

FILED  
Court of Appeals  
Division III  
State of Washington  
9/27/2018 4:11 PM

NO. 35361-3-III

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

---

BRANDEN E. PLATTER  
Prosecuting Attorney  
237 4th Avenue N.  
P.O. Box 1130  
Okanogan County, Washington

509-422-7280 Phone  
509-422-7290 Fax

Leif Drangsholt  
WSBA #46771  
Deputy Prosecuting Attorney

**TABLE OF CONTENTS**

STATEMENT OF THE CASE.....1

Procedural History.....1

First Jury Trial.....1

Jury Deliberations and Mistrial.....3

Second Jury Trial.....5

Sentencing.....5

ARGUMENT.....7

    A. The Court Properly Declared a Mistrial..... 7

    B. The Defendant was Sentenced Appropriately .....10

CONCLUSION.....12

**TABLE OF AUTHORITIES**

**US Supreme Court**

*Renico v. Lett*, 559 U.S. 766, 775, 130 S. Ct. 1855, 1863–64, 176 L. Ed. 2d 678 (2010).....8

**Washington State**

*State v. Fish*, 99 Wn.App. 86, 90, 992 P.2d 505, 507–08 (1999).....9

*State v. Jones*, 97 Wn.2d 159, 164 641 P.2d 708 (1982).....7, 10

*State v. Melton*, 97 Wn.App. 327, 331, 983 P.2d 699, 702 (1999).....9

*State v. Robinson*, 46 Wn.App. 471, 476, 191 P.3d 906, 909 (2008).....7

*State v. Strine*, 176 Wn.2d 742, 754, 293 P.3d 1177, 1182 (2013).....8

*State v. Tili*, 148 Wn.2d 350, 360, 60 P.3d 1192, 1197 (2003).....12

**Rules of Professional Conduct**

RPC 3.3.....11

**Appendices**

Appendix A: Clerk’s Minutes 4/6/17 Jury Trial

Appendix B: Jury Inquiry

Appendix C: State’s Sentencing Memorandum

## **STATEMENT OF THE CASE**

### **1. Procedural History**

#### **A. Charging**

January 31<sup>st</sup> 2017, the Defendant was booked into the Okanogan County Jail and held in relation to a number of burglaries in the Omak-Okanogan area. One of these cases involved the Defendant breaking into the Omak JC Penney's store and stealing a quantity of jewelry. This was charged as 17-1-00046-7 as Burglary in the Second Degree, Theft in the Second Degree, and Malicious Mischief in the Second Degree. [CP 4]

#### **B. First Jury Trial**

The Defendant's first jury trial was held on the day of 4/5/2017 and 4/6/2017.

#### **Trial Testimony- Day 1**

Officer Reyes of the Omak Police Department testified that on 12/6/2016 he learned that the jewelry display case alarm had gone off at the local JC Penney's. When Officer Reyes responded he saw that the store's front door was shattered. Officer Reyes searched inside, and noticed that in the jewelry department the glass display case had been smashed open. A number of jewelry boxes were strewn around and items appeared to be missing. Officer Reyes saw that the fingertip to a latex

glove was inside of the display case. Some blood was also located on and within the shattered display case. Officer Reyes took a swab of this blood and had it sent to the Washington State Crime Laboratory for testing. The Crime Laboratory was unable to test the blood by the time of trial. Officer Reyes stated there were no significant leads in the investigation until Officer Bowling contacted the Defendant. [RP 90 – RP 99]

Omak Police Officer Brien Bowling testified that he and another officer arrested the Defendant on 1/28/2017. They transported him to the police station for questioning. Eventually the Defendant confessed to Officer Bowling that it was he who burglarized the JC Penney's store. The Defendant explained that he thought he could make around a quarter of a million dollars with this burglary. He told Officer Bowling that he prepared for the burglary by taping the ends of gloves to his fingertips. The Defendant stated that he used a hammer to break into the store, and a hammer to smash the jewelry display case. The Defendant stated he cut his right hand when taking the display boxes. He stated that he took the boxes and ran off to a nearby residential area.

Officer Bowling traveled to the residential area that the Defendant described. He recovered abandoned empty jewelry boxes. These boxes had identifying JC Penney serial numbers. The boxes also had droplets of what appeared to be dried blood. [RP 102 – RP 108]

Store manager Tammy Stillwaugh testified as to the condition of the store when it was burglarized. She described the costs of replacing the shattered front doors and the shattered jewelry display case: \$1,156.00. She testified that she conducted a thorough inventory and determined the retail value of the missing jewelry. That amount totaled over \$3,000.00. [RP 75 – RP 90]

### **Closing- Day 2**

On the second day of trial the parties presented their closing arguments. Defense counsel emphasized that there was no corroboration that the blood on the display case was the Defendant's blood. The defense also challenged the lack of audio recording of the Defendant's confession. [RP 162- 168]

### **Jury Deliberations and Mistrial**

The jury was excused for deliberation at 10:12 a.m. The admitted exhibits were submitted to the jury at 10:20 a.m. *Appendix A: Clerk's Minutes 4/6/17 Jury Trial.*

At 11:40 a.m. the presiding juror sent a written inquiry to the Judge. The inquiry read "what if we can't unanimously agree on a verdict?" [RP 186] and *Appendix B: Jury Inquiry.* The Judge replied to the jury at 11:47 a.m by writing "Is there a reasonable chance of reaching verdicts if you continue to deliberate for an additional reasonable period of

time? Yes or No?” The jury replied by circling “No” and returning the questionnaire to the Judge. [RP 186]

At 12:20 p.m. the Court went into session again. The Court explained to the trial attorneys what had occurred regarding the jury inquiry and the Court’s response. The Court stated that it would be appropriate to declare a mistrial if the presiding juror was to confirm that they could not reach a verdict. The Court asked if the State or Defense would like to put anything on the record. Neither party did so, except the State asked to clarify when the jury recessed for deliberations. The Court stated that the jury had been deliberating for around two hours, and observed that there was not a lot of specific information presented in the case. The Court noted that the actual testimony was relatively brief, and that it did not seem likely that the jurors were going to change their minds. [RP 186 – RP 188]

The Court called in the jury and explained to the presiding juror that the Defendant was charged with three counts along with a “lesser included” count. The Court asked if in the opinion of the presiding juror, there was a reasonable chance of reaching verdicts on any of the counts if they were to continue deliberating for a reasonable amount of time. The presiding juror replied “no.” The Court then declared a mistrial. [RP 188 – RP 189]

### **Second Jury Trial**

On 5/31/2017 the second trial commenced. The testimony presented was essentially the same, with the exception of an additional witness, forensic scientist William Culnane. By the time of this second trial the DNA evidence was processed. The jury heard testimony from Officer Bowling that after the Defendant confessed to the burglary, Officer Bowling collected the Defendant's saliva pursuant to a search warrant. This sample of the Defendant's saliva was sent to the State Crime Laboratory. Forensic Scientist Culnane compared a DNA profile from the Defendant's saliva to a DNA profile from the blood that was recovered inside JC Penney's store. The DNA profiles were the same. [RP 228 – RP 240]

The Defendant testified that he never confessed to the crime, and that he was not responsible for the burglary. [RP 301 – RP 211] The jury returned a verdict of guilty as charged on all three counts.

### **Sentencing**

The Defendant was sentenced on 6/2/2017. The Court reviewed the State's Sentencing Memorandum, and the Defense indicated that they had received and reviewed the State's sentencing Memorandum. [RP 372].

Within the State's sentencing memorandum, the State indicated the Defendant's prior felony convictions. The State indicated that his three prior felony convictions for which he was sentenced on May 8<sup>th</sup> 2006, did not "wash out" because of subsequent misdemeanor criminal history.

The memorandum detailed particularized facts of the Defendant's subsequent felony convictions. The State identified his prior burglary conviction from May of 2015 in Okanogan County case 15-1-00031-2. The State then summarized the Defendant's recent convictions in Okanogan County from April 2017 by cause number. These were 17-1-00039-4 and 17-1-00040-8. The memorandum described the sentences imposed in these two cases. The memorandum indicated that based on his prior felony convictions and current offenses, the Defendant was at a "score" of 9+ for each count. The memorandum further detailed that the total "points" actually amounted to 16 on the controlling charge of burglary (based on burglary convictions double scoring), and 12 on the other two charges. [CP 90]

The State orally represented to the Court that it calculated the Defendant's offender score by viewing prior plea agreements, judgement and sentences, the National Crime Information Center, and the Defendant's criminal history (Judicial Information System). The State

recommended a sentence at the high end of the standard range. [RP 372 – RP 375]

The Defense asked for the low end of the standard range sentence on the controlling charge of burglary: 51 months. 51 months is the low end of the standard range for a score of 9+ on the controlling charge of Burglary in the Second degree. The Court ultimately sentenced the Defendant to the middle of the standard range. [RP 375 – RP 381]

## ARGUMENT

### **A. The Trial Court Properly Declared a Mistrial**

The Constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. A Defendant may be subject to double jeopardy in a situation where a mistrial is erroneously declared. *State v. Jones*, 97 Wn.2d at 164, 641 P.2d 708. An example is the case of *State v. Robinson*, where a judge declared a mistrial once it learned that the bailiff responded to a jury a question regarding a review of specific items of evidence. *State v. Robinson*, 46 Wn. App. 471, 476, 191 P.3d 906, 909 (2008). In *Robinson* the Court declared a mistrial without finding a factual basis for juror misconduct, bailiff misconduct, or determining appropriate remedies. *Id* at 481.

A genuinely “hung jury” *is* a valid basis for a Court to declare a mistrial. A “mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.” *Id.* at 509, 98 S.Ct. 824. *State v. Strine*, 176 Wn.2d 742, 754, 293 P.3d 1177, 1182 (2013).

There is no minimum period of time that a jury is required to deliberate on a verdict.

We have also explicitly held that a trial judge declaring a mistrial is not required to make explicit findings of “‘manifest necessity’ ” nor to “articulate on the record all the factors which informed the deliberate exercise of his discretion.” *Washington, supra*, at 517, 98 S.Ct. 824. And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse.

*Renico v. Lett*, 559 U.S. 766, 775, 130 S. Ct. 1855, 1863–64, 176 L. Ed. 2d 678 (2010).

When a Court declares a mistrial due to jury deadlock, the decision should be accorded great deference by the reviewing court. When a jury acknowledges through its foreman, and on its own accord, that it is hopelessly deadlocked, there is a factual basis sufficient to constitute the “extraordinary and striking” circumstance necessary to justify discharge.

Some of the factors a judge should consider in determining whether to discharge the jury include the length of deliberations in light of the length of the trial, and the volume and complexity of the issues. *State v. Fish*, 99 Wn. App. 86, 90, 992 P.2d 505, 507–08 (1999). The trial court is not necessarily required to make express findings of “manifest necessity” *State v. Melton*, 97 Wn. App. 327, 331, 983 P.2d 699, 702 (1999).

In the instant case the jury received the admitted exhibits at 10:20 a.m. It was approximately one and a half hours later when they submitted their inquiry to the Court regarding their inability to reach a verdict. The Court answered the inquiry by inquiring if they could reach a verdict if given a reasonable amount of time. The Court’s question was answered in the negative. Half an hour later, the presiding juror confirmed in open Court that they the jury would not come to a verdict even if given additional time.<sup>1</sup>

The full record indicates that the jury was deliberating somewhere between one and a half and two hours; *not* half an hour. Regardless of the length of time, the Court acknowledged that the presented evidence was not particularly complex, and that additional time would probably not

---

<sup>1</sup> Appellate Counsel suggests that the jury was almost certainly on lunch time during the deliberation period. This assumption is unsupported and without merit.

break the deadlock. *Cf. State v. Jones*, 97 Wn.2d 159, 165, 641 P.2d 708, 713 (1982).

As the Trial Court indicated, the jury likely came to a fundamental disagreement on an uncomplicated case. The disagreement between jurors was unlikely to be resolved with additional time. The Court correctly indicated that there is no set period of time for a jury to deliberate. Neither party disagreed. The Court appropriately considered the various factors and properly declared a mistrial.

**B. The Defendant was Sentenced Appropriately in Accordance with his Offender Score**

The Defendant on appeal argues that the State did not provide sufficient evidence of his prior convictions when it calculated his offender score. The Defendant does not argue that the score was incorrectly calculated, but still asks that the case be remanded so that the Defendant can be rescored as having no criminal history.

The State largely disagrees with this characterization. The State's memorandum referred to several prior felony convictions from 2006, noting the dates of sentencing and the crimes. The State noted that these convictions were supported by evidence in the form of plea agreements and a review of multiple subsequent judgement and sentences.

The State indicated in its sentencing memorandum that it had reviewed the Judgment and Sentences, among other materials that supported the Defendant's more recent convictions out of Okanogan County Superior Court. The State then provided the cause numbers and details of the two recent cases that the Defendant had been sentenced to just seven weeks prior to sentencing in the instant case.

Trial counsel did not challenge the results of those two cases, which were accurately detailed in the State's sentencing memorandum. A challenge to the outcome of those cases would have likely violated RPC 3.3. Immediately after the State presented its sentencing recommendations and explained the Defendant's offender score, trial counsel requested that the trial Court sentence the Defendant using the same offender score (9+).

*Even if* it can be considered error for the Sentencing Court to adopt the criminal history of the Defendant with insufficient inquiry or inviting Defense counsel to contest the calculation- it was harmless error. It is noteworthy that at sentencing, Trial Counsel asked for a sentence that was consistent with a score of 9+ on the controlling charge of Burglary in the Second Degree. This was an implicit acknowledgement that the Defendant was indeed "maxed out" at his offender score. Appellate Counsel has not identified any error in the calculation of the Defendant's

offender score, but merely states that sentencing was improper because the State never produced sufficient evidence of the Defendant's score (even though it was agreed, and remains uncontested on appeal). The remedy for such an error would not be to resentence the defendant with a score of zero as Appellate Counsel requests. This would amount to the reviewing Court remanding a case for the purpose of imposing an *inaccurate* sentence, without the procedural step that the Appellate Counsel says is necessary. See State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192, 1197 (2003).

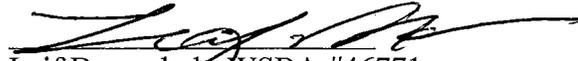
Because the Defendant's offender score was correctly calculated (there is no assertion that it was not accurately calculated), there is no basis for the reviewing Court to remand the case for resentencing. The Defendant's conviction and sentence should be affirmed.

### **CONCLUSION**

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

Dated this 26<sup>th</sup> day of September, 2018

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'Leif Drangsholt', written over a horizontal line.

Leif Drangsholt, WSBA #46771  
Deputy Prosecuting Attorney  
Okanogan County, Washington

# **Appendix A:**

## **Clerk's Minutes 4/6/17 Jury Trial**

Time	Speak	Note
9:03:01 AM	CRT	CALLS CASE REVIEWS INSTRUCTIONS WITH PARTIES ASKS ABOUT OBJECTIONS
9:04:27 AM	DRAG SHOL T	NONE
9:04:32 AM	CRT	ASKS DEFENSE
9:04:38 AM	WARG IN	NO
9:04:51 AM	CRT	REVIEWS WHAT THE INSTRUCTIONS WERE GIVEN FROM EACH PARTY TALKS ABOUT PRIOR CONVICTIONS
9:05:21 AM	WARG IN	ONE OTHER MATTER CORPUS MOTION TALKS ABOUT NO EVIDENCE AND ASKS ABOUT A MOTION TO DISMISS
9:06:09 AM	DRAG SHOL T	THAT MIGHT BE THEN EXPLAINS ABOUT THE CRIME AND BLOOD HAND AND BLOOD ON ITEMS RECOVERED THEN CONTINUES TO EXPLAIN
9:06:51 AM	CRT	MR CATE YOUR ATTORNEY HAS ASKED ABOUT DISMISSING THE CHARGES BASED UPON THE LINE OF CASES THEN EXPLAINS THIS TO HIM IN THIS CASE THERE IS EVIDENCE THAT A CRIME WAS COMMITTED BASED UPON THE POLICE BEING CALLED AND WHAT THEY FOUND EXPLAINS THIS TO ALL THERE IS EVIDENCE OF A CRIME THE MOTION IS DENIED
9:09:25 AM	DRAG SHOL T	3.5 FINDINGS AND FACT
9:09:33 AM	CRT	THANK YOU COURT SIGNS ORDER
9:10:07 AM	JURY IN	
9:11:21 AM	CRT	WELCOMES EVERYONE BACK THEN EXPLAINS WHAT WILL HAPPEN BEGINS READING JURY INSTRUCTIONS
9:33:40 AM	DRAG SHOL T	BEGINS CLOSING ARGUMENT
9:51:42 AM	WARG IN	BEGINS CLOSING ARGUMENT
9:52:39 AM	DRAG SHOL T	OBJECTION
9:52:44 AM	CRT	OVERRULED
9:52:48 AM	WARG IN	CONTINUES
9:55:58 AM	DRAG SHOL T	OBJECTION

5

Record Certification: I certify that the electronic copy is a correct copy of the original, on the date filed in this office, and was taken under the Clerk's direction and control.  
Okanogan County Clerk,  
by GOZVANBRUNT Deputy - # pages 5 - 4/6/2017 1:52:17 PM

<b>Description</b>	17-1-00046-7 State of WA vs. Brandon Cate Judge Culp/ Clerk Speiker & Groomes
<b>Date</b>	4/6/2017
<b>Location</b>	CRS-CEC

9:56:03 AM	CRT	EXPLAINS WHAT EVIDENCE IS
9:56:11 AM	WARG IN	CONTINUES TO GIVE CLOSING
10:04:46 AM	CRT	STATE
10:05:01 AM	DRAG SHOL T	GIVES REBUTTAL
10:05:32 AM	WARG IN	OBJECTION
10:05:38 AM	CRT	EXPLAINS THE RULES TO JURY
10:05:58 AM	DRAG SHOL T	CONTINUES
10:09:29 AM	CRT	EXPLAINS NEXT STEP ALTERNATE IS INSTRUCTED... NOW INSTRUCTS THE JURY... CELL PHONES ARE TAKEN BY BAILIFF AND WHY...
10:12:32 AM	JURY	OUT
10:13:14 AM	CRT	HAS ALTERNATE SIT BACK IN BOX AND GIVES INSTRUCTIONS TO HIM...
10:15:41 AM	CRT	CONTINUES TO DISCUSS THE EXHIBITS
10:19:41 AM	DRAG SHOL T	REVIEWS OTHER CASES... 17-1-00039-4, 17-1-00040-8, 17-1-00047-5
10:22:24 AM	CRT	THESE ARE ALL LEAVE SET
10:22:39 AM	DRAG SHOL T	YES
10:22:47 AM	WARG IN	YES
10:22:50 AM	CRT	THE COURT WILL MOVE TO CONTINUE RULE 3.2 G. READS THE RULE TO ALL MOTION TO CONTINUE OR THE DEFENDANT WILL THE STATE CHOOSE TO CONTINUE TO MONDAY
10:24:38 AM	DRAG SHOL T	IT IS A DEFENSE CONTINUANCE HE IS UNAVAILABLE DUE TO BEING IN TRIAL AND THAT IS THE BASIS TO CONTINUE
10:25:10 AM	CRT	THAT ASSUMES YOU ARE NOT HERE
10:25:18 AM	WARG IN	THE DEFENSE IS HERE AND WE ARE NOT REQUESTING A CONTINUANCE
10:25:31 AM	DRAG SHOL T	HE CANNOT BE AVAILABLE TO GO ON ALL THREE CASES
10:25:54 AM	WARG IN	THAT POSITION CANNOT BE SUPPORTED
10:26:03 AM	CRT	THAT IS NOVEL AND CREATIVE IDEA IT DOES NOT MATTER
10:26:52 AM	WARG IN	DEFENSE HAS NO WITNESSES

10:27:04 AM	CRT	UNDER CR 3.3 THE COURT ON ITS OWN MOTION USING THE 14 DAY CURE PERIOD RULES THAT THE DEFENDANTS TIME FOR TRIAL 4/21/2017 WILL BE SET FOR TRIAL ON APRIL 11 WE WILL BE BACK FOR READINESS ON MONDAY WE CAN DO THESE BACK TO BACK NEXT WEEK.... GIVES OPTIONS FOR TRIAL SCHEDULE DRAGSHOLT PREPARE THE ORDERS FOR WHEN WE COME BACK IN RECESS
12:20:16 PM	COURT	RECONVENED. AT 11:40 THIS MORNING THERE WAS A QUESTION ABOUT WHAT IF WE CAN'T UNANIMOUSLY AGREE ON A VERDICT, I DIDN'T CONSULT COUNSEL ON THAT AS THERE IS A STOCK ANSWER FOR THAT WHICH I DID SUBMIT TO THEM. THEY RESPONDED THE SAME SO NOW WE SHOULD BRING IN THE JURY TO ASK THEM.
12:22:09 PM	STATE	WHEN DID THEY START TO DELIBERATE
12:22:23 PM	COURT	IT'S BEEN NEARLY 2 HOURS. THERE IS NO SET OF TIME THEY MUST DELIBERATE. THIS CASE WAS NOT PARTICULARLY COMPLEX. I THINK THERE IS DIFFERENCE OF OPINION
12:23:37 PM	JURY	IN
12:24:35 PM	COURT	ADDRESSED THE JURY. MR PARTEN IS THE PRESIDING JUROR. APPARENTLY JURY IS DEADLOCKED. NEED TO CONFIRM A COUPLE OF THINGS. WE KNOW THERE ARE 3 COUNTS AND A LESSOR INCLUDED. 1ST ? JURY NOT ABLE TO AGREE ON ANY OF THE COURTS
12:25:31 PM	JUROR	YES
12:25:34 PM	COURT	SECOND ?. IS THERE A REASONABLE CHANCE TO REACH A VERDICET ON ANY COUNT IF YOU DELIBERATE LONGER
12:26:02 PM	PARTEN	NO
12:26:05 PM	COURT	THEN THE COURT HEREBY DECLARES A MIS TRIAL. WE CAN DEAL WITH THAT. WE START OVER AGAIN IF THE STATE DECIDES THEY WANT TO RE-FILE THAMATTER AND SELECT A DIFFERENT JURY. SO YOUR SERVICE IS DONE AND HEREBY RELEASED FORM ANY OF THE COURTS PREVIOUS INSTRUCTIONS. YOU ARE FREE TO TALK TO WHOMEVER YOU WISH ABOUT THE CASE. YOU DON'T HAVE TO THAT'S YOUR CHOICE BUT I WILL JOIN YOU FOR A FEW MINUTES IF YOU WISH TO TALK TO ME. YOU ARE NOW EXCUSED FOR THE NEXT 6 3 YEARS. YOU ARE THE FIRST JURY WE GET TO DO THIS WITH.
12:30:49 PM	JURY	EXCUSED

12:30:59 PM	RECE SS	
12:54:09 PM	COUR T	RECONVENED. THIS IS A NEW COMMENCEMENT DATE.
12:54:52 PM	STAT E	WE HAVE A NEW ORDER SETTING DATES AS WE WILL PROCEED. TRIAL 05-17-2017. COURT SIGNED ORDER DECLARING A MISTRIAL. COURT SIGNED TRIAL CONTINUANCES ON HIS OTHER 3 CASES. APRIL 21ST NEW OUTSIDE DATE. APRIL 11 TRIAL.
12:58:09 PM	COUR T	NOT SURE WHY THE DEFENDANT IS REFUSING TO SIGN THE ORDER SETTING DATES
12:59:00 PM	RECE SS	

# **Appendix B:**

## **Jury Inquiry**



**SUPERIOR COURT OF WASHINGTON  
COUNTY OF OKANOGAN**

(Clerk's Date Stamp)

FILED

APR 06 2017

OKANOGAN  
COUNTY CLERK

STATE OF WASHINGTON

Plaintiff(s)

vs.

BRANDON WILLIAM CATE

Defendant(s)

CASE NO. 17-1-00046-7

INQUIRY FROM THE JURY  
AND COURT'S RESPONSE

JURY INQUIRY:

*What if we can't agree unanimously  
on a verdict?*

PRESIDING JUROR:

*Randy Porter*

DATE AND TIME RECEIVED:

4/6/17

11:40 AM

COURT'S RESPONSE:

*Is there a reasonable chance of reaching verdicts  
if you continue to deliberate for an additional  
reasonable period of time? Yes w **No?***

JUDGE:

*Chris [unclear]*

DATE AND TIME RETURNED TO JURY:

4/6/17

11:47 AM

# **Appendix C:**

## **State's Sentencing Memorandum**

6

Record Certification: I certify that the electronic copy is a correct copy of the original, on the date filed in this office, and was taken under the Clerk's direction and control. Okanogan County Clerk, by COZvanbrunt Deputy - # pages 6 - 6/6/2017 4:25:55 PM

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

FILED

JUN 02 2017

OKANOGAN  
COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON,

Plaintiff,

vs.

Brandon Cate,

Defendant

NO. 17-1-00046-7

STATE'S SENTENCING  
MEMORANDUM

COMES NOW the Plaintiff, State of Washington, by and through the undersigned Prosecuting Attorney in and for Okanogan County, Washington, and submits this brief pertaining to the defendant's offender score for purposes of sentencing as well as the State's sentencing recommendation.

Dated this 2<sup>nd</sup> day of June 2017.

KARL F. SLOAN  
Prosecuting Attorney  
Okanogan County, Washington

By:

  
Leif Drangsholt, WSBA #46771  
Deputy Prosecuting Attorney

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**A. INTRODUCTION**

In 17-1-00046-7 the Defendant was found guilty at jury trial on 6/1/2017 for one count of Burglary in the Second Degree, one Count of Theft in the Second Degree, and one count of Malicious Mischief in the Second Degree, for crimes that occurred on December 6<sup>th</sup> 2016.

**B. PRIOR CRIMINAL HISTORY**

**1. Prior Non Burglary Felony History**

The Defendant's prior felony offenses include convictions for Assaulting a Law Enforcement Officer, Intimidating a Public Servant, and Felony Bail Jumping from 2006 in Douglas County. The Defendant was sentenced on May 8<sup>th</sup> 2006. These offenses do not 'wash out' because of his subsequent misdemeanor criminal convictions.

**2. Prior Burglary and Theft Felony History**

The Defendant has a conviction from May of 2015 for Burglary in the Second Degree from Okanogan Court case 15-1-00031-2. In that case the Defendant illegally entered a fenced in City Shop associated with Okanogan County PUD. Surveillance video captured him attempting to steal fertilizer and a large quantity of metal. He loaded a large quantity of metal into a bag, but the bag was too heavy for him to transport. He attempted to transport another item in a handcart. The Defendant cut himself in the process of hopping the fence and cutting himself, and tearing his clothing on wire. He was quickly located hiding in another person's RV without permission. He had cuts on his hands, his clothing was torn, and told police that they were quicker responding than he thought. The shoes he was wearing matched footprints at the scene. Despite overwhelming evidence, the Defendant did not accept quick responsibility when the case was filed. He eventually pled guilty the day of trial, but later asked the Court to reduce the sentence after he was convicted.

1 The Defendant was convicted on 4/12/2017 in Okanogan County Court case 17-1-00039-  
2 4. With this event, the Defendant in January of 2017 went over to his friend's house. He told  
3 them he was low on money because he had borrowed money from someone and spent it at the  
4 casino. He borrowed or took a hammer from Frank Fry and told his friends that he going to get  
5 some pipes. He changed into more comfortable winter clothing, biked down the road and  
6 smashed the window of the 'Flying B' gas station. Once inside he smashed a display case- even  
7 though it was unlocked, and stole a large quantity of drug paraphernalia. He left the hammer.  
8 He biked away from the scene, and gave some of the stolen items to his friends. Two weeks  
9 later he confessed to this crime, but did not take responsibility when confronted with the criminal  
10 charges of burglary 2<sup>nd</sup>, Theft 2<sup>nd</sup> and Malicious Mischief 2<sup>nd</sup> Degree. The Defendant was found  
11 guilty at jury trial. While the Defendant argued for concurrent sentencing, the Court followed  
12 the State's recommendation sentenced him at the mid-point of the standard range, 38 months,  
13 consecutive to that imposed in 17-1-00040-8.

14 On 4/12/2017 the Defendant was convicted Okanogan County Court case 17-1-00040-8.  
15 In this event, the Defendant walked into a residential neighborhood in search of a petrol can so  
16 that he could siphon gasoline from cars. While looking for a can, he saw a pathway leading  
17 through the snow to a shop. It was Kevin Bowling's tool shop, which was located next to Kevin  
18 Bowling's home. The Defendant broke the window of the shed and went inside. He took  
19 multiple power tools. He took a hose, snaked it through the handles of the tools, and walked off  
20 with them. When he became tired, he stole a wagon from somebody's yard, and went to  
21 Malynda Fry's house. The Defendant told Malynda Fry what he had done. He later made a full  
22 confession to the police.

23 One and a half days later, the defendant hopped the fence at 'Omak Marine' in East  
24 Omak. This was an enclosed area, surrounded by barbed wire fencing. The Defendant stole  
25 cans, and then siphoned gasoline from ATV's. The Defendant's actions were captured on video.  
26 When caught, the Defendant made a full confession. He admitted to stealing the gas, and stated  
27 his motivation was to fuel a truck, so that he could transport a bathtub to the northern part of the  
28 County. The Defendant took no responsibility when charged for the crimes he committed. The

1 Court rejected the Defense request to score 17-1-00040-8 and 17-1-00039-4 together, and  
2 impose concurrent sentencing. The Court noted that because the acts in both cause numbers  
3 were separate days, separate actions, the defendant would effectively not be getting punished for  
4 the full crimes he committed. The Court followed the State's sentencing recommendation and  
5 sentenced the Defendant to the mid-point of the standard range, which was 50 months,  
6 consecutive to 17-1-00039-4. The Court noted that it actually intended to sentence the  
7 Defendant to more than the mid-point of the standard range of 50 months, but that it somewhat  
8 prematurely followed the State's recommendation, which was made after a somewhat  
9 complicated calculation of the Defendant's offender score.

### 10 11 3. OFFENDER SCORE

12  
13 For felony scoring purposes, the Defendant is "maxed out" on all counts.

14 The standard sentencing range on count 1, the Burglary Second conviction is 51 to 68  
15 months with an offender score of 9+. When scoring his felony convictions, with the Defendant's  
16 prior burglaries double scoring, the Defendant has a point score of 16.

17 The standard sentencing range on count 2, the Theft Second conviction is 22 to 29  
18 months with an offender score of 9+. When scoring his felony convictions, with the Defendant  
19 has a prior point score of 12.

20 The standard sentencing range on count 3, the Malicious Mischief Second conviction is  
21 22 to 29 months with an offender score of 9+. When scoring his felony convictions on a point  
22 basis, he has likewise has 12 prior points.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**D. STATE'S SENTENCING RECOMMENDATION**

The State recommends that the Court adopt the following sentencing recommendation for Count 1, the controlling charge of Burglary Second Degree: 68 months in prison, which is within the standard range of 51 to 68 months. Legal Financial Obligations totaling \$1,610.50. this amount includes a \$100 Crime Lab Fee. This amount also includes a jury fee. The Defendant requested, and received two jury trials for this case.

The State asks that this Court impose restitution in the amount of \$4,718.47 to JC Penney's. The Court has already heard testimony regarding the values of the theft items, and the cost to repair the window and display cases that the Defendant damaged. This is a reasonable amount of restitution, which does not include the time employee's spent responding to the crime scene in the early morning of December 6<sup>th</sup> 2016, and any loss of business that they may have suffered that day.

The State asks that the Court impose 29 months on Count 2, Theft Second Degree, which is the high end of the standard range of 22 to 29 months, concurrent with Counts 1 and 3. \$1,510.50 LFO's. Restitution ordered as a condition of the Sentence.

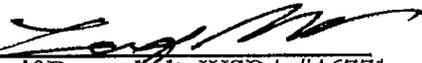
The State asks that the Court impose 29 months on Count 3, Malicious Mischief in the Third Degree, which is the high end of the standard range of 22 to 29 months, concurrent with Counts 1 and 2. \$1,510.50 LFO's. Restitution ordered as a condition of the Sentence.

The State is asking for the high end of the range because of the nature of the crimes, and the Defendant's criminal history, which exceeds the requisite points for the standard range. The Defendant planned this burglary in some level of detail, and has shown no remorse. The crime had an impact on a business and its employees during a holiday season, where the store doors were out of commission and jewelry section was out of commission for at least half of a day.

1 The Defendant has an established history of committing burglaries with the intent to gain  
2 personal profit.

3 The only basis for not imposing an exceptional high sentence, or consecutive sentences  
4 Counts 1, 2 and 3 is that the Defendant initially made a belated confession to the crime, which  
5 enabled police to solve the crime. There are no real mitigating circumstances or reasons  
6 compelling the Court to impose a sentence lower than the high end of the standard range.  
7

8  
9  
10 Dated this 2<sup>nd</sup> day of June, 2017.

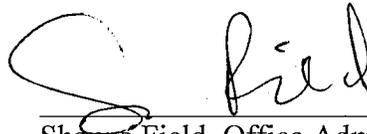
11  
12  
13 By   
14 Leif Drangsholt, WSBA #46771  
15 Criminal Deputy Prosecutor  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 27th day of September, 2018, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Amended Brief of Respondent:

**E-mail:** skylarbrettlawoffice@gmail.com

Skylar Texas Brett  
Law Office of Skylar T. Brett  
P.O. Box 18084  
Seattle, WA 98118

A handwritten signature in black ink, appearing to read "S Field", written over a horizontal line.

Shauna Field, Office Administrator

**BRANDEN E. PLATTER**  
Okanogan County Prosecuting Attorney  
P. O. Box 1130 • 237 Fourth Avenue N.  
Okanogan, WA 98840  
(509) 422-7280 FAX: (509) 422-7290

**OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE**

**September 27, 2018 - 4:11 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35361-3  
**Appellate Court Case Title:** State of Washington v. Brandon William Cate  
**Superior Court Case Number:** 17-1-00046-7

**The following documents have been uploaded:**

- 353613\_Briefs\_20180927161041D3722506\_9271.pdf  
This File Contains:  
Briefs - Respondents - Modifier: Amended  
*The Original File Name was 9.27.18 Amended Brief of Respondent.pdf*

**A copy of the uploaded files will be sent to:**

- bplatter@co.okanogan.wa.us
- skylarbrettlawoffice@gmail.com
- valerie.skylarbrett@gmail.com

**Comments:**

---

Sender Name: Shauna Field - Email: sfield@co.okanogan.wa.us

**Filing on Behalf of:** Leif Timm Drangsholt - Email: ldrangsholt@co.okanogan.wa.us (Alternate Email: sfield@co.okanogan.wa.us)

Address:  
PO Box 1130  
Okanogan, WA, 98840  
Phone: (509) 422-7288

**Note: The Filing Id is 20180927161041D3722506**