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Division III
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NO. 35230-7

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

STATE OF WASHINGTON
PLAINTIFF/RESPONDENT,

V.

BRANDON WILLIAM CATE
DEFENDANT/APPELLANT

AMENDED BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

1. Procedural History

A. Charging

On January 31st 2017, the Defendant was booked into the Okanogan County Jail and held in relation to a number of burglaries. For the at issue, 17-1-00039-4, the State filed an Information on February 1st 2017, charging the Defendant with one count of Burglary in the Second Degree, one count of Malicious Mischief in the Second Degree, and one Count of Theft in the Second Degree. [CP 4, 5].

B. Jury Trial

3.5 Hearing

A CrR 3.5 “confession hearing” was held on April 5th 2017 and April 11th of 2017. [RP 65-73]. The Court ruled that the Defendant’s admissions to Officer Bowling were Constitutionally admissible. [CP 49]. The findings of facts and conclusions were incorporated for all of the Defendant’s cases. [RP 32-46], and [RP 48-62].

Summary of Trial Testimony

Sergeant Tony Hawley

Sergeant Hawley testified that on the morning of 12/10/2016 he responded to a burglary complaint. The reported burglary was at the 'Flying B' gas station/convenience store in the city of Okanogan. Once he arrived at the scene, Sergeant Hawley noticed that the front entry-glass door was broken out. Just inside of the store was a shattered display case. The display case normally held smoking paraphernalia such as e-cigarettes and various glass smoking devices. Sergeant Hawley interviewed the reporting party, store clerk Jeatinder 'Jeet' Kaur; as well as the owner, Gagandeep 'Deep' Baines (Singh). Jeet Kaur provided Sergeant Hawley with itemized values for the various missing items and their values. [RP 170, 171]. The value of these stolen items totaled \$657. Sergeant Hawley testified that this estimate did not include \$100 in stolen cash because no cash was initially reported missing. [RP 174, 175].

Sergeant Hawley took photographs of the shattered door and display case. He photographed a hammer that was on the ground next to the broken glass. [CP 4- 17]. Sergeant Hawley also photographed a number of footprints and bicycle tracks that were left in the snow surrounding the building. Sergeant Hawley questioned the store owner about the value of the damage. The owner, Gagandeep Baines estimated

that the value of the damaged front door was around \$1,000 while the value of the display case was around \$200.

Jeatinder Kaur

Jeatinder 'Jeet' Kaur testified that she works at the Flying B gas station. She described how they sold gasoline, food, glass pipes, and items like cigarettes. She stated that on 12/10/2016 she went to work and discovered that the door was broken open. There was broken glass and a hammer on the floor of the gas station. Kaur looked to see what was missing, and saw pipes, baggies and other items were missing. She said that once the police arrived she figured out exactly what was missing, and knew what the pricing was. When tested about a number of the stolen items that she reported missing to Sergeant Hawley- she confirmed her valuation of a sampling of those items.

Deputy Terry Shrable

Deputy Shrable testified that on 1/20/2017 he spoke with Malynda Fry at the County Jail. Deputy Shrable was aware of the Flying B burglary, and asked Fry if she knew anything about that crime. Deputy Shrable related that she told him about how Brandon Cate had arrived at her house, asked for a hammer, changed his clothes, rode away on a bike,

and returned later on with property (consistent with the property that was reported stolen).

Deputy Shrable said that he was aware that William Christopher Taylor lived with Malynda Fry at the time of the burglary. Deputy Shrable then spoke to Taylor (also in the jail). Deputy Shrable later testified (after Taylor's testimony) that Taylor had described to him in detail about how the Defendant showed up on a bicycle, and how Taylor said he helped the Defendant change into winter clothing. The Defendant told Taylor he was on his way to get some pipes, pointed to the South, left the location, and returned later on with pipes, scales and baggies. The Defendant told Taylor that he was doing this because of settling a debt with someone named 'Grams' [RP 237].

Malynda Fry

Malynda Fry testified that she was the Defendant's former girlfriend. She said she remembered living at her father's house on December 10th [2016], staying with her current boyfriend William Christopher Taylor. She said that this house is about four blocks from the Flying B. She recalled that the Defendant came by the house and changed into some winter boots. She said that the Defendant explained that he was going to commit the crime because his girlfriend had spent some money at

the casino and he had to pay someone back. She remembered the Defendant coming over to her house after the event, and showing her a number of marijuana pipes that he displayed on the floor. She said she took one of the pipes for herself, and gave the Defendant a ride into town.

Deputy Isaiah Holloway

Deputy Holloway stated that he was present when Malynda Fry explained to Deputy Shrable about the Defendant's involvement in the Flying B burglary. He admitted that he didn't ask her any questions about her involvement in the burglary.

William Christopher Taylor

Taylor testified that he was the Defendant's friend, and Malynda Fry's girlfriend. He explained that he remembered the Defendant coming by Malynda Fry's house on December 10th 2016. He said that he helped the Defendant into some shoes, and the Defendant left the house and returned about an hour later. On direct examination, Taylor initially said he didn't remember much of this incident. He then admitted that he really didn't want to testify against his friend, but that he had previously given a much more thorough account of the incident to the Sheriff's Deputy [Shrable], and that he had recently affirmed this account was accurate.

Taylor remembered telling them that the Defendant arrived on a bicycle, and that the Defendant said he was doing this [crime] because he had to pay back \$20 for a debt related to him and his girlfriend losing \$20 at the local casino. He admitted to helping the Defendant into some winter boots prior to the Defendant taking off. He explained that the Defendant returned with about a dozen weed pipes, a torch or two, and possibly a scale. William Taylor admitted that he was probably high on methamphetamine and marijuana on the date of this incident.

Officer Brien Bowling

Officer Bowling testified that he and Deputy Shrable interviewed the Defendant on 1/28/2017 at the Omak police station. Officer Bowling said that initially the Defendant would not respond to questioning, but after Deputy Shrable left he opened up and started to talk. Officer Bowling said he (Officer Bowling) wasn't particularly aware of the details of the Okanogan Flying B burglary, but did ask the Defendant about it. The Defendant told Officer Bowling that he was responsible for the burglary. The Defendant explained that he'd broken the glass door with a hammer, took \$100 in cash, glass pipes, baggies, scales, and e-cigarettes. Officer Bowling admitted that this confession was not recorded by tape recorder or video.

Verdict

On April 11th 2017, the jury returned a verdict of guilty as charged. Sentencing was scheduled for April 19th 2017 in front of the Honorable Judge Culp. The date of April 19th 2017 was also the sentencing date (previously scheduled) for one of the Defendant's other burglary case 17-1-00040-8.

C. Sentencing Hearing

The Defendant was sentenced on April 19th 2017 for the case of 17-1-00039-4 as well as 17-1-00040-8 (case involving the Defendant burglarizing properties in the city of Omak).

The State's initial sentencing recommendation involved a recommendation of consecutive sentencing for both cause numbers, where each cause number would "score" against each other. In this scenario the Defendant would be "maxed out" in his standard range. [RP 294]. The State described how both cause numbers were entirely different events. The State then acknowledged the Court's concern that it would probably not be appropriate to consecutively sentence the Defendant for these separate and distinct crimes if they were both to score against each other.

The Defense briefly stated that they preferred concurrent sentences. The Defense then said that if consecutive sentences on each cause number were imposed, that the Court should be careful to not have the cases in both cause number scored against each other.

The Court then sentenced the Defendant within the standard range on each cause number, 17-1-00039-4 as well as 17-1-00040-8. The sentences were consecutive to one another. [RP 321- 322]. In calculating the offender score, the points for each cause number were not included in calculating the points for the other. [CP 11].

ARGUMENT

A. There was Sufficient Evidence to Support a Conviction of Malicious Mischief in the Second Degree

In arguing sufficiency of the evidence, all reasonable inferences from the evidence must be drawn in favor of the State, and interpreted most strongly against the Defendant. Here the jury heard through Sergeant Hawley that the gas station/shop owner Gagandeep Baines arrived at the scene of the crime, and looked at the damage to both the front door and the destroyed display case inside of the store. The store owner estimated that the cost to repair the destroyed door would be about \$1000, while the cost to repair the display case about \$200. [RP 171, 172].

Sergeant Hawley took a number of photographs of this damage. These photographs were offered and admitted into evidence as Exhibits 4 through 11. The photographs depict a completely shattered window. The photographs also reveal that the display case is completely shattered and unserviceable.

The jury was informed by the pattern instructions that they could use common sense and experience in evaluating the evidence. The jury was accurately instructed that in calculating the value of damage they should consider the diminution of value, as well as the replacement cost. [RP 265]. The State's argument to the jury was that it was the jury's duty to decide whether the costs for labor, materials, and the complete diminution in value would exceed \$750; and if they did not believe this was proven, then they should find the Defendant guilty of the lesser included offense of Malicious Mischief in the Third Degree. [RP 281 – RP 283].

The Defendant asks this court to reverse the conviction because the estimate of damage of \$1200 was presented through hearsay evidence and was not documented. *Appellate Br. at 12*. While this is an appropriate argument before the trier of fact, it is contrary to the acceptance of the State's evidence and construing inferences in favor of the State. The Defense relies on *State v. Williams*. That case is distinguishable as it was

a Possessing Stolen Property Second Degree case that involved a jury determination of the valuation of fair market value for an item. The only evidence in that case of valuation was a witness stating that they could “guess” a “value” of \$800; without any other support. Essentially, there was no actual testimony that the *fair market value* exceeded \$750. State v. Williams, 199 Wn. App. 99, 107, 398 P.3d 1150, 1154 (2017).

In the present case the jury was presented with a rough estimate of \$1200 for the damage to the door, display case, and the costs to repair them. This rough estimate was made the day that the damage was discovered by the proprietor of the business. The jury was shown the damage to these items, and asked to consider the diminution in value along with the replacement costs. Assuming the truth of the State’s evidence, it was a reasonable inference for the jury to conclude that the shattered door to the business was unusable, as was the shattered display cabinet. The diminution in value would be added to the costs to replace the glass door and display case. That replacement cost would involve material and labor costs. Given the testimony at trial, the jury’s finding that the value of damage and replacement exceeded \$750 was reasonable and should not be disturbed.

B. There was Sufficient Evidence to Support a Conviction Theft in the Second Degree

The standard of review on a challenge to the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Mines, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); State v. McPherson, 111 Wn.App. 747, 756, 46 P.3d 284 (Div. 3, 2002). When the sufficiency of evidence is challenged on appeal, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201; McPherson, 111 Wn.App. at 756. 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 201; Mines, 163 Wn.2d at 391; McPherson, 111 Wn.App. at 756.

The evidence in this case was sufficient for a rational trier of fact to find that the Defendant stole a combination of cash and goods that exceeded \$750.

The Defense position is essentially that the reporting party did not initially report a theft of cash; but instead only reported a theft of goods that amounted to a value of \$657. This is correct. However there was also

testimony that the Defendant admitted to stealing \$100 cash, in addition to the various drug paraphernalia he stole.

1. The Defendant's Confession to Stealing \$100 was Admissible under the rule of *Corpus Delecti*.

The defense argues that this admission to stealing \$100 cannot be considered as evidence, because of the rule of the application of *corpus delecti*. *Appellate Br. at 19*. The defense acknowledges that this *corpus delecti* argument was not made at the trial court level, and correctly states that it can now be raised on appeal. See *State v. Cardenas-Flores*, 189 Wn.2d 243, 263, 401 P.3d 19, 29 (2017). The *Corpus* is satisfied when there is independent corroboration, apart from a Defendant's confession:

The confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti*, but if there is independent proof thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession

State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210, 218 (1996)

In this case multiple witnesses provided testimony that corroborated the whole of the Defendant's confession. This was presented by Sergeant Hawley, Malynda Fry, William Taylor and Jeatinder Kaur.

All saw combinations of damaged property that the Defendant admitted to destroying or saw the actual stolen property that he admitted to stealing.

While it is true that there was no specific testimony about \$100 cash being immediately found missing, this does not undermine the broad corroboration of the whole of the Defendant's confession. In other words, every single specific admission of the Defendant's confession does not need to be independently corroborated for the prima facie case of admissibility. "*Prima facie*" in this context means there is "evidence of sufficient circumstances which would support a logical and reasonable inference" of the facts sought to be proved." *State v. Aten*, at 656.

Witnesses Fry and Taylor saw the Defendant immediately prior to the burglary and helped him into shoes. The Defendant told them he was going to get some pipes, and pointed toward the south, in the direction of the Flying B. He left on a bicycle. He returned about an hour later and was sweaty. He had glass marijuana pipes, e-cigarettes, and other paraphernalia with him. Sergeant Hawley testified that he saw bicycle tracks in the snow around the Flying B, that led North toward the house where witnesses Fry, Taylor, and the Defendant said they had been. Sergeant Hawley observed the shattered door window, shattered display cabinet, and missing items from the store. Jeatinder Kaur confirmed that e-cigarettes, pipes, and other items were missing. This substantial

corroboration is more than sufficient to admit the Defendant's confession; which was consistent with all of the witnesses' testimony. A *prima facie* case for the admissibility of the defendant's statements is easily satisfied. Because it is satisfied, there is no basis for the reviewing Court to isolate and exclude a component of the confession.

2. The Defendant's Confession to Stealing \$100 was Properly Considered by the Jury

The Defense asks this Court to retroactively suppress the Defendant's admission to stealing \$100, because the State did not include this in the "to wit" language in the charging document. *Appellate Brief at 18*. There has been no showing that the Defendant was not on notice of the nature of his charges. He was charged with Theft in the Second Degree under RCW 9A.56.040(1)(a) and RCW 9A.56.020(1)(a). [CP 37].

The charging document is not substantive evidence for the case. The purpose of the document is to inform the accused of the charges against him or her and to allow the defendant to prepare a defense. *State v. Zillyette*, 178 Wn.2d 153, 158 (2013). Although not required, the State included allegations of some of the items that the defendant stole in the "to wit" language. The Defendant was still charged with a theft of items exceeding \$750. The filed documents in support of probable cause note

that the Defendant was booked on Theft Second Degree because: “*RCW 9A.56. 040 Theft 2d Degree (total of items and cash taken from store: \$777.00)*” [CP 7]. There is no basis for the reviewing Court to remove evidence of the Defendant’s theft of \$100. The Defendant was properly advised of the allegations against him and the anticipated evidence.

3. The Jury was Presented with Evidence that the Defendant stole a Combination of Goods and Cash that Exceeded \$750.

The jury heard evidence through Sergeant Hawley, that the Defendant acquired goods valued at \$657. This valuation was done by Jeatinder Kaur at the time of the initial investigation. [RP 174,175]. Sergeant Hawley again tallied up the items during the trial, on the witness stand, and reached \$657 as the value of acquired goods. He noted that when completing his report, he wrote the values as they were read to him by Kaur and included them in his report accurately. He specifically testified that this did not include \$100 cash. The State then asked Ms. Kaur about some of those items and some of those values. She confirmed that the store sold pipes, baggies, e-cigarettes, scales, and bongs there. She said English was not her first language, but she explained the retail value of those items and what they were to Sergeant Hawley. [RP 186 –

197]. The jury later heard from Officer Bowling that the Defendant admitted to stealing among other things, \$100 in cash. [RP 242].

In summary, the jury heard evidence that the Defendant stole a combination of cash and stolen goods that amounted to \$757 in value. A claim of insufficiency admits the truth of the State's evidence, and all inferences reasonably drawn therefrom. The jury's evaluation of the presented evidence should not be disturbed.

C. The Defendant Received Effective Assistance of Counsel.

The Defense on appeal argues that trial counsel, Jason Wargin, was ineffective because he chose not to object to the hearsay statements of Gagandeep Baines, or the hearsay statements of Jeatinder Kaur.

Our courts strongly presume that trial counsel's representation was effective. *State vs. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). The burden is on the Defendant to overcome the strong presumption of competency and to show deficient representation. *McFarland* at 335. The presumption of effective assistance cannot be rebutted if trial counsel's conduct can be characterized as legitimate trial strategy or tactic. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986), cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Lord*, 117 Wn.2d 829, 885, 822 P.2d 177 (1991).

The defendant must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." McFarland, 127 Wn.2d at 334-35; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct.2052, 80 L.Ed.2d 674, reh'g denied, 467 U.S. 1267, 104 S.Ct.3562, 82 L.Ed2d 864 (1984).

The first prong requires a showing of errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. The second prong requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. Strickland at 694.

A defendant is not denied effective assistance of counsel where the record as a whole shows that he or she received effective representation and a fair trial. State v. Smith, 104 Wn.2d 497, 511, 707 P.2d 1306 (1985). Rather, the defendant must make "an affirmative showing of actual prejudice" demonstrating a manifest constitutional error. McFarland at 334, 338 (n. 2, citing, RAP 2.5(a)(3)).

In determining whether defense counsel was deficient, the court must make every effort to eliminate the distorting effects of hindsight and

must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland* 466 U.S. at 689, see also, *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

The State believes that trial counsel made a tactical decision not to object to Gagandeep Baines statements to Sergeant Hawley regarding the valuation of the damage. First, the Defense was made aware that although Gagandeep Baines was not expected to appear for trial that day, he might have been present if the case proceeded into a second day of testimony. [RP 221]. Even if Baines' statements to Sergeant Hawley were inadmissible for the truth of the matter asserted, they were likely admissible to establish the course of the investigation. An objection to Sergeant Hawley asking about damage would undermine the theory of the Defendant's case, which was that leads were not followed up on, and other suspects were not investigated. This trial strategy involved eliciting hearsay statements from Gagandeep Baines.

Defense trial strategy was to not focus on attacking the estimation of the value of this damage so much as attacking the police for not investigating the value of the damage, or seeking out other suspects. In trial counsel's opening statement, counsel suggested that two witnesses were not investigated (Fry and Taylor), even though those two had strong ties to the time and location of the crime. Attention was made to the fact

that the Defendant's confession was not recorded, and was therefore suspect. [RP 165 - 167].

When questioning Sergeant Hawley on cross examination, Defense counsel drew attention to the fact that Sergeant Hawley spoke with Gagandeep Baines and learned that there were no functioning cameras. [RP 182]. Defense counsel then elicited testimony that Sergeant Hawley did not obtain written documentation that would support Gagandeep Baine's valuation of the damage. Counsel then asked on cross examination if Malynda Fry or Frank Fry were known to the Sergeant, and established that Sergeant Hawley did not actually seek those individuals out as potential suspects.

As for the failure to object to hearsay statements from Kaur, this again was a legitimate trial strategy. Kaur testified immediately after Sergeant Hawley, and when presented with specific questions from both the State and defense counsel- confirmed that the valuation she provided to Sergeant Hawley were accurate. It is also apparent that Jeatinder Kaur was not a native English speaker. She was a gas station clerk who walked into her place of work to discover that it was burglarized. An objection to Sergeant Hawley's testimony regarding Kaur's reporting would only result in a more prolonged questioning of Kaur on direct examination to get the substantive evidence admitted. In fact, the Defense used Kaur's hearsay

statement to their advantage by asking if Sergeant Hawley recalled if Kaur reported to him that cash was missing. Sergeant Hawley replied that she did not, and if she did it would have been included in his report. [RP 183]. In this manner defense counsel was able to emphasize the salient issue later in the case- that proving this crime crucially relied on the Defendant's unrecorded confession, and ruling out other suspects.

Further into the trial, the defense elicited testimony on cross examination that witnesses Fry and Taylor were routinely high on drugs, near the crime scene, had access to the burglary tool (hammer owned by Fry's father). Emphasis was made that subsequent to the crime, these two were placed into custody. [RP 203 and 212]. Their statements to deputies were made in this jail environment (where they did not have access to drugs which they craved). [RP 212 and 237]. The inference was that these witnesses were in fact suspects who had strong motivations to mislead the officers.

In closing argument, the defense insisted that the investigation was faulty, and that although there were other suspects, they were not investigated as suspects. [RP 288]. The defense briefly mentioned in closing that although the property damage estimate was \$1000, there was no supporting work orders, hours worked, or categorization of necessary supplies. The defense mentioned that the evidence was 'not enough.' [RP

290]. However this was the only reference to the valuation of damage. The focus of the closing argument, and trial strategy of a whole was not to challenge the seriousness of the crime (value of damages and stolen items), but to challenge the integrity of the investigation.

Immediately thereafter the defense asked the jury to find the Defendant not guilty on all counts. The defense never argued or suggested that the proposed lesser included offenses of Malicious Mischief in the Third Degree or Theft in the Second Degree were appropriate option. This again was consistent with trial counsel's strategy of arguing that the Defendant in fact did not commit these crimes at all. This was also consistent with trial counsel's strategy of permitting hearsay statements from Kaur and Baines into trial. It permitted trial counsel to focus less on undermining the seriousness of the crime, but rather to draw attention to perceived errors in the investigation and interrogation of the Defendant.

In the present case, the Appellant has failed to demonstrate that counsel's representation was deficient in any way. There is no reasonable probability that but for trial counsel's decision to forgo a questionable objection, the result of the trial would have been different. The Defense has failed to demonstrate that trial counsel's performance was not based on legitimate strategy or that the allegedly deficient performance prejudiced the Defendant. Both of these two prongs must be met for an ineffective

assistance argument to prevail. *See State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). Both prongs have not been met.

Because the Defendant cannot demonstrate that trial counsel's actions were not based on legitimate trial strategy, or that any alleged error affected the outcome of the trial, this court should affirm the Appellant's conviction.

D. The Defendant was Sentenced Appropriately

The Defendant was convicted for two unrelated cause numbers, on two separate days, by two different juries. In both cases, 17-1-00040-8 and 17-1-00039-4, the presiding Judge was Christopher Culp. For scheduling purposes, it was decided that 17-1-00040-8 should be heard on the date that was previously scheduled for sentencing, 17-1-00039-4. [RP 308].

The Defendant argues that because sentencing for these cause numbers happened to occur at the same time, that it was error for the sentences to not run concurrently. The State would agree that there *would* have been error had these cause numbers been current offenses. In that case a finding under RCW 9.94A.589 is necessary. However, the offenses here are not current offenses. They are completely different crimes that occurred on completely different days and were filed under different cause

numbers, and went to different juries. This was acknowledged by the sentencing Judge. [RP 321].

The Defense relies primarily on *In Re Finstad* to support the argument that both cause numbers are current offenses. *In re Finstad*, 177 Wn.2d 501, 505, 301 P.3d 450, 452 (2013). The distinction is that *Finstad* involved a scenario where there was a plea agreement, and the Defendant plead guilty in four separate cause numbers, and was sentenced on the same day according to a plea agreement.

In the current case, it just happened that for scheduling purposes the two cause numbers were addressed on the same day. That made sense given that trial counsel and the Court were available. Although the cases happened to be addressed on the same day for sentencing, this alone is not sufficient for a reviewing Court to determine that the trial Court erred when the trial court concluded that these events were distinct, and thus should have been sentenced (and scored) separately.

Even if the reviewing Court was to rely on *Finstad* to the extent that it found error to not consider the two cause numbers current offenses, this error would not be a constitutional error.

In this case, the trial court's failure to make the finding appears to us to be nonconstitutional error. Accordingly, Finstad would be entitled to relief only if he establishes he has suffered from a complete miscarriage of justice. [internal cites omitted]. But even assuming that this error

was of constitutional magnitude under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), Finstad still must show actual and substantial prejudice flowing from that error...Any error here could have been avoided by simply scheduling the entry of the pleas for two successive days. Actual and substantial prejudice is made of sterner stuff.

In re Finstad, 177 Wn.2d 501, 508–09, 301 P.3d 450, 453–54 (2013)

Like *Finstad*, if there was an error with the Defendant's two cases, it would have been addressed by simply scheduling sentencing hearings on two different days. (which would have been less convenient for the parties and Defendant). This is not an error (and the State does not concede error) of Constitutional magnitude. Because there is no actual and substantial prejudice from any error, the Court should affirm the Trial Court's sentence.

CONCLUSION

For the aforementioned reasons, the State asks that this Court affirm the Defendant's conviction and sentence.

Dated this 14th day of May, 2018

Respectfully Submitted:

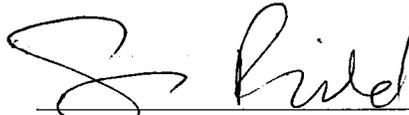

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I, Shauna Field, do hereby certify under penalty of perjury that on the 14th day of May, 2018, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Amended Brief of Respondent:

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