

FILED
Court of Appeals
Division III
State of Washington
8/29/2019 8:00 AM

NO. 36718-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JESSIE ALLERT,

Appellant.

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

The Honorable Scott D. Galina, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant Allert's constitutional right to a public trial when it addressed his capacity to assist counsel and waive his right to testify.

2. The trial court committed manifest constitutional error when it instructed the jury on a non-existent hit and run offense.

3. Defense counsel was ineffective for failing to object to the instruction on a non-existent offense.

4. The trial court exceeded its statutory authority when it imposed restitution to compensate the State for witness expenses.

Issues Pertaining to Assignments of Error

1. Is reversal necessary where the trial court held a closed, off-record, and partially ex parte conference regarding the effect of Mr. Allert's extreme illness on his decisions to proceed with trial and waive his right to testify?

2. Must Mr. Allert's conviction for Hit and Run – Property Damage be vacated, where the jury was instructed to convict for breach of duties that the law does not in fact impose?

3. Was defense counsel ineffective for failing to object to that instruction?

4. Must the trial court's restitution order be vacated when it requires Mr. Allert to compensate the State for trial expenses, including a witness's \$750 plane ticket?

B. STATEMENT OF THE CASE

One morning in November 2017, Jessie Allert struck a mailbox with his car. RP 201. Another driver observed him stop, pick up the mailbox, and carry it "really nicely" to a safe location away from the road. RP 202. Mr. Allert then approached this driver's car and apologized for the accident, telling her that he would fix the mailbox. RP 203. This driver had been following Mr. Allert and called 911 to report him for erratic driving. RP 199-200.

An officer located Mr. Allert's vehicle and began following it. RP 106. Seeing the police car behind him, Mr. Allert voluntarily pulled over to talk with the officer. RP 107-08. The officer asked Mr. Allert about the mailbox and Mr. Allert admitted to striking it. RP 109. He told the officer that he intended to find the owner and pay for the repair. RP 109.

The officer ran Mr. Allert's Idaho driver's license and determined that it was suspended. RP 109-10. He placed Mr. Allert under arrest for this misdemeanor offense and secured Mr. Allert's car so that it could be impounded. RP 112-13. While securing the car, the officer noted a rifle lying across the backseat, unconcealed. RP 112. Mr. Allert told the officer he used the rifle for hunting. RP 145. A subsequent inventory search of the car

revealed ammunition in the rifle's chamber and methamphetamine in containers under the front passenger's seat. RP 153, 217-18.

The State charged Mr. Allert with Possession of a Controlled Substance with Intent to Deliver (Count I), Driving Under the Influence (Count II), Driving While License Suspended in the Third Degree (Count III), Hit and Run - Property Damage (Count IV), and Unlawful Possession of a Loaded Weapon in a Motor Vehicle (Count V). CP 7-11. The State also specially alleged that Mr. Allert was armed with a firearm during the commission of Count I. CP 7. Mr. Allert was 31, his only prior offense a misdemeanor from Idaho in 2015. CP 45-46.

Mr. Allert was noticeably ill when trial began. Defense counsel devoted a significant portion of voir dire to Mr. Allert's symptoms, asking jurors whether they would be distracted or bothered by his constant coughing. RP 58-59. At the end of the first day, when the State rested, the defense still had not decided whether Mr. Allert would take the stand. RP 232-33. The court ended proceedings early, in order to afford Mr. Allert more time to "be able to improve his health situation . . . while counsel makes a decision overnight as to whether or not he's going to testify." RP 210.

When trial resumed the next morning, defense counsel requested a jury instruction on the defendant's right not to testify. RP 236, 247. After

the parties agreed on the remaining instructions, the court recessed for five minutes, from 9:31 a.m. to 9:36 a.m. RP 251-52.

When transcription resumed, the judge asked defense counsel whether she wanted to make a record of what had occurred during the recess. RP 252. Counsel responded that she had just had a detailed, largely ex parte discussion with the judge about the defense's decision to go to trial while Mr. Allert was "very sick" and having difficulty breathing and communicating. RP 252-53. She stated that, in the days just before trial, she had attempted to talk with Mr. Allert but "he simply couldn't, and his breathing was off, and he couldn't have a conversation with me." RP 252. She recalled that, although she had had "misgivings" about proceeding with trial and "was kind of waffling" just prior to jury selection, the parties had agreed to "soldier on" due in part to the extra expense involved in a delay. RP 253. Counsel wanted the record to reflect that she had advised Mr. Allert to get documentation from a doctor if he thought he might be too sick to make decisions regarding trial, but that it was her "impression that Jessie wanted . . . to move forward with trial in light of his sickness and . . . I just . . . want to make sure that that didn't impair his . . . or factor into his ability as to testify or not testify." RP 253-54.

The prosecutor then stated that he was not present for all the off-record discussion, and that he became aware of it only because he "wandered back to let the Court know we were ready to proceed." RP 254-55. He expressed

serious concerns about this closed proceeding but claimed that he “believe[d] the Court treated it as a . . . ministerial issue concerning scheduling and not . . . anything that touched upon the facts or . . . the disposition of the case itself.” RP 254-55. The court and defense counsel agreed with the prosecutor’s characterization, with the judge commenting that “there was no discussion of substantive matters,” RP 255, and defense counsel opining that it was “well within the province of the Judge” to make that determination, RP 256. The court then recalled the jury and the defense rested. RP 256. The jury convicted Mr. Allert as charged. RP 317-18.

The judge imposed the lowest possible standard range sentence: 87 months of total confinement, including a three-year firearm enhancement pursuant to the special verdict. CP 48. He commented that this was “more than sufficient punishment for the facts and circumstances of this particular incident.” RP 339. Over defense counsel’s objection, the judge also granted the State’s request for restitution in the amount of \$1,271.09, which included witness expenses such as a \$750.00 plane ticket. RP 327-31.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. ALLERT'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL WHEN IT HELD A CLOSED, OFF-RECORD, AND PARTIALLY EX PARTE PROCEEDING TO ADDRESS MR. ALLERT'S DECISIONS TO PROCEED WITH TRIAL AND WAIVE HIS RIGHT TO TESTIFY.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995). Article I, section 10 of the Washington Constitution also provides “[j]ustice in all cases shall be administered openly.” This gives the press and public a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The public trial right is a core safeguard in our justice system. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). It helps ensure fair trials, deters perjury and other misconduct, and tempers biases and undue partiality. Id. at 6. Public access is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id.

Whether a defendant’s public trial right has been violated is a question of law that the appellate court reviews de novo. Wise, 176 Wn.2d at 9. A

violation occurs where (1) the proceeding at issue implicates the public trial right, (2) the proceeding was in fact closed, and (3) the closure was not justified. State v. Whitlock, 188 Wn.2d 511, 520, 396 P.3d 310 (2017). In this case, there can be no dispute about the second and third factors: a proceeding in chambers is closed to the public, id. (citing State v. Frawley, 181 Wn.2d 452, 459-60 & n.8, 334 P.3d 1022 (2014)), and a closure is unjustified if it occurs with no Bone-Club¹ analysis, id. at 520-21 (citing State v. Smith, 181 Wn.2d 508, 520, 334 P.3d 1049 (2014)). Thus, the only question here is whether an in-chambers discussion of the defendant’s ability to communicate with counsel and participate in his own defense implicated the public trial right. The answer is yes.

To determine whether a proceeding implicates the public trial right, Washington courts use the two-prong “experience and logic” test. Smith, 181 Wn.2d at 514 (citing State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012)). The experience prong “asks ‘whether the place and process have historically been open to the press and the general public.’” Sublett, 176 Wn.2d at 73 (plurality opinion) (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II)). The logic prong “asks

¹ Bone-Club, 128 Wn.2d at 258-59 (court may not close proceeding unless it weighs, on record, proponent’s interest in closure, which must be compelling; objections of anyone present; whether there are less restrictive means of protecting proponent’s interests; the public’s competing interests; and how to ensure any closure is as limited as possible).

‘whether public access plays a significant positive role in the functioning of the particular process in question,’” i.e., whether that process “implicate[s] the core values the public trial right serves.” *Id.* at 72-73. If the answer to both questions is yes, then the public trial right attaches to the proceeding. *Id.* (citing Press II, 478 U.S. at 7-8).

In the context of jury selection, the Washington supreme court has held that certain “administrative” or “ministerial” proceedings fall outside the scope of the public trial right. Such proceedings include preliminary hardship excusals based on juror questionnaires, which may occur off the record because they address only scheduling matters. State v. Russell, 183 Wn.2d 720, 730, 357 P.3d 38 (2015) (hardship excusals depend on “whether a juror is able to serve at a particular time or for a particular duration”) (emphases omitted). They do not include peremptory or for-cause challenges, however, *id.* at 730-31, which trigger the public trial right because they involve substantive issues that “implicate the core purpose of the right,” such as “a juror’s neutrality and a party’s motivation for excusing the juror,” State v. Love, 183 Wn.2d 598, 605-06, 354 P.3d 841 (2015).

Presumably mindful of this precedent, counsel and the court in Mr. Allert’s case characterized the in-chambers conference as involving “a ministerial issue concerning scheduling and . . . not anything that touched upon . . . the disposition of the case itself.” RP 254-55. But the record belies that

characterization. While it is impossible to know exactly what occurred in chambers, the existing record makes clear that the partially ex parte² discussion addressed issues of fundamental importance to the entire trial: Mr. Allert's decisions to proceed, and then to decline to testify, and whether these decisions resulted from his illness. See RP 253 (defense counsel stating that the purpose of closed proceeding was to "make sure that [Mr. Allert's illness] didn't impair his . . . or factor into his ability as to testify or not testify"); State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999) (waiver of the right to testify must be knowing, voluntary, and intelligent). Contrary to the prosecutor's assessment, these are not "ministerial issue[s] concerning scheduling," RP 254-55. Contrary to the trial judge's assessment, RP 255, they are every bit as "substantive" as peremptory and for-cause challenges. See State v. Shearer, 181 Wn.2d 564, 575, 334 P.3d 1078 (2014) (lead opinion) (rejecting State's argument that in-chambers discussion of juror's criminal record was "a 'ministerial or administrative matter'"); id. at 575 (Gordon McCloud, J., concurring).

In substance, the in-chambers discussion at issue here most resembles a competency hearing, as it addressed Mr. Allert's ability to assist in his own defense. See State v. Coley, 180 Wn.2d 543, 551-52, 326 P.3d 702 (2014)

² While not independently requiring reversal, the fact that the non-public hearing also excluded the prosecutor further demonstrates how unusual and improper it was.

(defendant competent only if he can assist in his own defense). Competency hearings trigger the public trial right under the experience and logic test. See State v. Chen, 178 Wn.2d 350, 357, 309 P.3d 410 (2013) (competency evaluations in court record presumptively public); id. at 359 & n.12 (Gordon McCloud, J., concurring) (under experience and logic test, “competency proceedings in a criminal case are presumptively open to the public”) (citing United States v. Guerrero, 693 F.3d 990, 1000-03 (9th Cir. 2012)).³ Like a competency hearing, the in-chambers discussion in this case plainly implicates almost all the “core values” underlying the public trial right. Those values include “ensuring a fair trial, reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions, encouraging witnesses to come forward, discouraging perjury, promoting confidence in the judiciary, and providing an outlet for the public’s concern, outrage, and hostility.” State v. Schierman, 192 Wn.2d 577, 609, 438 P.3d 1063 (2018) (lead opinion) (alterations and internal quotations omitted). Here, defense counsel conferred in private with the trial judge regarding her client’s sickness and whether it “impair[ed] . . . or factor[ed] into his ability . . . to testify.” RP 253. That conference implicates the basic fairness of the trial, the

³ This is so because competency hearings have historically been open to the public (the experience prong), Guerrero, 693 F.3d at 1000 & n.5 (collecting cases), and because “[a] court’s decision on whether a defendant is able . . . to assist counsel in his defense is a critical part of the criminal process” (the logic prong), id. at 1001.

judge's responsibility to the accused, confidence in the judiciary, and community concern. Because trial proceeded after the conference, we can infer that the court reached a decision regarding Mr. Allert's decision not to testify, but it is impossible to know the basis for that decision, since the conference was not transcribed. Such secrecy is exactly what the public trial right prohibits, and it is reversible error.

Our supreme court recently recognized a limited exception to reversal where a violation of the public trial right is de minimis, Schierman, 192 Wn.2d at 614; id. at 764 (Yu, J., concurring), but that extremely narrow exception does not apply here. An improper closure cannot be de minimis if it involves "the determination of facts behind closed doors." Id. at 610-11. This rule is not limited to "facts" at issue in the trial; it applies to facts about potential jurors, id. (citing State v. Paumier, 176 Wn.2d 29, 33, 288 P.3d 1126 (2012)), facts relevant to a pretrial suppression motion, id. (citing Bone-Club, 128 Wn.2d at 256-57), and facts relevant to a codefendant's motions to sever and dismiss, id. (citing State v. Easterling, 157 Wn.2d 167, 172, 137 P.3d 825 (2006)).

Of all the cases reversing for "the determination of facts behind closed doors," Schierman, 192 Wn.2d at 11, Easterling is most analogous to what occurred here. Easterling involved a closed hearing where defense counsel (for Easterling's codefendant) argued that the State had misled him by

withdrawing a plea offer without notice. 157 Wn.2d at 172. As a result of that hearing, a plea agreement was reached. Id. The circumstances here are the same: as in Easterling, the closed proceeding resolved facts underlying the defendant’s decision to forgo fundamental constitutional rights—in Easterling, the right to a jury trial, in Mr. Allert’s case, the right to testify in his own defense. See RP 253. Consistent with the public trial right, such facts cannot be resolved behind closed doors.

Moreover, the closure in Mr. Allert’s case was much worse than the closure in Easterling because, unlike the hearing in Easterling, the proceeding at issue here was not transcribed. Even where the closure at issue involves no resolution of facts, and thus the de minimis exception can apply, the exception will not be satisfied if the closure “undermined the values furthered by the public trial right.” Schierman, 192 Wn.2d at 614 (citing Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996)). Applying that test, Division Three recently held that a closure was not de minimis because the proceeding at issue (a pretrial motion to exclude hearsay) was not transcribed. State v. Karas, 6 Wn. App. 2d 610, 626, 431 P.3d 1006 (2018). The court reasoned that, because “[n]o record of the argument was made, and the trial court provided only a cursory explanation . . . when it summarized the chambers conference,” the public could not be assured that an important evidentiary issue was properly resolved. Id.

The same is true in Mr. Allert's case. The lack of a transcript makes it impossible to know how the court resolved the issue of Mr. Allert's capacity to assist counsel and waive his right to testify. And that problem is not mitigated by the parties' attempts to memorialize what occurred in chambers. On the contrary, the post-closure record is ambiguous as to whether any resolution was achieved at all. See RP 252-53 (I just . . . want to make sure that that didn't impair his . . . or factor into his ability as to testify or not testify").

Mr. Allert is entitled to a trial consistent with Sixth Amendment and article I, section 22 protections. His convictions must be reversed and the case remanded for a new trial.

2. THE TRIAL COURT COMMITTED MANIFEST CONSTITUTIONAL ERROR WHEN IT INSTRUCTED THE JURY ON A NON-EXISTENT HIT AND RUN OFFENSE

A jury instruction that eases the prosecution's burden "affect[s] such fundamental aspects of due process as the presumption of innocence and the right to have the State prove every element of the charge beyond a reasonable doubt." State v. Johnson, 100 Wn.2d 607, 614, 674 P.2d 145 (1983), overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). Accordingly, such an instruction is a manifest constitutional error, which may be raised for the first time on appeal under

RAP 2.5(a)(3). State v. O'Hara, 167 Wn.2d 91, 100-01, 217 P.3d 756 (2009) (collecting cases).

The to-convict instruction for the Hit and Run – Property Damage charge in Mr. Allert's case stated that any driver of a vehicle that "collided with property fixed or adjacent to any public highway" must "fulfill all of the following duties:"

- (a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible.
- (b) Immediately return to and remain at the scene of the accident until all duties are fulfilled,
- (c) To take reasonable steps to either locate the owner of the property struck and give that person his name and address and the name and address of the owner of the vehicle he was operating or leave in a conspicuous place upon the property struck a written notice giving his name and address and the name and address of the owner of the vehicle he was operating.

CP 29. The first two "duties" are entirely absent from the statute under which Mr. Allert was charged. That statute provides, in full:

The driver of any vehicle involved in an accident resulting only in damage to property fixed or placed upon or adjacent to any public highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of the name and address of the operator or owner of the vehicle striking such property, or shall leave in a conspicuous place upon the property struck a written notice, giving the name and address of the operator and of the owner of the vehicle so striking the property, and such person shall further make report of such accident as in the case of other accidents upon the public highways of this state.

RCW 46.52.010(2).

This statute imposes no requirement to stop, and no requirement to remain at the scene of an accident.⁴ Nevertheless, Mr. Allert's jury was told that he violated the law if he failed to do those things. This instructional error eased the State's burden: it is easier for the State to prove the offense described in the instruction—an offense that does not actually exist—than the offense codified in the law. Thus, Mr. Allert may raise this error for the first time on appeal. O'Hara, 167 Wn.2d at 100-01.

Nor was this instructional error harmless.⁵ The evidence at trial indicated that, immediately after hitting the mailbox, Mr. Allert was taking steps to locate and notify its owner. Two witnesses at trial testified that Mr. Allert told them, at or shortly after the time of the accident, that he planned to find the owner and pay for the damage. RP 109, 203. On this record, the jury might well have convicted Mr. Allert because it believed he had a duty to “remain at the scene of the accident until all duties are fulfilled,” CP 29—

⁴ Nor does the pattern instruction for this hit and run offense include these requirements. See WPIC 97.08. The erroneous instruction given in Mr. Allert's case appears to incorporate duties imposed by a different hit and run statute, RCW 46.52.020(1), which applies where “an accident result[s] in the injury to or death of any person or involv[es] striking the body of a deceased person.”

⁵ Mr. Allert does not concede that harmless error analysis applies to this instructional error. An erroneous jury instruction is normally subject to harmless error analysis, but it requires automatic reversal if it “relieves the State of its burden to prove every element of a crime.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Mr. Allert contends that the error in the Hit and Run instruction was, for due process purposes, the equivalent of an omission relieving the State of its burden to prove every element.

a duty the law does not in fact impose. In other words, the jury might well have convicted Mr. Allert because of the instructional error. Thus, the error was not harmless. Brown, 147 Wn.2d at 341 (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)) (“In order to hold [instructional] error harmless, we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’”).

Finally, even if Mr. Allert were barred from raising this instructional error under RAP 2.5(a)(3), he may still raise it as a claim of ineffective assistance. Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney’s conduct “(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney’s conduct.” State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). Both requirements are met here.

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). Counsel’s failure to notice

and object to a faulty jury instruction is constitutionally deficient performance. State v. Townsend, 142 Wn.2d 838, 843-847, 15 P.3d 145 (2001); State v. Wilson, 117 Wn. App. 1, 17, 75 P.3d 573, review denied, 150 Wn.2d 1016, 79 P.3d 447 (2003). The erroneous hit and run instruction in Mr. Allert's case plainly misstated the law, and it did so in a manner that made it easier for the State to obtain a conviction. Competent counsel would have noticed and objected to this instruction.

And it is very likely the outcome would have been different absent this instructional error. As discussed above, the jury could well have convicted Mr. Allert for violating a non-existent duty to remain on the scene of the accident.

This Court must vacate Mr. Allert's conviction for Hit and Run – Property Damage in violation of RCW 46.52.010.

3. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED RESTITUTION TO COMPENSATE THE STATE FOR WITNESS EXPENSES.

A trial court's restitution order is reviewable for abuse of discretion. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). A court necessarily abuses its discretion if it relies on an incorrect legal standard, id., as the court did in this case.

The court's authority to impose restitution derives entirely from statute. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). The statute applicable here provides:

restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.

RCW 9.94A.753(3).

This statute permits restitution only for “losses that are ‘causally connected’ to the crimes charged.” Tobin, 161 Wn.2d at 524, (quoting State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005)). It is well established that this does not include witness or other trial-related expenses. E.g., State v. Goodrich, 47 Wn. App. 114, 115, 733 P.2d 1000 (1987) (reversing imposition of restitution for victim's lost wages where losses resulted from victim's attendance at trial and not from injury”).

Division One recently reversed a restitution order in an unpublished decision that is directly on point. In State v. Rehaume,⁶ noted at 186 Wn. App. 2d 1034, 2015 WL 1307164 (Mar. 23, 2015), at *3, the court explained that “a jury trial, while ‘connected with’ the crime charged, is not an act constituting part of the charge . . . [and] does not directly result from the defendant's crimes.” Id. at *3. This is correct. The restitution statute was

⁶ Under GR 14.1(a), Allert cites this unpublished decision for whatever persuasive authority this court deems appropriate.

enacted to protect crime victims from financial loss, State v. Gonzalez, 168 Wn.2d 256, 265, 226 P.3d 131 (2010), not to punish the accused for exercising the right to a jury trial. To the extent the trial court's restitution order in this case compensates the State for witness expenses and other costs resulting from trial, it is unlawful.

This court should vacate the restitution order and remand for entry of an order limited to damages resulting from the underlying offenses in this case, not from Mr. Allert's exercise of his right to a jury trial.

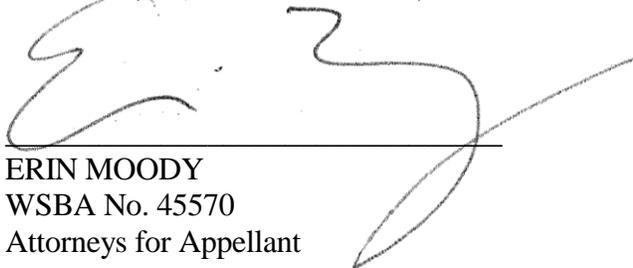
D. CONCLUSION

For the reasons discussed above, this Court should reverse Mr. Allert's convictions and remand for a new trial. Alternatively, this Court should vacate Mr. Allert's conviction for Hit and Run – Property Damage, vacate the restitution order, and remand for entry of a new order that omits witness expenses and other costs not directly resulting from the offenses.

DATED this 28th day of August, 2019.

Respectfully submitted,

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August 28, 2019 - 5:42 PM

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