from inside the building. I RP (Sitter) at 45-46. West also claimed that Priest's black truck was used to transport material from the cell tower to Doree's house

to strip off the insulation. 1 RP (Sitter) at 47, 49. Like Butler, West was unclear about when the events occurred, testifying that it happened in 2015 and the various visits occurred over the course of about half a year. 1 RP (Sitter) at 50-51.

In addition to these witnesses, the State also presented testimony from a jailhouse informant. 2 RP (Sitter) at 11. The informant claimed that Priest told him about getting involved with the cell tower in Sprague through his buddies. 2 RP (Sitter) at 14. Priest told him the two Corys brought him in and they went to the tower several times, removing copper wire, as well as the walls and structure itself to get to the wire. 2 RP (Sitter) at 15. Priest said they removed a lot of wire and processed it to remove the coating, then took it to R&S Recycling in Spokane. 2 RP (Sitter) at 16-17. Some of the processing occurred at Doree's house, but later the recycling company let them use their equipment to remove the casing. 2 RP (Sitter) at 18. At some point, Priest said something about \$38,000, but the informant was not sure if he was referring to the retail value of the wire or damage to the building. 2 RP (Sitter) at 19.

The trial court instructed the jury on the charges as follows:

To convict the defendant of the crime of burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about or between March 1, 2015 and May 8, 2015 the defendant entered or remained unlawfully in a building other than a dwelling;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

(3) That this act occurred in the State of Washington.

...

To convict the defendant of the crime of theft in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about or between March 1, 2015 and May 8, 2015 the defendant wrongfully obtained or exerted unauthorized control over property of another; and

(2) That the property was commercial metal property of another, and

(3) That the defendant intended to deprive the other person of the commercial metal property; and

(4) That the costs of the damage to the owner's property as a result of the defendant's act exceed \$5,000 in value; and

(5) That this act occurred in the State of Washington.

...

To convict the defendant of the crime of malicious mischief in the first degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about or between March 1, 2015 and May 8, 2015, the defendant

(a) Caused physical damage to the property of another in an amount exceeding \$5,000; and

(2) That the defendant acted knowingly and maliciously; and

(3) That this act occurred in the State of Washington. CP 82, 87, 97, 2 RP (Sitter) at 106, 107, 111. The trial court also gave lesser-included offense instructions for second and third degree theft and malicious mischief. CP 92, 94, 106, 107, 2 RP (Sitter) at 109, 110, 114, 115. The jury convicted Priest of all three charged offenses. CP 128-30, RP (Anderson) at 72.

At sentencing, the State alleged that Priest had multiple prior convictions that resulted in an offender score of 9 for the burglary and 8 for the theft and malicious mischief. RP (Anderson) at 82. Priest signed an “Understanding of Defendant’s Criminal History” document that stipulated to several prior felony convictions occurring in 2001 and 2002, and for which he was last sentenced in 2004. CP 145-46. Priest argued that the prior felonies washed out. RP (Anderson) at 84. The State then asserted that Priest was convicted of driving with a suspended license in 2009 and that he was sentenced to 25 months on prior charges of second degree burglary and second degree possession of stolen property. RP (Anderson) at 85. The State presented no proof of the alleged prior conviction, which did not appear on the Understanding of Defendant’s Criminal History document, nor any proof substantiating its allegation of the sentence or the date when Priest was released from custody on the burglary and stolen property charges. Nevertheless, accepting the State’s

calculation of Priest's offender score, the trial court imposed a high end sentence of 68 months. CP 136-37, RP (Anderson) at 93. Priest then timely appealed, and was found indigent for that purpose. CP 149, 163.

## **V. ARGUMENT**

Evidentiary deficiencies undermine the convictions and sentence in this case. As to the theft and malicious mischief charges, the State's proof of the collective amount of damage done to the cell tower over the period of time that West and Butler were stripping it provided no basis to estimate what portion of the damage was caused by Priest on the day that he assisted. Consequently, the evidence did not establish the minimum damage elements of those charges. As to all of the counts, including the burglary charge, the State failed to present sufficient evidence that the events occurred during the specific time frame of between March 1, 2015 and May 8, 2015 as charged in the complaint and set forth in the jury instructions. These insufficiencies require reversal of the convictions.

As to the sentence, the State failed to meet its burden of proof to establish Priest's offender score was what it alleged. Because the State's mere allegations do not substitute for evidence, and because Priest did not stipulate to intervening misdemeanor convictions that would have

prevented the prior felony convictions from washing out, the offender score is unsupported by law and the sentence must be vacated.

1. The evidence introduced at trial failed to establish the essential elements of first degree theft, first degree malicious mischief, and second degree burglary.

The State's case at trial failed to establish at least one essential element of each of the charges. As to all of the charges, the State failed to prove that the conduct occurred during the charged time period. As to the first degree theft and malicious mischief charges, which require proof that the defendant caused damage of a certain value, the State failed to prove that the damage for which Priest was responsible met the required threshold. These deficiencies require reversal.

In reviewing the sufficiency of the evidence, the reviewing court considers the evidence in the light most favorable to the State and asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). In challenging the sufficiency of the evidence, the appellant admits the truth of the State's evidence and all inferences that can reasonably be drawn from it, giving equal weight to circumstantial and direct evidence. *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280

(2002); *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The State bears the burden of proving all the elements of the crime charged beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). Speculation cannot substitute for an absence of evidence. *See State v. Brockrob*, 159 Wn.2d 311, 338, 150 P.3d 59 (2006) (finding evidence insufficient to convict when only unsupported speculation sustained essential element).

A. The State failed to prove that the criminal acts took place within the charged time period.

In its charging document and instructions to the jury, the State contended that Priest committed the criminal acts on or between March 1, 2015 and May 8, 2015. CP 1, 82, 87, 92, 94, 97, 106, 107. The jury instructions were not objected to; accordingly, the dates of commission are elements of the crime the State was required to prove beyond a reasonable doubt. *Hickman*, 135 Wn.2d at 102. Here, the State failed to meet its burden to present non-speculative evidence that the crime occurred within this specific time frame. Accordingly, the convictions must be reversed and dismissed. *Id.* at 103 (*quoting State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)).

While it could be established that the crimes occurred before May 8, 2018 when Blake discovered the condition of the property, there was no non-speculative reason to believe the crimes must have been committed on or after March 1, 2015. Blake testified that it had been several weeks or months since he had been to the property. 1 RP (Sitter) at 24. Nothing in this testimony precludes the crimes from having been committed before March. Not only did the State not solicit specific testimony about the date of Blake's last visit, it did not even attempt to narrow the range of possibilities by asking if it took place during winter, early spring, or late spring. In its closing argument, the State explained that it identified the time frame based upon a statement by Blake that it had been several weeks since he had been to the facility. 2 RP (Sitter) at 149. But "several" is an indefinite term; it could mean eight or nine weeks, as interpreted by the State, but it could also mean 10, or 12, or 16 weeks, placing the events before the charging period.

Testimony from the other State witnesses similarly failed to prove the time frame. Butler, who did not identify a specific date, said only that it was 2015, getting into springtime, but later said twice it was in 2014. 1 RP (Sitter) at 28, 38, 40. West, who testified to visiting the site as many as 20 times, said only that the events occurred in 2015, on and off throughout the year for about half a year, but did not specify when in that time frame

Priest went to the property with him. 1 RP (Sitter) at 43, 50, 51. None of this testimony establishes a non-speculative reason to conclude beyond a reasonable doubt that Priest must have gone to the property on or after March 1, 2015.

At best, the State's evidence established that Butler and West engaged in an ongoing operation looting the cell tower from as early as sometime in 2014 until Blake discovered the damage on May 8, 2015. But there was no proof that Priest was part of the larger undertaking, and both Butler and West testified only to a single visit Priest made at an unidentified time to assist. 1 RP (Sitter) at 29, 39, 41, 45-46. In the absence of some factual basis for concluding that Priest's visit must have occurred no earlier than March 1, 2015, the State's evidence falls short.

B. The State failed to prove that Priest caused damage reaching a certain monetary threshold required to establish first degree theft and first degree malicious mischief.

Both first degree theft and first degree malicious mischief require proof that the defendant caused damage of at least \$5,000. RCW 9A.56.030(1)(d); RCW 9A.48.070(1)(a). Again, the jury instructions incorporated these elements. CP 87, 97. But the evidence was clear that a substantial amount of the total damage preceded Priest ever coming to the

property, and the damage caused on the occasion Priest was involved was not identified. Again, because there was no non-speculative reason to estimate the cost of the damage caused during Priest's involvement relative to the damage Butler and West caused over time, the evidence failed to establish the minimum amount required to sustain the first degree theft and malicious mischief charges.

Blake testified that the property was substantially damaged on May 8, 2015 when he discovered it. 1 RP (Sitter) at 18. Butler and West both testified that on the first visit, the copper outside the building was taken. 1 RP (Sitter) at 30, 44. Butler also testified that he went back a second time with West, when they went inside the building. 1 RP (Sitter) at 30-31, 38-39. It was the third occasion when Priest went with them, and materials were removed from inside the building. 1 RP (Sitter) at 32, 39, 41. West also agreed that Priest went inside and helped load material that they were taking. 1 RP (Sitter) at 45, 46. Other than the materials they took, the amounts of which were unspecified, neither Butler or West described any other damage to the property either committed by Priest or occurring on the date he was there.

By contrast, Blake described equipment cases tipped over and gone through, a hole in the side of the building where a window had been

ripped out, and a place in the corner where somebody had urinated and defecated. 1 RP (Sitter) at 18-19. He testified to at least \$33,000 in costs to clean up the site, and estimated that the cost of all the materials taken from the site would be hundreds of thousands of dollars. 1 RP (Sitter) at 21. But Blake did not specifically identify, and the State did not ask, how much of the material came from inside the tower and how much was outside. He described grounding wire and wave guidelines<sup>2</sup> that were removed, but was not clear about where the materials were located relative to the building – apparently some were outside, some were inside, and some were both inside and outside. 1 RP (Sitter) at 19-20.

Although the testimony was clear that Priest only participated in the vandalism of the cell tower to a limited extent, and that Butler began removing materials before Priest ever arrived there, the evidence did not establish how much of the total damage resulted from the occasion when Priest participated. Consequently, the jury would have been required to speculate that the damage on that specific occasion met or exceeded the \$5,000 threshold. Because the evidence failed to establish the essential

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<sup>2</sup> “Guidelines” is believed to be a scrivener’s error. Blake was probably referring to guy-lines, which are tensioned cables that stabilize a tall object like a tower to prevent it from falling or being blown over. See <http://en.wikipedia.org/wiki/Guy-wire> (last visited Feb. 12, 2018).

element of the damage caused by Priest, the first degree theft and malicious mischief convictions must be reversed.

2. The State's unsupported assertions about Priest's incarceration term and misdemeanor criminal history failed to meet its burden to prove Priest's offender score.

The trial court calculated accepted the State's calculation of Priest's offender score as a "9" for the burglary and an "8" for the theft and malicious mischief charges. CP 136. But this calculation was not supported by Priest's stipulation, and relied upon the State's mere allegation about Priest's sentence, together with conjecture as to his release date, as well as unstipulated misdemeanor history. Because the State's allegations fail to meet its evidentiary burden to prove that Priest's prior convictions did not wash out, the offender score is unsupported and the sentence must be vacated.

The court of appeals reviews the calculation of an offender score *de novo*. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). In determining whether the offender score is supported by the record, the reviewing court considers that "the trial court may rely on no more information that is admitted by the plea agreement, or admitted,

acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530.

The burden of providing sufficient evidence to support the offender score rests squarely on the State. In *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), the Washington Supreme Court evaluated the State’s burden of proof to establish the offender score, stating:

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction. While the preponderance of the evidence standard is “not overly difficult to meet,” the State must at least introduce “evidence of some kind to support the alleged criminal history.” Further, unless convicted pursuant to a plea agreement, the defendant has “no obligation to present the court with evidence of his criminal history.” (Internal citations omitted.)

Thus, while evidence of prior convictions need not be substantial, there must be some evidence beyond the assertions of the prosecutor, which are not evidence but are mere argument. *Hunley*, 175 Wn.2d at 911-12.

Here, Priest stipulated to several prior felony convictions, for which he was sentenced no later than 2004. CP 145-46. Under RCW 9.94A.525(2), class B and C felonies are not to be included in the offender score if, since the last date of release from confinement or entry of

judgment and sentence for a felony, the offender has been crime-free in the community for 10 or 5 years, respectively. The facts in the record before the trial court establish that Priest was sentenced for a second degree burglary and two counts of possessing stolen property in the second degree on February 4, 2004. CP 145-46. More than ten years elapsed before Priest was accused of committing the present offenses on or between March 1, 2015 and May 8, 2015. CP 1. Thus, based upon the evidence available to the trial court, no class B or C felonies should have been included in Priest's offender score. Because Priest's convictions were *only* for class B and C felonies, the correct offender score based upon the evidence was a "0," and the standard range for the burglary conviction should have been 1-3 months.<sup>3</sup>

At sentencing, Priest objected to the offender score, arguing that the offenses washed out. RP (Anderson) at 84. However, the State alleged that Priest was convicted of driving with a suspended license in 2009, which precluded the washout, and that Priest was sentenced to 25 months on the earlier burglary and stolen property charges.<sup>4</sup> RP

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<sup>3</sup> Second degree burglary has a seriousness level of III. RCW 9.94A.515. The standard range of 1-3 months is determined by reference to the sentencing grid in RCW 9.94A.510. The theft and malicious mischief convictions carry lower terms and therefore, because the sentences run concurrently, do not affect the length of the sentence.

<sup>4</sup> Presumably, the State sought to show that less than five years elapsed between Priest's release from custody on the 2004 convictions and the alleged 2009 suspended license conviction. But even if the State proved its allegations, more than 5 years elapsed

(Anderson) at 85. But the State presented no evidence to substantiate its claims. Mere allegation is insufficient to meet the State's burden. *Hunley*, 175 Wn.2d at 911-12.

“[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). Because the State's calculation of Priest's offender score is not supported by an evidentiary foundation in the record, the sentence imposed does not comport with minimal due process requirements and must be reversed.

The remedy for the error is to vacate Priest's sentence and remand the case for resentencing. *State v. Wilson*, 170 Wn.2d 682, 691, 244 P.3d 950 (2010). The State should be permitted to present evidence substantiating the offender score on remand. RCW 9.94A.530(2); *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

3. Appellate costs should be denied.

Priest's completed Report as to Continued Indigency is filed contemporaneously with this brief. Consistent with this Court's General

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between the alleged 2009 conviction and the March 1, 2015-May 8, 2015 offense. Accordingly, class C felonies should not have been included in the offender score even if the State had met its burden.

Order dated June 10, 2016 and RAP 14.2, Priest requests that the court decline to impose appellate costs in this case.

**VI. CONCLUSION**

For the foregoing reasons, Priest respectfully requests that the court REVERSE his convictions or, in the alternative, VACATE his sentence, and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 12 day of February, 2018.

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

## DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Jason Lee Priest, DOC # 980635  
Airway Heights Correction Center  
PO Box 2049  
Airway Heights, WA 99001

Jeffrey S. Barkdull  
Lincoln County Prosecuting Attorney  
450 Logan  
PO Box 874  
Davenport, WA 99122

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 12 day of February, 2018 in Walla Walla,  
Washington.



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Andrea Burkhart

**BURKHART & BURKHART, PLLC**

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**Transmittal Information**

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