

NO. 71415-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON WILLIAMS,

Appellant.

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

The Honorable, Eric Lucas, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	8
1. BECAUSE THE STATE FAILED TO PROVE WILLIAMS INTENDED TO COMMIT ASSAULT OR ATTEMPTED ASSAULT, AN ALTERNATIVE MEANS OF COMMITTING BURGLARY, THE CONVICTION MUST BE REVERSED.....	8
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Crippen v. Pulliam</u> 61 Wn.2d 725, 380 P.2d 475 (1963).....	9
<u>Davis v. Baugh Indus. Contractors, Inc.</u> 159 Wn.2d 413, 150 P.3d 545 (2007).....	9
<u>Englehart v. General Elec. Co.</u> 11 Wn. App. 922, 527 P.2d 685 (1974).....	9
<u>In re Personal Restraint of Stockwell</u> 179 Wn.2d 588, 316 P.3d 1007 (2014).....	14
<u>Pepperall v. City Park Transit Co.</u> 15 Wash. 176, 45 P. 743 (1896)	9
<u>Schatz v. Heimbigner</u> 82 Wash. 589, 144 P. 901 (1914)	10
<u>Scoccolo Const., Inc. v. City of Renton</u> 158 Wn.2d 506, 145 P.3d 371 (2006).....	9
<u>State v. Bergeron</u> 105 Wn.2d 1, 711 P.2d 1000 (1985).....	8, 15, 16
<u>State v. Calvin</u> __ Wn. App. __, 316 P.3d 496 (2013).....	9, 13
<u>State v. Eakins</u> 127 Wn. 2d 490, 902 P.2d 1236 (1995).....	12
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	9, 10, 13
<u>State v. Holt</u> 104 Wn.2d 315, 704 P.2d 1189 (1985).....	15

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	14
<u>State v. Lewis</u> 69 Wn.2d 120, 417 P.2d 618 (1966).....	17
<u>State v. Lobe</u> 140 Wn. App. 897, 167 P.3d 627 (2007).....	13
<u>State v. McCarty</u> 140 Wn.2d 420, 998 P.2d 296 (2000).....	15
<u>State v. Nonog</u> 169 Wn.2d 220, 237 P.3d 250 (2010).....	15
<u>State v. Petrich</u> 101 Wn.2d 566, 683 P.2d 173 (1984).....	14
<u>State v. Whitney</u> 108 Wn.2d 506, 739 P.2d 1150 (1987).....	13
<u>Thornton v. Dow</u> 60 Wash. 622, 111 P. 899 (1910)	9
<u>Tonkovich v. Department of Labor & Indus.</u> 31 Wn.2d 220, 195 P.2d 638 (1948).....	10

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Gray v. Netherland

518 U.S. 152, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996)..... 15

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.52.010 12

U.S. Const. amend. VI 15

Const. Art. I, § 22..... 15

A. ASSIGNMENTS OF ERROR

1. The State failed to prove each element of residential burglary beyond a reasonable doubt.

2. The trial court erred by denying Jason Williams' motion for a bill of particulars.

Issues Pertaining to Assignments of Error

1. The trial court instructed the jury that the State had to prove Williams entered a dwelling with the intent to commit "a crime" therein to sustain a guilty verdict for residential burglary. The court also gave the jury instructions defining assault and theft, thereby grafting elements onto the charge. The State failed to prove Williams intended to assault or attempt to assault the dwelling's occupants. Under the law of this case, must the residential burglary conviction be reversed?

2. Williams' counsel moved before trial for a bill of particulars, requesting the State to identify the crime or crimes that Williams allegedly intended to commit when he unlawfully entered a dwelling. Such a bill was essential to prepare an effective defense. Did the trial court err by denying the motion?

B. STATEMENT OF THE CASE

Nicholas Spencer-Berger and his wife, Keri Devilbiss, were watching television in their upstairs bedroom on January 25, 2013, at about 10:30 p.m. when they heard a thumping sound. RP 7-8, 36, 81-82. Thinking it was their young daughters in the next room, Devilbiss went to check on them. They were asleep. RP 81-82. When the couple heard another thump or crashing sound, they both called 911. RP 8-9, 37, 82.

Devilbiss stayed with the children, while Spencer-Berger, who was six-feet-one-inch tall and weighed 280 pounds, left his bedroom and went to investigate. RP 9-10, 75. He immediately saw Williams walking up the stairs. RP 9-10, 37. Williams had entered the home by throwing a stump through a garage window and entering the attached house. RP 15-16, 64, 105-06, 139-40. The window was not visible from the street. RP 106. Spencer-Berger repeatedly yelled at Williams to get out of the house. Williams was "saying things that made no sense," such as "telling me to give him keys." RP 10-11, 37, 47-48.

Williams also repeatedly asked Spencer-Berger, in an aggressive and confrontational tone, why he was following him. But Spencer-Berger had never seen Williams before. RP 21-23, 34, 37, 42-43, 50. This made Spencer-Berger fear for his safety and that of his family. RP 11-12, 34.

Spencer-Berger admitted, however, that Williams never attempted to strike him or make verbal threats. RP 38-42. Nor did Williams gesture as if he was about to display a weapon. RP 40. Spencer-Berger did not know what Williams' intent was. RP 42. In addition, Devilbiss was concerned because she thought Williams was after them, since she never heard Williams say he wanted property. She heard nothing about the keys. RP 88.

Rather than leaving, Williams approached Spencer-Berger and asked him who was in the next room. Spencer-Berger said no one was in the room. RP 12-13. Williams opened the door to the room and Spencer-Berger pushed him out of the way and closed the door. RP 12-13, 83-84. Spencer-Berger then pushed Williams down the stairs. RP 13, 38-39.

Spencer-Berger remained on the phone with the 911 operator to this point of the incident. After the operator told him officers were close to his home, Spencer-Berger opened the front door to the house. RP 14. Williams went over to Spencer-Berger's television and picked up a plug and looked at it. He then came back and shut and locked the front door. RP 14, 40. Spencer-Berger responded by knocking Williams to the ground with a punch in the face and reopening the door. RP 15, 40.

Several officers responded to a burglary-in-progress call. RP 60, 61, 93-94, 137-38. Each parked a block or more from Spencer-Berger's house. RP 94, 146. The officers drove with their flashing lights and sirens on, but one officer said it would have been difficult to hear the sirens from the house. RP 156. Spencer-Berger said he did not hear sirens before the police appeared. RP 74.

As officers approached, one officer saw that Spencer-Berger had Williams pinned against a wall. RP 138-40. The officers handcuffed and arrested Williams without incident. RP 15, 61, 96. An officer asked Williams who he was, but Williams said he did not want Spencer-Berger to hear his name. RP 97, 111. Williams denied having identification, but officers found a driver's license on his person. RP 104. Williams was not armed. RP 96-97. No property was missing nor had property been stacked near the door. RP 124. One officer heard Williams say he walked to the home, and a second said Williams told him a friend had driven him there. RP 62, 102-03. Officers nevertheless found Williams' car parked about two blocks from Spencer-Berger's home. RP 62-63, 107-08, 111.

The following day, Spencer-Berger discovered someone had emptied the glove box of his car and dumped the contents on the passenger

seat. RP 16. He was unaware of anything having been taken from the car. RP 46-47.

Williams agreed to speak with the officers after his arrest. RP 100-01. He said he went to the home to find out why Spencer-Berger had been following him after an altercation that occurred at a Fred Meyer store earlier in the day. RP 102. A "sixth sense" told him where Spencer-Berger lived. RP 102. Williams first knocked on the door, but no one responded. He then broke a window in the garage and entered the home. RP 103, 106. He went to the sound of commotion upstairs where he was attacked by Spencer-Berger. RP 104. Williams also gave a written statement, which did not rationally relate to the questions asked. RP 109-10; Ex. 7 (attached as appendix).

The State charged Williams with residential burglary in violation of RCW 9A.52.025. Williams' defense was that he did not intend to commit a crime when he entered the garage and residence. RP 330. Counsel implored the jury to find Williams guilty of first degree criminal trespass. RP 346. Two experts testified to Williams' mental state at the time of the incident.

Williams retained psychiatrist Lawrence Wilson to conduct an evaluation. RP 251-53, 259. Wilson reviewed many of Williams' medical

and mental health records, substance abuse treatment records, police reports, and criminal history. He interviewed Williams at the Snohomish County Jail on June 4, 2013. RP 259-60. Williams was under the care of a psychiatrist at the time for problems including anxiety and attention deficit hyperactive disorder (ADHD). RP 262.

Dr. Wilson learned that Williams' psychiatrist increased his dosage of an anti-anxiety drug two days before the incident. Williams reported this made him drowsy, which is consistent with the medication and dosage increase. RP 262-63. During this time, Williams believed he took an extra dosage of his ADHD medication, which contained amphetamine. RP 263.

Williams described one incident in which he thought he heard his boss say something to him, but the boss had said nothing. RP 264. Williams also reported he began to believe someone was following him. The feeling became stronger until he could not get it out of his mind. RP 263-64. On the night of the incident, Williams was driving home and missed his freeway exit. He got off the freeway and went back in the other direction when he got back on. He drove into a neighborhood he knew nothing about because he was compelled to find out who was following him. RP 264-65. He chose a house unknown to him, entered, and told the

occupant he was not there to cause harm but rather to find out why the man was following him. RP 265. Williams said he "wanted to find out the truth." RP 280-81. This was consistent with what the occupant told the police. RP 266.

Dr. Wilson reviewed Williams' written statement to the police. He called the statement "incredible" and "dreamlike." RP 267. Dr. Wilson said the statement was consistent with someone who suffered from medical toxicity. RP 268. Despite that, Dr. Wilson said Williams gave a urine sample two days before the incident that was analyzed and was negative for amphetamine. RP 268-69. Dr. Wilson diagnosed Williams with a brief psychotic disorder, one explanation of which was increased amphetamine. RP 269.

Western State Hospital psychiatrist Margaret Dean interviewed Williams shortly before trial. RP 179, 185. Dr. Dean's testimony was similar to Dr. Wilson's. She explained that amphetamine in high doses can cause psychosis. RP 196. Dr. Dean said Williams' report of events was consistent with a chemically induced psychosis. RP 199, 202. Her professional opinion was that Williams intended to act on his delusion that Spencer-Berger had been following him.

The jury found Williams guilty as charged. CP 40. The trial court imposed a standard range sentence of 43 months. CP 24-37.

C. ARGUMENT

1. BECAUSE THE STATE FAILED TO PROVE WILLIAMS INTENDED TO COMMIT ASSAULT OR ATTEMPTED ASSAULT, AN ALTERNATIVE MEANS OF COMMITTING BURGLARY, THE CONVICTION MUST BE REVERSED.

The specific crime or crimes intended to be committed inside a burglarized premises is not an element of burglary that must be included in the jury instructions; instructing in the language of the burglary statute suffices. State v. Bergeron, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985). Despite this general rule, the trial court in Williams' case defined two separate crimes: assault (attempted battery) and theft. CP 55, 57 (instructions 12 and 14).¹ Proving intent to attempt to or to commit these crimes therefore became the law of the case. Because the State failed to prove Williams intended to commit assault or attempt assault, Williams' conviction cannot stand.

Under the law of the case doctrine, any instructions not timely objected to become the law applicable to that particular case. State v.

¹ The State proposed each instruction. Supp. CP __ (sub. no. 48, Plaintiff's Proposed Jury Instructions).

Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The doctrine is not limited to *adding* elements of proof, although that was in fact what happened in Hickman. The doctrine is broad and has been applied to definitional instructions as well as to-convict instructions. State v. Calvin, ___ Wn. App. ___, 316 P.3d 496, 506 (2013).

Since 1896, the doctrine has provided that "whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case." Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743 (1896), overruled on other grounds by Thornton v. Dow, 60 Wash. 622, 111 P. 899 (1910), abrogated on other grounds by Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 417-18, 150 P.3d 545 (2007); see also Scoccolo Const., Inc. v. City of Renton, 158 Wn.2d 506, 522-523, 145 P.3d 371 (2006) (Madsen, J., concurring) (definition of "acting for" in contract dispute was law of the case in absence of challenge); Crippen v. Pulliam, 61 Wn.2d 725, 732, 380 P.2d 475 (1963) (in malpractice case, multiple instructions were law of the case because plaintiff failed to take exception); Englehart v. General Elec. Co., 11 Wn. App. 922, 527 P.2d 685 (1974) (instructional definition of "accidental death" for insurance claim was law of the case in absence of challenge).

As Hickman makes clear, any challenge to the sufficiency of the evidence on appeal is assessed in light of the law of the case; i.e., the instructions given to the jury without objection. Hickman, 135 Wn.2d at 102-106. Like the doctrine itself, this approach to sufficiency of the evidence is not limited to added elements in a "to convict" instruction. See Tonkovich v. Department of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948) (worker's compensation case; "It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved for each party, no objections or exceptions thereto having been made at any stage. In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions"); Schatz v. Heimbigner, 82 Wash. 589, 590, 144 P. 901 (1914) (contract dispute; "These alleged errors are not available to the appellants, because they are at cross purposes with the instructions of the court to which no error has been assigned. There is but one question open to them; that is, is there sufficient evidence to sustain the verdict under the instructions of the court?").

The court here instructed the jury that to convict Williams of residential burglary, it had to find beyond a reasonable doubt that he

entered with the intent to commit "a crime" against a person or property therein. CP 51. The two crimes defined in these instructions were assault and theft. CP 55, 57. In addition, the prosecutor made the connection during closing argument.

For example, the prosecutor asserted that Spencer-Berger and Devilbiss were assaulted because "Nicholas testified that he was scared, he thought he was going to be hurt, assaulted or killed, and his wife did so too when [Williams] opened the door." 2RP 328. The prosecutor also argued that Williams intended to commit theft. He argued that Williams demanded Spencer-Burger's keys and that the keys were property that did not belong to Williams. 2RP 323-24. He maintained Williams had no right to take the keys. Continuing, the prosecutor said, "There's no dollar limit or value limit on the goods. A simple key would be enough." 2RP 324.

The prosecutor also maintained Williams "just had to enter with intent to commit a crime against person or property. I submitted three, that evidence supports any of the three.² You have to just determine that one occurred." 2RP 348.

² The prosecutor appears to have misspoken by stating he submitted three potential underlying crimes. He submitted two potential crimes.

The prosecutor's statement might be correct in the abstract, but wrong under the law of this case. The court instructed the jury as to assault and theft. This is fatal to the State's case because the State did not prove assault or attempted assault.

The fact Spencer-Berger and Devilbiss claimed to be in fear of harm does not mean they were assaulted. If that were true, each time someone unlawfully entered an occupied building and caused apprehension and fear of bodily injury, he would face a first degree burglary charge. RCW 9A.52.010. Such a practice would eviscerate the distinction between second degree burglary and first degree burglary.

As the trial court instructed, the State had to prove Williams *intended* to place Spencer-Berger or Devilbiss them in "apprehension and fear of bodily injury[.]" CP 55 (instruction 12); State v. Eakins, 127 Wn. 2d 490, 496, 902 P.2d 1236 (1995). None of Williams' bizarre behavior indicated an intent to place Spencer-Berger or Devilbiss in apprehension and fear of bodily injury. He merely remained in the house because of a compulsion to find out why Spencer-Berger was following him and to urge Spencer-Berger to stop. He neither threatened nor attempted to commit assault. Williams made no gestures as if he were about to commit assault. He did not follow up after unsuccessfully obtaining Spencer-Berger's keys.

Nor did he strike Spencer-Berger after being punched in the face. Cf., Calvin, 316 P.3d at 500 (park ranger's apprehension and fear were reasonable where the incident occurred in a dark, isolated area, Calvin was aggravated and appeared unbalanced or impaired, Calvin reached his hand toward the ranger, swore at the ranger multiple times, and forced the ranger to back up about 10 feet).

Williams plainly did not intend to commit assault or attempt to commit assault. Furthermore, any apprehension or fear of injury was simply not reasonable. The State failed to prove one of the requisite underlying offenses. Under the law of the case, this Court must reverse Williams' conviction and remand for dismissal. Hickman, 135 Wash. 2d 97, 106, 954 P.2d 900, 904 (1998).

By analogy, the "alternative means" cases support the same result. The jury was instructed on two alternative means of committing residential burglary: assault and theft. When a crime can be committed by alternative means, jury unanimity as to the means is required where one of the means is not supported by substantial evidence and the means are inconsistent with each other. State v. Whitney, 108 Wn.2d 506, 508, 739 P.2d 1150 (1987); see State v. Lobe, 140 Wn. App. 897, 905-06, 167 P.3d 627 (2007) (conviction reversed where State charged three alternative means, each

means was included in jury instructions, and State failed to present evidence as to two of the means). This Court should reverse Williams' conviction. Lobe, 140 Wn. App. at 906.

As discussed, the State did not prove Williams intended to commit the assault alternative. The State did not elect to rely solely on theft as the underlying crime. And the trial court rejected Williams' proposed unanimity instruction based on State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988), abrogated on other grounds by In re Personal Restraint of Stockwell, 179 Wn.2d 588, 316 P.3d 1007 (2014). This error requires reversal of Williams' conviction. In response, the State may contend Williams waived his alternative means claim by basing it on Petrich, which is a multiple acts case. But related to the overall issue, defense counsel moved for a bill of particulars that the trial court denied. 2RP 59-62. Specifically, counsel asked the court to compel the prosecutor to identify which crime or crimes Williams purportedly intended to commit inside the premises. CP 68-69, 2RP 41-51.

A defendant has a state and federal constitutional right to be informed of the charge against him so he can prepare an adequate

defense.³ State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Gray v. Netherland, 518 U.S. 152, 167-68, 116 S. Ct. 2074, 2083, 135 L. Ed. 2d 457 (1996). Where an information charging burglary does not specify the nature of the offense with "sufficient exactness" to enable the accused to properly defend, the State may be required to present a bill of particulars. Bergeron, 105 Wn.2d at 17. This is especially true in the rare circumstance where the defendant shows the crime intended to be committed in the premises is material to the defense. Id., 105 Wn.2d at 17-18, see State v. Holt, 104 Wn.2d 315, 321, 704 P.2d 1189 (1985) (function of bill of particulars "is to amplify or clarify particular matters essential to the defense.").

Where a defendant claims to have entered and/or remained in the premises for a lawful purpose,

the time[-]honored way of proceeding is for defense counsel to file a motion for a bill of particulars, make the requisite showing, and obtain an order requiring the prosecuting attorney to specify the crime intended by way of a bill of particulars, and to then propose instructions on the subject which will permit the defendant to argue his or her theory of the case in that regard.

Bergeron, 105 Wn.2d at 18.

³ Art. I, § 22 of the state constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him. . . ."; accord U.S. Const. amend. VI; State v. Nonog, 169 Wn.2d 220, 225-26, 237 P.3d 250 (2010).

Williams' counsel used this "time-honored" method for obtaining more specific information, which was necessary to prepare an effective defense. Counsel acknowledged the State is not normally required to identify the intended crime(s), but stressed that "in this case it is material for Mr. Williams' defense." 2RP 61. Counsel maintained the State would have to show Williams engaged in unequivocal behavior indicating he intended to commit a particular crime or crimes in order to defeat a bill of particulars. 2RP 62.

The State contended it did not need to provide further specification of the underlying crimes. It nevertheless stated the underlying crimes could be fourth degree assault (reasonable apprehension of harm), disorderly conduct, robbery, theft, and theft of a motor vehicle. 2RP 47-49. In its trial brief, the prosecutor added the crimes of attempt to commit theft, robbery or "property crimes." Supp. CP __ (sub. no. 44, State's Trial Brief at 5-6).

The trial court denied the bill of particulars. The court found the case did not come under Bergeron. 2RP 63. The court also found Williams' conduct was not equivocal and clearly established an intent to commit an offense. 2RP 62-63. It held: "I think that there's enough there for any attorney to prepare for this case at trial, because I think that's what

you're going to have to combat, that interpretation of that behavior." 2RP 63.

Criminal intent may not be imputed to a defendant from his overt acts alone when a defendant's acts are "patently equivocal." State v. Lewis, 69 Wn.2d 120, 124, 417 P.2d 618 (1966). The trial court found Williams' conduct was not equivocal, but the finding is not supported by the record. Williams did nothing to indicate an intent to commit a crime once he entered the home. He neither made gestures nor threats suggesting he was about to assault Spencer-Berger, his family, or the police officers who responded to the scene. Nor did he attempt to steal or take property by force. He entered the home and confronted Spencer-Berger only to find out why Spencer-Berger was following Williams and urging Spencer-Berger to stop doing so.

Dr. Wilson testified "the compelling need for him to answer his question was an intent that overruled" any intent to harm someone. 2RP 283. Dr. Wilson said Williams "appeared to have no intent to harm anybody or to take articles that were not his but seemed overwhelmed with the need to definitively get an answer to his urgent question." 2RP 281.

Williams' rambling statement, admitted as Exhibit 7, had nothing to do with the incident and was considered by Dr. Wilson as a

demonstration of disorganized thinking. He said disorganization of thought was another aspect of psychosis. 2RP 276. He did not believe Williams was being playful or was not taking his situation seriously. 2RP 267. Instead, the statement indicated Williams was "struggling to try to explain his state of mind at the time and he wasn't doing a very good job of it." 2RP 267. Dr. Wilson did not believe Williams "was trying to fake being crazy" when he wrote the statement. 2RP 276.

In short, defense counsel made timely efforts to determine the basis for the state's charge before trial, and requested the court to require jury unanimity at the close of the evidence. The state simply failed to prove the assault alternative it had chosen. The state also failed to ask for a special verdict to determine which alternative the jury relied upon in convicting Williams. Because the state's actions and the trial court's instructions allowed the jury to convict Williams based on insufficient proof of the assault alternative, reversal is required.

D. CONCLUSION

The State failed to prove Williams entered a dwelling with intent to commit or attempt to commit assault. This Court should reverse the conviction and remand for dismissal with prejudice.

DATED this 16 day of June 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

APPENDIX

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71415-5-1
)	
JASON WILLIAMS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] JASON WILLIAMS
DOC NO. 324510
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

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SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JUNE 2014.

X *Patrick Mayovsky*