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No. 36600-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

PAULA MACHELE GARDNER,

Appellant.

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

The Honorable Judge John Strohmaier

APPELLANT'S OPENING BRIEF

Laura M. Chuang, Of Counsel, #36707
Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com

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A. SUMMARY OF ARGUMENT

A jury found Paula Machele Gardner guilty of first degree burglary (Count One) and possession of a controlled substance (Count Two).

Before trial, the State and Ms. Gardner conducted a “free talk” so she could provide information about her co-defendant in exchange for a lesser charge. Ms. Gardner then pleaded guilty to criminal trespass in the first degree. After the guilty plea, an investigating deputy accused Ms. Gardner of being untruthful and the State brought charges against her for making a false statement. The State also successfully moved to withdraw her plea. The trial court abused its discretion by allowing the State to withdraw Ms. Gardner’s plea, as substantial evidence did not exist to prove Ms. Gardner was being untruthful, and the trial court relied on incorrect facts to make its decision.

The jury found Ms. Gardner guilty of possessing a controlled substance, but neither the to-convict instruction nor the verdict form identify what controlled substance she was guilty of possessing. Because the verdict does not authorize the trial court to impose a felony sentence, the case must be remanded for resentencing.

Finally, the trial court erred when it imposed discretionary costs of DOC supervision fees upon Ms. Gardner. The costs should be stricken from the judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it allowed the State to withdraw Ms. Gardner's plea of guilty to criminal trespass.
2. The trial court erred when it entered the following findings of fact and conclusions of law:
 - a. "The State initially filed its police report ... dated May 14, 2018, referencing possible new charges against defendant of obstructing a law enforcement officer, harassment threats to kill, and making a false or misleading statement; but no such charges were filed." (CP 258).
 - b. "The State also submits the following factors to show the State should be allowed to withdraw from the Plea Agreement as defendant repeatedly made untrue statements that she was fearful for her life." (CP 258).
 - c. "If [Ms. Gardner] was hiding from Michael Jackson and his family, then why did she stay at Robert Brown's (Mr. Jackson's brother) residence on the night before and also the night of the free talk held on May 2, 2018?" (CP 259).
 - d. "According to the testimony . . . Mr Brown's neighbor confirmed that although the defendant did not live there, she had stayed there on both of these nights and that Michael Jackson was there as well." (CP 259).
 - e. "If Michael Jackson was an active Crip[s] Palmer Block gang member as represented by the defendant, why did his Facebook photos show him wearing red, which is the color of a rival gang?" (CP 259).
 - f. "There was no evidence that Mr. Jackson sent [Ms. Gardner] any messages threatening [*sic*] her life." (CP 259).
 - g. "If the defendant was fearful for her life and indicated that she was going to go to Las Vegas, then why did she remain in Spokane after Mr. Brown and Mr. Jackson were arrested on May 4, 2018?" (CP 259).
 - h. "[T]he only reason for being offered such a reduced plea [of criminal trespass] was due to [Ms. Gardner's] stated fears for her safety, which she did not divulge until her free talk and subsequent Plea Agreement, not in February." (CP 260).
 - i. "[Ms. Gardner's statements to Pickle] do not show a woman who was fearful of Mr. Jackson but one who was actually in charge." (CP 260).

- j. “Defendant was homeless and had few options so elected to stay at Mr. Brown’s house at times. She stated she was not fearful of Mr. Brown until he was arrested.” (CP 261).
- k. “Defendant denied that she stayed at Mr. Brown’s residence after the free talk but stayed in her car.” (CP 261).
- l. “Defendant did not want Mr. Brown arrested; but once the State elected to file charges against him, she stated she became fearful of what he might do.” (CP 261).
- m. “Defendant claims that Mr. Jackson’s Facebook profile picture did not show he was wearing any red.” (CP 262).
- n. “[T]here would be little reason, if any, to offer the defendant such a reduced charge [of criminal trespass] and for this court to accept such a plea reduction other than to ensure her safety (assuming she was in danger), especially after considering her significant criminal history, and to assist in the prosecution of both Mr. Jackson and Mr. Brown with charges of intimidation, harassment, gun dealing and possible gang membership relying on her statements.” (CP 262).
- o. “The only specific evidence defendant submitted showing she was fearful of her life was Mr. Jackson’s two messages (February 26 and 28, 2018) stating she was going to get hers and called her a snitch and a bitch if she did not sign his affidavit. These two messages are certainly subject to interpretation; but there was no evidence that these messages should or could be considered as a threat to kill or that she was actually afraid for her safety and hiding from Mr. Jackson simply because she did not want to sign an affidavit without reviewing same with her attorney.” (CP 262).
- p. “The five remaining messages only show a person who wanted her to sign an affidavit but did not threaten her other than to call her names such as a snitch and a bitch.” (CP 262).
- q. “The most likely cause of the threats on the defendant’s phone or computer were from her utilizing her ability to use Mr. Jackson’s own passwords.” (CP 262-263).
- r. “The defendant testified that she was afraid of Mr. Jackson in February of 2018. However, there was no evidence that Mr. Jackson had done anything or threatened [*sic*] her in February other than wanting her to sign his proposed affidavit. Her claim that she was afraid was not reasonable nor credible at that time. It is more likely that she sought to manipulate the process and implicate Mr. Jackson in additional criminal activity as early as February 18, 2018, when she suggested that

she would be offered a reduced plea to criminal trespass.” (CP 263).

- s. “The defendant maintained what appeared to be a good relationship with Mr. Brown for some time even after she claimed that Mr. Jackson had threatened to kill her.” (CP 263).
- t. “Although defendant stated that Mr. Jackson had texted her with a threat to kill, there was no evidence other than her statement that these texts or Facebook messages were from him, and no other witnesses or documents were presented.” (CP 263).
- u. “The defendant’s recorded statements show a woman who was not fearful of Mr. Jackson but more likely was the one who was actually in charge of their criminal operations.” (CP 263).
- v. “In view of the foregoing, defendant materially misled the State and law enforcement; and her motion for reconsideration is denied.” (CP 263).

- 3. The to-convict instruction failed to set forth the identity of the controlled substance, which is an essential element of the crime of possession of a controlled substance.
- 4. The jury’s verdict does not support the sentence for possession of methamphetamine, where the to-convict instruction did not specify which controlled substance was possessed.
- 5. The trial court erred in imposing a condition of community custody requiring Ms. Gardner to pay supervision fees as determined by DOC.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in vacating the defendant’s plea of guilty to criminal trespass in the first degree.

Issue 2: Whether the jury’s verdict does not support the sentence for possession of methamphetamine, where the to-convict instruction did not specify which controlled substance was possessed, requiring remand for resentencing to impose a misdemeanor sentence.

Issue 3: Whether the trial court erred in imposing a condition of community custody requiring Ms. Gardner to pay supervision fees as determined by DOC.

D. STATEMENT OF THE CASE

The State charged Paula Machele Gardner by amended information with one count of first degree burglary and one count of possession of a controlled substance, methamphetamine, due to events occurring on February 10, 2018, in Davenport. (CP 86-87). A co-defendant, Michael Jackson, was also involved with the burglary. (RP¹ 272-279, 467-468). He was found in the same burgled residence, with a firearm in the vicinity. (RP 467-468).

On May 2, 2018, the State conducted a “free talk” with Ms. Gardner. (CP 49). The State and Ms. Gardner then entered into a plea agreement on May 8, 2018. (CP 37-38). Ms. Gardner agreed to cooperate by providing information about Michael Jackson and Robert Brown for specific cause numbers the State was prosecuting. (CP 37-38). In return the State would drop all other charges and Ms. Gardner would be permitted to plead guilty to criminal trespass in the first degree, which she did shortly after the free talk. (CP 37-38; RP 5-14).

Free Talk

During the free talk at the May 2nd meeting, Ms. Gardner indicated she had a relationship with Michael Jackson and lived with him for almost a year. (CP 49). Ms. Gardner told the State she was with Mr. Jackson when he committed more than ten burglaries. (CP 49). Mr. Jackson stole a firearm during

¹ “RP” refers to the Amended Transcript of Proceedings, dated November 3, 2019.

one of these burglaries, the same firearm he was found with in the current case. (CP 49-50).

Ms. Gardner stated Mr. Jackson was a Crip Palmer Block gang member and wears the color “blue.” (CP 50).

Ms. Gardner also stated she had made contact with Mr. Jackson in-person, by phone, and text, and subsequent to the arraignment in her case. (CP 50). Mr. Jackson threatened to kill Ms. Gardner. (CP 50). Ms. Gardner told the State that Mr. Jackson’s brother—Robert Brown—wanted Ms. Gardner to sign an affidavit claiming the firearm found during the burglary in the current case was not Mr. Jackson’s. (CP 50). Mr. Jackson texted Ms. Gardner, urging her that if she was not a “snitch” then she would not have any problem signing the affidavit. (CP 50).

In mid-March of 2018, Ms. Gardner also received a threatening text from Mr. Jackson, which stated something along the lines of “you and that nigga going to end up dead.” (CP 50). Ms. Gardner was unsure who Mr. Jackson was referring to with the word “nigga” but thought he could have been referring to Ms. Gardner’s eighteen-year-old son. (CP 50).

Ms. Gardner also explained she had blocked Mr. Jackson’s calls to her phone after being released from jail and his text messages were in a blocked folder on her phone. (CP 50). She also explained during the free talk that she

was using a new phone that was different than the one she was using when arrested. (CP 50).

Ms. Gardner told the State about several more threats she received from Mr. Jackson via text messaging. (CP 51). The texts included the following:

“If that fucking gun is put on me man, I’m doing 100 and some fucking much man”

...

“You and that nigga going to end up dead”

...

“you got me fucked up, you keep talking you going to end up like Pickle you stupid hoe”

...

“the funny part is you think you think, you have nothing coming, I’m going to hurt you bad watch”

...

“you’re a snitch bitch”

...

(CP 51). Ms. Gardner said “Pickle” is a friend of hers who had been pistol whipped by Mr. Jackson’s cousin because it was believed Pickle was helping Ms. Gardner. (CP 51). Ms. Gardner also said people were talking about Ms. Gardner being a rat, and that Mr. Jackson had threatened to “beat her ass.” (CP 51). Ms. Gardner believed the threats were based on Mr. Jackson’s belief that she is a “snitch.” (CP 51). Mr. Jackson was physically violent in the past towards her,

and Ms. Gardner stated during the free talk she was frightened Mr. Jackson or someone in his family would harm or kill her. (CP 51).

Investigation Post Free Talk

Not long after the free talk, Mr. Jackson and Robert Brown were arrested and questioned. (CP 50-53). Mr. Jackson claimed Ms. Gardner was threatening his girlfriend, that Ms. Gardner had his passwords and old phone, and that Ms. Gardner previously used his account to text people and threaten them. (CP 52). However, during the interview he did not deny calling Ms. Gardner or sending her threatening text messages, either. (CP 52). He just never answered the questions. (CP 52). Rather, Mr. Jackson focused the conversation on threats he alleged Ms. Gardner was making to his former girlfriend. (CP 52).

Mr. Brown was also interviewed by a deputy, but denied trying to persuade Ms. Gardner to sign an affidavit about the gun. (CP 53). Mr. Brown stated he assisted Ms. Gardner with her release from jail, and he told the deputy that Ms. Gardner planned to pay Mr. Brown extra money for helping to bail her out of jail. (CP 53, 55). Mr. Brown did not expect payment, and Ms. Gardner did not pay him. (CP 55).

While in jail, Ms. Gardner phoned an acquaintance nicknamed "Pickle." (CP 53-54). Ms. Gardner told Pickle she thought the charges might be reduced to trespassing. (CP 54). She also said she was going to file a restraining order

against Mr. Jackson. (CP 54). Ms. Gardner also told another acquaintance she thought her charge was going to be reduced. (CP 54).

Assuming Ms. Gardner had not yet spoken to her trial counsel, the investigating deputy opined Ms. Gardner was “making or had a plan” to reduce her charges. (CP 54).

Mr. Jackson’s neighbor, “Trina” was interviewed by the investigating deputy. (CP 55-56). Trina informed the deputy she had seen Ms. Gardner at Mr. Jackson’s residence almost every day since their arrest in February. (CP 55). Trina also saw Ms. Gardner at Mr. Jackson’s home on May 3, which was the day after the free talk. (CP 55). The deputy’s statement indicated he thought this conflicted with Ms. Gardner’s comments earlier, wherein she stated she believed Mr. Jackson was going to kill her and she was in hiding from him. (CP 55-56).

Jennica Low was also interviewed, and Ms. Low indicated Ms. Gardner had previously threatened her by using Mr. Jackson’s Facebook profile to message her. (CP 56). Both Ms. Gardner and Ms. Low had prior relationships with Mr. Jackson. (CP 56-57). The investigating deputy determined the messages on Facebook to Ms. Low had the same rhythm and type of speech as the threatening messages Ms. Gardner received from Mr. Jackson. (CP 57).

The investigating deputy also decided he did not believe Ms. Gardner’s assertion that Mr. Jackson was a Palmer Block Crip gang member, as this gang wears blue. (CP 57). The deputy determined this because Mr. Jackson—going

under the different name of “Jamere Jackson” on Facebook—was wearing the color red in some of the pictures posted on Facebook. (CP 57).

On May 14, 2018, the investigating deputy arrested Ms. Gardner for knowingly providing false statements and obstructing a law enforcement officer. (CP 57).

Plea Withdrawal Hearings

A few days after Ms. Gardner’s arrest, on May 22, 2018, the State moved to withdraw the plea on the grounds that Ms. Gardner was not truthful when providing information during the free talk. (CP 46-60; RP 17-21). The State subsequently charged her under Lincoln County Cause No. 18-1-00038-3 with possession of a controlled substance other than marijuana (Count 1), obstructing a law enforcement officer (Count 2), and making a false or misleading statement to a public servant (Count 3). (CP 46-60; RP 17-21).

On June 5, 2018, after a change in counsel, the trial court allowed the investigating deputy to testify regarding Ms. Gardner’s alleged breach of the plea agreement. (RP 30-54). The deputy went through his investigation, explaining why he believed Ms. Gardner was not truthful during the free talk. (RP 39-54). First, the deputy did not believe Ms. Gardner was mortally fearful of Mr. Jackson as she stayed in Mr. Jackson’s home shortly after the free talk. (RP 39-40, 46). Ms. Gardner stated she was afraid of Mr. Jackson’s family, including Mr. Brown, but invited Mr. Brown to the residence where she was staying. (RP 40, 46-47). A

search warrant executed on Ms. Gardner's cell phone revealed she had texted Mr. Jackson and planned to visit his home the night of the free talk. (RP 40). The deputy believed Ms. Gardner stayed at Mr. Jackson's residence the evening prior to the free talk and that she did not want to be seen leaving his residence. (RP 41). The deputy also believed Ms. Gardner planned out her plea agreement for criminal trespass before having discussed it with her attorney. (RP 41-42). The deputy thought Ms. Gardner was not truthful when she claimed Mr. Jackson was a Palmer Block Crip gang member. (RP 42, 46). Also, Ms. Gardner talked to Mr. Jackson on a regular basis despite stating they spoke occasionally, and she had regular conversations with Mr. Jackson despite blocking his messages on her phone. (RP 43).

The deputy also testified a subject² provided pictures of Facebook messages that Ms. Gardner allegedly sent using Mr. Jackson's account. (RP 43-44). Based on this, he concluded that Ms. Gardner during the free talk "showed messages allegedly from Michael Jackson that could have been from her" (RP 44).

The deputy could not find any evidence that Mr. Brown was attempting to have her sign an affidavit, though there was evidence she met with Mr. Brown. (RP 45). Ms. Gardner also apparently agreed to pay Mr. Brown an extra fee for bailing her out, but never paid the fee. (RP 45-46).

² This "subject" was likely Ms. Low. (CP 56-57).

The deputy stated Ms. Gardner requested she be notified once Mr. Jackson and Mr. Brown were arrested so she could leave town due to her fear of them. (RP 49). The deputy stated she later decided she was going to stay until the trial. (RP 49).

Ms. Gardner did not state in any jail conversations that she planned to be untruthful in order to obtain a plea bargain. (RP 54).

At this time, no testimony was obtained from Ms. Gardner, as the State charged her with making a false statement on the basis of these facts, and thus it would have been difficult for her to present any testimony that might not be incriminating. (RP 55).

The court ruled the plea should be withdrawn because “based upon the sole testimony of the deputy, there is enough facts to show that she was no being totally honest, [which] would give the State the right to revoke the plea agreement.” (RP 55).

Several months later, in February 2019, Ms. Gardner was represented by new trial counsel, who moved the court for reconsideration of the plea withdrawal. (CP 168-180; RP 96-97). Due to concerns about the effectiveness of prior trial counsel, the court allowed Ms. Gardner’s new trial counsel to proceed with a new evidentiary hearing. (RP 98-113).

The investigating deputy once again testified. (RP 145-201). The deputy admitted to having never asked Ms. Gardner about allegations she had threatened

Mr. Jackson's girlfriend; he also acknowledged he never provided the court with copies of text messages between the two. (RP 145-146). He also agreed he was not aware whether gangs were no longer wearing different colors to deceive law enforcement and he had no experience as a law enforcement officer in the Los Angeles area. (RP 147-148).

Defense counsel then played some recordings while questioning the deputy about whether Mr. Jackson threatened Ms. Gardner and whether Mr. Brown wanted her to sign an affidavit. (RP 152-154). The recordings, which the deputy acknowledged could have been Mr. Jackson's voice³, went as follows:

CALLER: (indiscernible) you gonna get yours...

...

CALLER: You not signing that paper lets me know that you really do want me to go to hell for this shit cause (indiscernible) you wouldn't have a problem signing the fucking paper, Paula. You making me second guess everything now.

...

CALLER: So, did you want my brother to write it out for you?

...

CALLER: Yeah, I've been looking forward to you saying you're not gonna sign it (indiscernible). I know you're not gonna sign it cause you told my brother the same thing. Don't worry, you gonna get yours. (indiscernible) you not gonna sign this. Now you a snitch, bitch, I know you are.

...

CALLER: (indiscernible) you not gonna sign it. Now, you're a snitch.

...

³ Ms. Gardner later testified these recordings were of Mr. Jackson. (RP 206).

CALLER: (indicatable) my brother would be cool
with you coming back over...

(RP 152-154). The deputy acknowledged he never did receive these messages from Ms. Gardner himself, claiming he had to go through her attorney to receive them. (RP 154). However, the deputy's report indicates he arrested Ms. Gardner for false statements before attempting to collect them—despite knowing Ms. Gardner told him during the free talk she had such messages and could provide them at another time. (CP 50, 57; RP 154). The deputy was aware Ms. Gardner had been abused by Mr. Jackson, and also knew Mr. Jackson had information that Ms. Gardner was likely being interviewed while in jail. (RP 155-157).

Despite the information the deputy obtained after the free talk with Ms. Gardner, he never gave her an opportunity to explain herself or conduct another free talk for more information. (RP 160). He merely arrested her and did not interview her afterwards. (RP 160). The deputy's report did not contain any specifics of threats supposedly made by Ms. Gardner to Mr. Jackson's girlfriend, and it appears he never interviewed any of Ms. Gardner's friends after the free talk. (RP 163-164).

Despite arresting Ms. Gardner for a false statement, the charge was later dropped. (RP 21-22, 163, 248-249, 252, 254). The deputy admitted that despite Ms. Gardner's statement that Mr. Jackson was violent with her in the past, he did not ask her any details. (RP 167-168). He also never asked Ms. Gardner why she went to Mr. Jackson's home the night of the free talk. (RP 169).

The deputy agreed Ms. Gardner stated on a jail phone call she was planning to obtain a restraining order against Mr. Jackson—yet she also claimed to love Mr. Jackson. (RP 199).

In fact, the deputy just assumed Ms. Gardner lied, and had no supporting evidence as to Mr. Jackson and Mr. Brown’s version of events. (RP 170-172).

Ms. Gardner also testified regarding her plea withdrawal. (RP 204-246). She stated she was homeless and had been in an emotionally and physically abusive relationship with Mr. Jackson for approximately one year. (RP 204-206, 233). Ms. Gardner identified Mr. Jackson as the caller in the messages previously provided by her, and stated the voicemails frightened her because she believed Mr. Jackson was threatening her. (RP 152-154, 207). She also believed he was trying to pin the charges on her, as Mr. Jackson was trying to convince her to sign an affidavit stating the gun found at the scene of the burglary was not Mr. Jackson’s. (RP 207-208). Because Mr. Brown—Mr. Jackson’s brother—became angry with her when she would not sign the affidavit, she became fearful of him. (RP 216-217). She was also threatened by Mr. Jackson’s cousin. (RP 219-220).

Ms. Gardner explained when she spoke on jail phone calls about her burglary charge being dropped to a criminal trespass, she was merely hoping it would happen and it was not due to a nefarious plan. (RP 208-209). She had discussed this hope with former trial counsel, as well, before the free talk. (RP 209).

Ms. Gardner felt she truthfully answered the State's questions during the free talk, and she denied trying to manipulate anyone. (RP 212, 218-219).

Ms. Gardner informed the trial court that while she was attending the free talk meeting, Mr. Jackson was calling and texting her because she "was gone too long." (RP 213). She said Mr. Jackson always wanted to know where she was. (RP 213). Ms. Gardner was scared of Mr. Jackson, but wanted to be near him so he did not think she was planning to testify against him. (RP 220). She acknowledged her relationship with Mr. Jackson was not normal in a prior jail phone call: "It's sick, it's a sick relationship. I feel um like right now I probably still have a little bit of love for [Mr. Jackson] and that's sick. I don't know—I don't know how to explain it." (RP 206). She also detailed the abused she endured, telling the court in the past Mr. Jackson slapped her, kicked her into a closet, bruised her and "choked [*sic*] her out" while she was driving. (RP 221-222).

Originally Ms. Gardner was intending to move to Las Vegas because she was scared to testify. (RP 222-223). But she did not because she was uncertain how she would get back to court. (RP 223). Ms. Gardner also explained Mr. Brown bailed her out with her own money, and she gave him some of the remaining money. (RP 224-225).

She also believed Mr. Jackson changed his name on his Facebook profile and wore the color red in efforts to hide his identity from prior Crips gang members in Los Angeles⁴. (RP 215).

Ms. Gardner told the State during the free talk she was “in hiding” from Mr. Jackson. (RP 226-227). She clarified that while she did see Mr. Jackson, she was “in hiding” in the sense she was avoiding coming to court the same times he was in court since she was planning to testify against him. (RP 226). It appeared from some of Mr. Jackson’s jail phone calls he was suspicious of whether Ms. Gardner was cooperating with law enforcement and whether she was planning to testify against him. (RP 236-246).

Ms. Gardner explained she had a different phone in March of 2018, but had forgotten to block Mr. Jackson’s number on that phone. (RP 227-228).

Ms. Gardner testified the State used the information she provided about the burglary and Mr. Jackson. (RP 234). No one presented evidence to the contrary.

The trial court issued a written opinion in the form of findings of fact and conclusions of law, affirming its earlier decision to allow the State to withdraw the plea. (CP 257-263).

⁴ The colors Mr. Jackson was wearing in the Facebook pictures were part of the investigating deputy’s concern over whether Ms. Gardner was truthful during the free talk. (CP 57; RP 42). Because the deputy recalled from his childhood that the Crips typically only wear the color blue and Bloods typically only wear the color red, the deputy presumed any pictures of Mr. Jackson wearing red had to indicate he was not actually a Crips gang member, as claimed by Ms. Gardner. (CP 57; RP 42).

The case proceeded to a jury trial. (RP 266-419).

The jury was given a “to-convict” instruction on possession of a controlled substance (Count Two):

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 10, 2018, the defendant possessed a controlled substance; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(Instruction No. 13, CP 287; RP 436).

The jury was also given the following additional instructions:

It is a crime for any person to possess a controlled substance.

(Instruction No. 11, CP 285; RP 436).

...

Methamphetamine is a controlled substance.

(Instruction No. 12, CP 286; RP 436).

Ms. Gardner was found guilty of both counts: first degree burglary in Count One and possession of a controlled substance other than marijuana in Count Two. (CP 291-292; RP 452).

The verdict form for Count Two, possession of a controlled substance, did not identify which controlled substance upon which the jury convicted. (CP 292).

Rather, the verdict form merely states:

We, the jury, find the defendant Paula M. Gardner “Guilty” of the crime of Possession of a Controlled Substance—other than Marijuana in Count II.

(CP 292; RP 452).

At sentencing, Ms. Gardner was sentenced to 116 months for the residential burglary in Count One, and 24 months for the possession of a controlled substance other than Marijuana in Count Two. (CP 309; RP 469). The trial court imposed an exceptional sentence, requiring the 116 months and 24 months run consecutively. (CP 308-309, 379-380; RP 469). The court based the exceptional sentence upon the fact Ms. Gardner had been convicted of multiple offenses, and due to her offender score of 23, the court decided the conviction for Count Two would go “unpunished if the sentences were to run concurrently.” (Supp. CP 1).

The felony judgment and sentence states Ms. Gardner is required to pay supervision fees as directed by DOC (Department of Corrections). (CP 310).

Ms. Gardner timely appealed. (CP 330-358). An order of indigency was entered for purposes of appeal. (CP 363).

D. ARGUMENT

Issue 1: Whether the trial court erred in vacating the defendant's plea of guilty to criminal trespass in the first degree.

The trial court abused its discretion when it determined the evidence supported the State's assertion Ms. Gardner was untruthful during the free talk. Because the trial court mistakenly relied upon incorrect facts to make this determination, Ms. Gardner's guilty plea to criminal trespass should be reinstated, and the first degree burglary charge dismissed.

The prosecution must act in compliance with a plea bargain agreement. *State v. Hall*, 104 Wn.2d 486, 490, 706 P.2d 1074 (1985) (citations omitted). Full compliance is required. *Id.* Because a plea bargain includes the waiver of several constitutional rights, "[t]here can be no question that prosecutorial negation of a plea agreement presents an issue of constitutional magnitude." *In re James*, 96 Wn.2d 847, 849, 640 P.2d 18 (1982).

When the State breaches a plea agreement, "a defendant is entitled to withdraw any entered plea or to have the agreement specifically enforced." *State v. Hall*, 32 Wn. App. 108, 110, 645 P.2d 1143 (1982). "The State is expected to keep its bargains unless the defendant has failed to keep his or hers." *Id.* at 110. Should there be concerns over the defendant's compliance with the agreement, then the defendant is entitled to an evidentiary hearing. *Id.* It is the State's burden to prove by a preponderance of the evidence that the defendant has failed perform her part in the agreement. *Id.* "[M]erely accusing the defendant of

misconduct does not relieve the State of its bargained-for duty.” *James*, 96 Wn.2d at 850.

Once a plea agreement is validly accepted, the court is bound by the agreement, too. *State v. Schaupp*, 111 Wn.2d 34, 38, 757 P.2d 970 (1988). In general, neither the court nor the State are bound by a plea agreement procured via fraud or misrepresentation. *Id.* 38-39. Breach of a plea agreement gives the defendant the choice between one of two remedies: plea withdrawal or specific performance. *Schaupp*, 111 Wn. 2d at 41.

A trial court’s decision on a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Blanks*, 139 Wn. App. 543, 548, 161 P.3d 455 (2007) (citation omitted). “A trial court abuses its discretion if its decision ‘is manifestly unreasonable or based upon untenable grounds or reasons.’” *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). A court’s decision is based upon untenable reasons if the “facts do not meet the requirements of the correct standard.” *Id.* A trial court’s decision is based upon “untenable grounds” if “the factual findings are unsupported by the record.” *Id.*

“Findings of fact will only be upheld if supported by substantial evidence.” *Schaupp*, 111 Wn.2d at 39; *Blanks*, 139 Wn. App. at 548 (citation omitted).

Here, the trial court abused its discretion by basing its decision on untenable grounds and reasons. First, in several instances the trial court’s

findings of fact are unsupported by the record. Second, many of the trial court's findings are not supported by substantial evidence. (CP 257-263). Each assignment of error is addressed below.

The trial court's findings assumed charges were never filed against Ms. Gardner for the statements which the investigating deputy alleged were false. (*Assignment of Error 2a*; CP 258). However, the court advised Ms. Gardner of her rights on those particular charges, and both parties acknowledged she had been charged with, among other things, providing a false statement. (RP 21-22, 163, 248-249, 252, 254).

The trial court also found Ms. Gardner's concerns for her safety and fear of Mr. Jackson to be untruthful, and there was no evidence she had been threatened. (*Assignments of Error 2b, 2c, 2d, 2f, 2g, 2i, 2o, 2p, 2q, 2r, 2t, 2u*). But the State could not prove with substantial evidence that Ms. Gardner's concerns were not true. Ms. Gardner provided audio recordings indicating Mr. Jackson was definitely displeased with her and suspicious of her (RP 152-154). She indicated she had previously been abused by Mr. Jackson. She admitted on a jail phone call that her relationship with Mr. Jackson was "sick"—which comports with her story of abuse, since she was in love with Mr. Jackson but also considering a restraining order against him. (RP 199, 206). And she was "in hiding" because she did not want Mr. Jackson to know she was cooperating with law enforcement. While she may have spent time with Mr. Jackson before and

after the free talk, few persons could find fault with her for attempting to cover up any of her meetings with law enforcement in a way that forced her to pretend like everything was normal while around Mr. Jackson. Moreover, it appears from jail phone call recordings Mr. Jackson was extremely suspicious of her activities. (RP 236-246). Ms. Gardner was in fear for her life and she considered the audio recordings messages from Mr. Jackson to be threats. (CP 50-51; RP).

The trial court's conclusion that Mr. Jackson never sent messages to her threatening her life is not supported by substantial evidence; but also, Ms. Gardner only stated Mr. Jackson had threatened her life—she did not claim he sent her a message stating so. (CP 50, 259; *Assignments of Error 2f, 2o*).

The trial court did not believe Ms. Gardner's statement that Mr. Jackson was a Crips Palmer Block gang member due to colors he allegedly wore or did not wear in photographs posted on Facebook. (CP 259; *Assignments of Error 2e, 2m*). Yet the State did not present substantial evidence that Mr. Jackson was not a gang member, no photographs were presented to show what colors he did wear, and as Ms. Gardner pointed out Mr. Jackson was in hiding from the gang—as evidenced by his name change to “Jamere” on Facebook. (CP 57).

The trial court also found the main reason for the State offering such a reduced charge was because Ms. Gardner expressed a false concern for her safety. (CP 260, 262; *Assignments of Error 2h, 2n*). However, during the free talk Ms. Gardner provided information about burglaries Mr. Jackson committed,

additionally providing the State information about where the gun came from that was found in this burglary. (CP 37-38, 49-50). The State used information Ms. Gardner provided—a fact that was not disputed by the State. (RP 234).

The trial court also mixed up key players in its findings, seeming to think Ms. Gardner was living with or staying with Mr. Brown at different points in time. (CP 261; *Assignments of Error 2j, 2k*). None of the evidence presented showed Ms. Gardner stayed with Mr. Brown—the evidence showed Ms. Gardner stayed with Mr. Jackson, the man with whom she was involved in an abusive relationship. (CP 49-51, 55-56; RP 40-41, 199, 206, 213, 220-222, 226-227).

Ms. Gardner did say she did not want Mr. Brown arrested, but she did not want him arrested *that day* as she knew then she would need to be careful of him. (RP 291). The trial court erroneously stated that Ms. Gardner did not want Mr. Brown arrested. (CP 261; *Assignment of Error 2l*).

The trial court also concluded Ms. Gardner said Mr. Jackson's Facebook profile picture did not show he was wearing red. (CP 262; *Assignment of Error 2m*). Ms. Gardner stated she did not think he was wearing red in his profile picture but believed he was wearing red in other Facebook pictures to hide his identity as a Crips member. (RP 215).

The trial court found—and with no evidence that Ms. Gardner had done this with Mr. Jackson's phone and Facebook account—that she likely sent herself her own threats. (CP 262-263; *Assignment of Error 2q*). The court apparently

concluded this because Ms. Gardner was accused of using Mr. Jackson's personal accounts in similar behavior with a former girlfriend of Mr. Jackson's. (CP 52, 56-57). However, there was no evidence presented that Ms. Gardner actually was sending herself the threats—and clearly the record presents audio recordings from Mr. Jackson wherein he is definitely calling Ms. Gardner names and is suspicious she is going to snitch on him. (RP 152-154, 236-246). There is no substantial evidence that Ms. Gardner was sending herself threatening messages using Mr. Jackson's phone and Facebook account.

The trial court again appeared to mix up characters in this story, stating the “defendant maintained what appeared to be a good relationship with Mr. Brown for some time even after she claimed that Mr. Jackson had threatened to kill her.” (CP 263; *Assignment of Error 2s*). The trial court was likely trying to solely speak to Ms. Gardner's relationship with Mr. Jackson, but in any event as noted above Ms. Gardner was part of an abusive relationship. (CP 49-51, 55-56; RP 40-41, 199, 206, 213, 220-222, 226-227). At some moments Ms. Gardner was probably trying to keep that relationship, and at others she was trying to protect herself. (*Id.*).

At one point, the investigating deputy opined it was strange Ms. Gardner was making plans to try to reduce her charge. (CP 54). Yet defendants frequently request a reduction in charges in exchange for giving information, in a hopeful attempt at reduced time in incarceration. *State v. Statler*, 160 Wn. App. 622, 629,

248 P.3d 165 (2011). The deputy's opinion alone that this seemed strange is not significant, as such situations are common.

Finally, based on these findings the trial court concluded Ms. Gardner materially misled the State and law enforcement. (CP 263; *Assignment of Error 2v*). However, the trial court erroneously relied on several misrepresented or misstated facts which are either not in the record, are only part of the story, or are just completely false themselves. And, even if this Court were to find the trial court did not misstate the facts in its findings, there is no substantial evidence showing Ms. Gardner was untruthful during her free talk with the State. *Schaupp*, 111 Wn.2d at 39 (findings of fact will be upheld if supported by substantial evidence). The most that exists is an investigating deputy who believed Ms. Gardner was lying, without actual proof. (RP 39-54).

Also, it should not be forgotten that the State did use the information Ms. Gardner provided in its prosecution of Mr. Jackson. (RP 234). Moreover, the State never did pursue the false statement charge against Ms. Gardner. (RP 21-22, 163, 248-249, 252, 254).

For the reasons cited, the trial court's withdrawal of Ms. Gardner's plea was an abuse of discretion because the decision was based on untenable grounds and reasons. The withdrawal of the plea to criminal trespass should be reversed and the plea reinstated.

Issue 2: Whether the jury’s verdict does not support the sentence for possession of methamphetamine, where the to-convict instruction did not specify which controlled substance was possessed, requiring remand for resentencing to impose a misdemeanor sentence.

The jury’s verdict for possession of a controlled substance does not support the sentence for possession of methamphetamine because the to-convict instruction did not specify which controlled substance was possessed. Remand for resentencing is required to impose a misdemeanor sentence.

“A to-convict instruction must include all essential elements of the crime charged.” *State v. Clark-El*, 196 Wn. App. 614, 618, 384 P.3d 627 (2016) (citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). “[A] ‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *Smith*, 131 Wn.2d at 263. The omission of an element of a charged crime from the to-convict instruction may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415, 417 (2005). Alleged error in jury instructions is subject to de novo review. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010).

“When the identity of a controlled substance increases the statutory maximum sentence which the defendant may face upon conviction, that identity is an essential element.” *Clark-El*, 196 Wn. App. at 618 (citing *State v. Goodman*, 150 Wn.2d 774, 778, 83 P.3d 410 (2004); *Sibert*, 168 Wn.2d at 311-12 (plurality opinion)). The identity of the controlled substance is an essential element of the

offense of unlawful possession of a controlled substance (methamphetamine) under RCW 69.50.4013(1). *State v. Gonzalez*, 2 Wn. App. 2d 96, 105-10, 408 P.3d 743 (2018), *review denied*, 190 Wn.2d 1021, 418 P.3d 790 (2018).

In *Gonzalez*, the defendant was charged with unlawful possession of a controlled substance (methamphetamine), under RCW 69.50.4013. *Id.* at 101. The to-convict instruction stated “the defendant possessed a controlled substance[.]” *Id.* at 104. It did not specify the nature of the controlled substance, but it did refer to the offense “as charged in Count II.” *Id.* On appeal, Division II agreed with the defendant “that because RCW 69.50.4013 imposes different statutory maximum sentences for possession of certain quantities of marijuana and otherwise authorizes possession of recreational and medical marijuana, the identity of the controlled substance that the defendant possessed is an essential element of the crime of unlawful possession of a controlled substance.” *Id.* at 105-06. The court reasoned that “RCW 69.50.4013(2), (3), and (5) have the effect of imposing different maximum sentences based on the type and amount of the controlled substance possessed.” *Id.* at 110. The court further reasoned “[w]ithout specifying the identity of the controlled substance, the to-convict instruction could allow the jury to convict a defendant and impose a class C sentence based on the possession of *any* controlled substance, including any amount of *marijuana*.” *Id.*

Thus, the *Gonzalez* court found “the omission of the essential element of the identity of the controlled substance from the to-convict instruction is error.” *Id.* at 111. The court held “the error in omitting the essential element of the identity of the controlled substance is subject to a harmless error analysis as to the conviction but . . . an unauthorized sentence is not subject to a harmless error analysis.” *Id.* at 112.

With respect to the sentence, the court found “[w]ithout a finding regarding the nature of the controlled substance, the jury’s verdict did not provide a basis upon which the trial court could impose a sentence based on possession of methamphetamine.” *Id.* at 114 (citing *Clark-El*, 196 Wn. App. at 624). The court reasoned “[t]he jury’s finding that [Gonzalez possessed] an unidentified ‘controlled substance’ authorized the court to impose only the lowest possible sentence for [unlawful possession of a controlled substance.]” *Id.* (quoting *Clark-El*, 196 Wn. App. at 624) (second and third alterations in original). The court remanded the case for “resentencing on the unlawful possession of a controlled substance conviction to impose a misdemeanor sentence. . . .” *Id.* at 114, 116.

More recently in *State v. Murillo*, Division III found the “omission of the identity of the controlled substance in the to-convict instruction constituted harmful error for purposes of sentencing.” *State v. Murillo*, No. 35695-5-III, 2019 WL 4805332, at *9, 12 (Wash. Ct. App. Oct. 1, 2019); *see also* GR 14.1(a)

(authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). In *Murillo*, neither the to-convict instruction nor the verdict form listed the controlled substance as methamphetamine. *Id.* at 12. The verdict form merely requested the jury convict or acquit the defendant “as charged.” *Id.* at 12. This “as charged” language was missing from the to-convict instruction. *Id.* The Court remanded for resentencing, holding the felony drug possession conviction’s sentence must be that of a misdemeanor. *Id.* at 12.

Here, as in *Gonzalez*, Ms. Gardner was charged with unlawful possession of a controlled substance (methamphetamine), under RCW 69.50.4013. (CP 86-87). Also as in *Gonzalez*, the to-convict instruction given to the jury did not require proof that the controlled substance possessed by Ms. Gardner was methamphetamine. (CP 287; RP 436). Instead, it merely required proof that Ms. Gardner “possessed a controlled substance.” (CP 287; RP 436). Further, unlike *Gonzalez*, the to-convict instruction given here makes no reference to the offense “as charged.” (CP 287; RP 286); *see Gonzalez*, 2 Wn. App. 2d at 104 (the to-convict instruction referred to the offense “as charged in Count II.”); *see Clark-El*, 196 Wn. App. at 619-20 (in finding the to-convict instruction omitted an essential element, noting that it did not include the “as charged” language).

Therefore, the jury’s finding that Ms. Gardner possessed an unidentified controlled substance authorized the trial court to impose only the lowest possible

sentence for unlawful possession of a controlled substance, which is a misdemeanor sentence. *See Gonzalez*, 2 Wn. App. 2d at 114 (quoting *Clark-El*, 196 Wn. App. at 624); *Murillo*, 2019 WL 4805332, at *12 (holding lowest offense is possession of marijuana of forty grams or less under RCW 69.50.4014); *and also* RCW 69.50.4013(2) (“Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.”); RCW 69.50.4014 (“Except as provided in RCW 69.50.401(2)(c) or as otherwise authorized by this chapter, any person found guilty of possession of forty grams or less of marijuana is guilty of a misdemeanor.”).

Including the “Possession of a Controlled Substance—other than Marijuana in Count II” language in the verdict form does not remedy the error in the to-convict instruction. (CP 290); *see, e.g., State v. Ibrahim*, No. 75770-9-I, 2018 WL 418894, at *2-3 (Wash. Ct. App. Jan. 16, 2018) (finding that including the “as charged” language in the jury verdict does not remedy the error in the to-convict instruction); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). “[A] reviewing court may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). “[T]he jury has a right to regard the ‘to convict’ instruction as a complete statement of the law and should not be required to

search other instructions in order to add elements necessary for conviction.”

Mills, 154 Wn.2d at 8 (quoting *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002)). While the verdict form states the jury found Ms. Gardner guilty of the “crime of Possession of a Controlled Substance—other than Marijuana in Count II”, none of the other instructions advised the jury what controlled substance “Count II” entails. (CP 273-292; RP 429-438). This case is similar to *State v. Barbarosh*, where the jury verdict only encompassed “Unlawful Possession of a Controlled Substance as charged in Count I.” *State v. Barbarosh*, ___ Wn.2d ___, 448 P.3d 74, 80 (2019). The *Barbarosh* Court decided that without an express jury finding identifying the controlled substance, the case must be remanded for resentencing to the “lowest possible offense for possession of a controlled substance.” *Id.*

“The constitutional right to jury trial requires that a sentence must be authorized by a jury’s verdict.” *Gonzalez*, 2 Wn. App. 2d at 113 (quoting *Clark-El*, 196 Wn. App. at 624) (internal quotation marks omitted). The sentence for possession of methamphetamine imposed here was not authorized by the jury verdict. Remand for resentencing is required, to impose a misdemeanor sentence.

Issue 3: Whether the trial court erred in imposing a condition of community custody requiring Ms. Gardner to pay supervision fees as determined by DOC.

The trial court erred in imposing a condition of community custody requiring Ms. Gardner to pay supervision fees as determined by DOC, because

this fee is a discretionary legal financial obligation (LFO), and the trial court found Ms. Gardner indigent. The condition should be stricken from her judgment and sentence.

Ms. Gardner challenges these community custody conditions for the first time on appeal. (CP 310). Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (*quoting Ford*, 137 Wn.2d at 477).

A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Where the trial court lacked authority to impose a community custody condition, the appropriate remedy is to remand to strike the condition. *See, e.g., State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The trial court erred in imposing a condition of community custody requiring Ms. Gardner to pay supervision fees as determined by DOC. The community custody supervision fee is a discretionary LFO, because it can be waived by the sentencing court. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3,

429 P.3d 1116 (2018); *see also* RCW 9.94A.703(2)(d) (allowing the sentencing court to impose, or to waive, a condition of community custody requiring an offender to “[p]ay supervision fees as determined by the department[.]”).

Discretionary LFOs cannot be imposed on a defendant who is indigent at the time of sentencing. *See* RCW 10.01.160(3); *see also* RCW 10.101.010(3)(a)-(c) (defining indigent). Ms. Gardner was found indigent at sentencing and for purposes of this appeal. (CP 363; RP 470).

Therefore, the condition of community custody requiring Ms. Gardner to pay supervision fees as determined by DOC should be stricken. *See State v. Taylor*, Nos. 51291-2-II, 51301-3-II, 2019 WL 2599184, *4 (Wash. Ct. App. June 25, 2019) (holding that because the defendant was found indigent at sentencing, the community custody supervision fee must be stricken under RCW 10.01.160(3)); *State v. Reamer*, Nos. 78447-1-I, 78506-1-I, 2019 WL 3416868, *5 (Wash. Ct. App. July 29, 2019) (directing the trial court to strike this condition on remand); *see also State v. Lilly*, No. 78709-8-I, 2019 WL 6134572, at *1 (Wash. Ct. App. Nov. 18, 2019) (community supervision cost is discretionary); *but see State v. Abarca*, No. 51673-0-II, 2019 WL 5709517, *10-11 (Wash. Ct. App. Nov. 5, 2019) (concluding that a community custody supervision assessment is discretionary, but it is not a cost requiring an inquiry into the defendant’s ability to pay; nonetheless encouraging the trial court to reconsider the imposition of this assessment on remand); *and* GR 14.1(a) (authorizing citation to unpublished

opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

The trial court erred and the community custody supervision fees must be stricken.

E. CONCLUSION

The trial court abused its discretion by withdrawing Ms. Gardner's plea to criminal trespass in the first degree, as the court's decision was based upon untenable grounds and untenable reasons. Ms. Gardner respectfully requests this Court reverse and remand to reinstate the original plea.

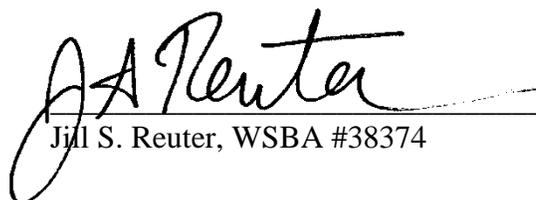
The trial court erred by sentencing Ms. Gardner to a felony sentence for her conviction of possession of a controlled substance in Count Two. The sentence is not authorized by the jury's verdict and the case should be remanded for a new sentence.

Finally, Ms. Gardner requests this Court strike the community custody condition requiring her to pay supervision fees to DOC.

Respectfully submitted this 4th day of December, 2019.



Laura M. Chuang, WSBA #36707
Of Counsel



Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

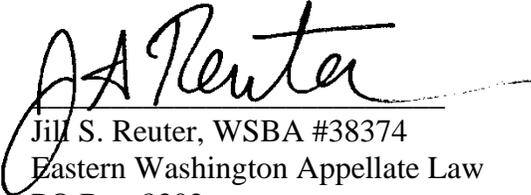
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 36600-6-III
vs.) Lincoln County No. 18-1-00012-0
)
PAULA MACHELE GARDNER) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 4, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Paula M. Gardner, DOC No. 838078
Yakima County Jail – Annex
111 N. Front Street
Yakima, WA 98901

Jeffrey S. Barkdull
Lincoln County Prosecuting Attorney
450 Logan
PO Box 874
Davenport WA 99122-0874

Dated this 4th day of December, 2019.


Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

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