FILED
Jun 27, 2016
Court of Appeals
Division III
State of Washington

No. 33574-7-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SHANE R. HUGHES,

Defendant/Appellant

Respondent's Brief

L. CANDACE HOOPER
WSBA #16325
205 W. 5th Ave, Ste. 213
Ellensburg, WA 98926
(509) 962-7660
Attorney for Respondent

TABLE OF CONTENTS

I. TABLE OF CONTENTS.....2.

II. TABLE OF AUTHORITIES.....3

III. RESPONSE TO ASSIGNMENT OF ERROR.....5

IV. STATEMENT OF FACT 6

V.ARGUMENT.....11

A. Any error the Court may have committed by ordering mental health evaluation and treatment was invited error and could be corrected by a mental status evaluation and hearing..... ..11

B. The trial court inadvertently imposed a substance abuse evaluation by checking a box in one section of the judgment and sentence, but then crossing the word substance abuse out of a different section.....15

C. The trial court did not err by ordering the defendant to pay a DNA collection fee 16

STATEMENT OF ADDITONAL GROUNDS

A. There was sufficient evidence to find a firearm enhancement beyond a reasonable doubt 22

VI. CONCLUSION.....26

TABLE OF AUTHORITIES

Cases **Page(s)**

State v. Bergeron, 105 Wn. 2d 1 (1985).....23

State v. Blank, 131 Wn.2d 230 (1997).....18

State v. Bryan, 145 Wn. App. 353 (2008).....20

State v. Curry, 118 Wn.2d 911 (1992).....21

State v. Delmarter, 94 Wash.2d 634, 638 (1980).....24

State v. Fiser, 99 Wash.App. 714 (2000).....24

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....23

State v. Jones, 118 Wn.App. 199 (2003).....14,16

State v. Lundy, 176 Wn. App 96 (2013).....18

State v. Mathers, slip..op. of the Washington State Court of Appeals, Division II, filed May 10, 2016.....17,18,21

State v. Motter, 139 Wn. App. 797 (2007).....12,14

State v. Roth, 131 Wn. App. 556 23

State v. Willis, 153 Wn.2d 366 (2005).....25

State v. Salinas, 119 Wn. 2d 192 (1992).....23

State v. Theroff, 25 Wash.App. 590, aff'd, 95 Wash.2d 385 (1980).....23

State v. Thornton, 188 Wn. App. 371, (2015).....17,20

Table of Statutes

RCW 9.94A.703(3).....12

RCW 9.94B.080.....13

RCW 43.43.7541 17,20

III. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

A. . Any error the Court may have committed by ordering mental health evaluation and treatment was invited error and could be corrected by a mental status evaluation and hearing.

B. The trial court inadvertently imposed a substance abuse evaluation by checking a box in one section of the judgment and sentence, but then crossing the words substance abuse out of a different section.

C. The trial court did not err by ordering the defendant to pay a DNA collection fee

RESPONSE TO APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

A. There was sufficient evidence to find a firearm enhancement beyond a reasonable doubt

IV. STATEMENT OF FACT

James Shockey lived out in the country on 59 acres "in the middle of nowhere" with a long ¾ mile driveway, the last house before you go up in the mountains. (RP 32) Around 12:30 a.m. on November 13, 2014, Mr. Shockey got a ride home from town and could see from the road that someone was up on his driveway by his house. (RP 35) It turned out to be an acquaintance, Shane Hughes, who had not visited for maybe ten years. (RP 39) Mr. Hughes was standing by the house with a window screen in his hand. (RP 35-36)

Mr. Hughes said he had driven up to visit and come upon burglars at the house. (RP 41) Mr. Shockey said he knew what was going on (he said he wasn't born yesterday) but played along. (RP 41) Mr. Shockey went into the house. (RP 41) He found he had been burgled, so he called the police to report it. (RP 44) He did not let Hughes know he was calling the police. (RP 44)

Mr. Shockey had the Taylor family staying with him while Mr. Taylor looked for work. (RP 42) Mr. Shockey knew Taylor had a .22 rifle in the house, so he looked for it. (RP 42) It was kept unloaded in the closet and brought out because Shockey had a bad coyote problem that year. (RP 43)

Mr. Shockey saw Audrey Gibson-Lyman in the car that was present. She was sitting in the front passenger seat, having just awakened. (RP 45) She asked and Mr. Hughes asked to use the bathroom at Mr. Shockey' s house. (RP 46)

At some point after the police came, Ms. Gibson-Lyman went back to the car. Mr. Shockey was frustrated that the police had not yet arrested Mr. Hughes, since he told the police what he suspected as soon as the police arrived. (RP 54-55) Mr. Shockey went out to Ms. Gibson-Lyman

and told her if she were so innocent, why didn't she pop the trunk. (RP 55) Ms. Gibson-Lyman did pop the trunk open by pushing a button. (RP 55)

Mr. Shockey saw his possessions in the trunk of the car. (RP 56) He yelled loudly, "There's my stuff" (RP 56) The gun, a pink rifle, was there, wrapped in his towel. (RP 57) The officers came out with flashlights and saw the Mr. Shockey's property in Ms. Gibson Lyman's trunk. (RP 58, 60) Mr. Shockey identified numerous items that had been stolen and discussed their value. (RP 61-66) He testified that the gun was kept unloaded and used to shoot at coyotes. (RP 72)

Mr. Taylor testified that the pink rifle was a real firearm, used to shoot real .22 bullets. (RP 97) It was kept in the closet, unloaded. (RP 98) The bullets were kept in the Taylors' daughter's room. (RP 98)

A deputy sheriff testified that when Mr. Shockey showed them where the gun was missing, he showed them a bag of bullets, now in the front room on the floor, that were for that gun. (RP 125, 133)

Ms. Gibson Lyman testified that she and Mr. Hughes had gone driving. (RP 140) Mr. Hughes was driving and had the keys. (RP 140) She indicated she had been asleep when the pink rifle was put into her

trunk. (RP 155) She said she went out to get her ID and opened the trunk. (RP 155) When Mr. Shockey asked, because she had nothing to hide, she opened the trunk. That is when she saw the property stolen out of the Shockey home. (RP 146, 156) Mr. Hughes had the keys to the vehicle in his pocket. (RP 193, 220) The gun had a live round chambered in it. (RP 230)

The jury found Mr. Hughes guilty of Burglary in the First Degree, (RP 365) and came back with a finding of a special verdict that he was armed with a firearm. (RP 366) He was also found guilty of Theft of a Firearm, Theft in the Second Degree, and Unlawful Possession of a Firearm in the Second degree. (RP 366)

At his sentencing, the defense presented the Court with letters from Mr. Hughes' grandmother and mother. (RP 377) They discussed his mental health issues (RP 378, CP 26-29) Then the Court openly asked Mr. Hughes if Mr. Hughes wanted the court to make a finding that there was a mental health issue that needed to be looked at, and also chemical dependency. (RP 386-387). This was discussed. Mr. Hughes specifically told the court, "I mean, to mental health, yes, sir." (RP 387) He went on to say, after the court said, "Okay," "But as far as chemical dependency, I

know that DOC deals with that when you end the sentence. You know what I mean?" And when the court answers, "Right," The Defendant adds, Because you have so much idle time after the program." (RP 387)

The defense attorney then adds, "So I think that just the mental health. If that would help—" (RP 387) Then the court asked about where it is in the pattern Judgment and Sentence form. After the prosecutor points that out, the defense says,

"they can—" (RP 387)

The judge then sentenced Mr. Hughes to a sentence in the middle of the standard range, which included community custody for the Burglary charge. (CP 14) The court checked the box on the Judgment and Sentence form ordering an evaluation for mental health. The court scratched out the substance abuse box on that same page, although a box had been checked on the appendix relating to substance use (CP 14, 21).

Standard court costs and fees, including a DNA fee was imposed. (CP 16). The defense attorney indicated he had had his DNA collected. The deputy from the jail indicated he had done it the first time there and it was done automatically. (RP 386)

This appeal followed.

V. ARGUMENT

A. Any error the Court may have committed by ordering mental health evaluation and treatment was invited error and could be corrected by a mental status evaluation and hearing.

The appellant argues that the court should not have imposed a requirement in his community custody that he undergo a mental health evaluation and treatment. The requirement was imposed in the Judgment and Sentence after discussion of the defendant's mental health was brought up and discussed by the defense on the record. (RP 386-388) It was the defendant's own relatives, his grandmother and his mother, who submitted letters at sentencing on behalf of Mr. Hughes, who brought Mr. Hughes mental state to the attention of the court. (CP 25-29). In those letters, the defendant's mother and grandmother brought to the court's attention the fact that the defendant suffers from mental health conditions

which have essentially resulted in the offenses before the court. These letters, provided by the defense, indicated that he needed medication and intense counseling. (CP 26-29)

This information was provided to the court as an informal defense pre-sentence report, and was clearly treated as such by the court. The purpose was to alert the judge to the defendant's mental status and to give the opinion that the defendant needed mental health medication and treatment, so that he could receive that from DOC. The letters specifically told the court that Mr. Hughes would benefit more from the treatment than long incarceration.

An offender convicted of a violent offense, such as Burglary in the First Degree, will receive community custody, and the court may order an offender to participate in rehabilitative programs or perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. *State v. Motter,* 139 Wn. App. 797 (2007), overruled on other grounds. The statute at 9.94A.703 (3) allows:

> "As part of any term of community custody, the court may order an offender to: ...(c) Participate in crime-related treatment or

> counseling services; and (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."

By the time of trial and sentencing, the legislature had amended RCW 9.94B.080 so that a mental status evaluation and mental health treatment "may" be based on a presentence report. The legislature clearly chose to give the court much greater discretion in this area. The statute in effect at the time of the crime indicated that a mental status evaluation "must" be based on a presentence report. The statute does not set forth exactly what the nature of the presentence report must be.

In the present case, it was the defense that brought up the issue of mental health evaluation and treatment, and then the Court inquired of defense counsel whether Mr. Hughes wanted him to make a finding that there's a mental health issue that needs to be looked at for chemical dependency. Mr. Hughes himself told the court DOC had cut back on this. But he specifically replied, "I mean, to mental health, yes, sir." (RP 387)

He appeared not to want conditions related to chemical dependency. Mr. Hughes' attorney indicated, "So I think that just the mental health. If

that would help—" (RP 387) Unlike the appellant's characterizations of these responses as ambiguous, they are in fact very clear. At least as of the date of sentencing, the defendant wished to avail himself of the opportunity to receive mental health counseling in prison, an opportunity which was available in prison by then to inmates after the effective date of the statutory amendment. The State did not need to spend great effort convincing the court Mr. Hughes wanted counseling as a condition of community custody. He said so. The State had not prepared to ask for it. *State v. Motter*, above, allows crime related treatment or counseling services. *State v. Jones*, 118 Wn.App. 199 (2003) allows for mental health treatment if the defendant could be characterized as a mentally ill person whose condition influenced the offense. Although appellant now indicates mental health treatment is onerous and burdensome, the defendant at the time of sentencing wished to have such treatment. Any error of the court in an attempt to give him what he requested was invited error. It is clear that the judge ordered this entirely because the defendant brought his mental status to the attention of the court. It could be corrected by having a hearing, agreed or not, and making findings that Mr. Hughes was a mentally ill

person whose condition influenced the offense. The letters certainly gave the Court probable cause to so believe.

B. The trial court inadvertently imposed a substance abuse evaluation by checking a box in one section of the judgment and sentence, but then crossing the word substance abuse out of a different section.

Mr. Hughes' mother's letter refers to his self - medicating when in a downward mental health spiral (CP 28) and to needing, "intense mental and drug counseling." (CP 28) There was no particular testimony that the crime was drug or alcohol related. During the sentencing hearing, the court inquired of Mr. Hughes whether he wished to have a finding made regarding chemical dependency. (RP 386-387) Mr. Hughes indicated essentially he wanted mental health but not chemical dependency. He said, "But as far as chemical dependency, I know that DOC deals with that when you end the sentence. You know what I mean?" (RP 387) His counsel indicated "...just the mental health." (RP 387) The Judgment and Sentence

shows that the Court had begun to check a box about substance use, but then crossed it off. (CP 15). One box on Appendix 4.6 evidently inadvertently remained checked. (CP 21) The many other chemical dependency related conditions from Appendix 4.6 remained unchecked, indicating the court had not meant the Judgment and Sentence to include significant findings regarding chemical dependency. If the court had found that chemical dependency was involved in the crime, the boxes would have been checked, and the condition would be supported under *Jones*.

C. The trial court did not err by ordering the defendant to pay a DNA collection fee

This issue has been addressed in various forms recently, even since the defendant's brief was received. Shane Hughes was ordered

by the court on the Judgment and Sentence to pay $100 for a DNA collection fee. (CP 10-23, specifically 16) This DNA fee is directed by the legislature in RCW 43.43.7541 and is a mandatory fee. Specifically, the statute states,

> " Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed." RCW 42.42.7541

As the Court concluded in *State v. Mathers*, slip..op. of the Washington State Court of Appeals, Division II, filed May 10, 2016, "The DNA fee 'serves to fund the collection of samples and the maintenance and operation of DNA databases'." Mather slip op. at p. 5. In *State v. Thornton,* 188 Wn. App. 371, (2015), the Court held that the Statute mandating the DNA fee furthered the purpose of funding for the state DNA database and agencies that collect samples.

Mr. Hughes claims the fee should be stricken on two bases. His first basis, that the statute violates substantive due process, has been decided in Washington State in several previous cases. Constitutional

challenges to the imposition of legal financial obligations generally turn upon the financial condition of the defendant at the time of recoupment of the costs, which in Mr. Hughes' case will be some years hence, after he has had opportunity to avail himself of whatever treatment or educational opportunities he can obtain in the Department of Corrections. (See the Judgment and Sentence, imposing 218 months, CP 10-23) Courts have properly declined to rule on constitutional claims until a recoupment action has been undertaken. *State v. Blank*, 131 Wn.2d 230 (1997). In *Mathers,* the Court held

> "Due process precludes the jailing of an offender for failure to pay a fine if the offender's failure to pay was due to his or her indigence.(citing *State v. Nason*, 168 Wn.2d 936 (2010). Under certain circumstances, however, the State may imprison an offender for failing to pay his or her LFO's such as if the offender is capable of paying but willfully refuses to pay or if the offender does not make a genuine effort to seek employment or borrow money in order to pay. Therefore, [i]t is at the point of enforced collection…where an indigent may be faced with the alternatives of payment or imprisonment, that he "may assert a constitutional objection on the ground of his indigency." *Mathers,* slip op. p. 13.

State v. Lundy, 176 Wn. App 96 (2013) held that the mandatory obligations are constitutional so long as there are sufficient safeguards in the sentencing scheme to prevent imprisonment of indigent defendants.

In this case there are sufficient safeguards of Mr. Hughes substantive due process that the statute should not be stricken down. Mr. Hughes DNA collection fee is mandatory and therefore properly imposed, however, Mr. Hughes will not be jailed for failure to pay because of indigency, and collections efforts are years away. Additionally, the Court told Mr. Hughes that the Court's practice is to waive the interest on DNA fees when the principal has been paid. (RP 388)

The second constitutional challenge Mr. Hughes brings is an equal protection claim. The Court in *Mather* held that the imposition of the DNA fee was not discretionary, and it declined to find an equal protection violation, comparing defendants who have been convicted of criminal offenses with civil litigants.

Appellant here argues that equal protection is violated because Mr. Hughes claimed at sentencing that his DNA was already collected. (RP 386) Mr. Hughes did not provide proof of this claim to the court, however he did at least raise it at sentencing. Courts have refused to decide an equal protection challenge to the imposition of DNA fees on this basis unless the defendant has provided proof to the court that he has actually

provided DNA samples. *Thornton* at 374. Nor did Mr. Hughes provide proof that he has ever paid the DNA fee if it was assessed on any of his previous fourteen felony convictions since 2002. His Judgment and Sentence properly complied with RCW 43.43.754, in that it directed that he need not provide a new DNA sample if his sample is already in the State database. (CP 17) Thus, he will not be subjected to an additional DNA collection if this has already occurred.

Although counsel correctly states the law concerning equal protection challenges, indicating that where neither suspect classes are involved, nor fundamental rights, a rational basis analysis is used to evaluate the challenge to a statute (citing, among others, *State v. Bryan*, 145 Wn. App. 353 (2008), the application of that test to these facts should come up with a different result than appellant seeks.

It is clear that the collection of DNA samples is rationally related to a legitimate state interest in solving and potentially deterring crime. As noted above, the imposition of the fee is undertaken to fund not only the collection of DNA by local agencies, but also the maintenance of a statewide database. The payment of a fee upon collection certainly assists the state in the legitimate business of recouping some of the attendant

costs of criminal prosecution by helping pay for the collection and analysis of DNA samples. (Mather, slip op. p. 11). The statute clearly passes a rational basis review. Since the defendant has not provided proof besides a statement on the record that he has provided a sample in the past, the assessment of the fee could be argued to be legitimate in this case.

But an argument could be made that even if some persons end up paying the DNA fee more than once, the payment of a fee more than once by repeat offenders also assists in maintaining and operating the expensive database. Although DNA does not change, the costs of criminal prosecution increase with each subsequent crime. It is not unreasonable or irrational to hold that charging repeat offenders more than once when they cause the criminal justice system additional cost with each crime does further a legitimate state interest in solving and deterring crime. This fee could be charged regardless whether the DNA is actually collected again.

Persons who commit crimes that do not have victims, still pay Victim Assessment Penalties. RCW 7.68.035(1) These fees are specifically assessed for the purpose of increasing funding for victim programs, (see Mathers) despite the fact that the crime may involve no victim. These fees, like DNA fees, are mandatory. *State v. Curry,* 118

Wn.2d 911 (1992) These penalties have been found to be constitutional, even for indigent defendants.

The DNA database may be maintained, updated, run, and consulted multiple times when offenders commit repeat offenses. The defendant, as a person who is convicted of a felony crime, can legitimately be mandated to pay into that database after each conviction, and this is arguably more fair than assessing the same cost to each person whether that person is prosecuted one time or fourteen times. If the fee is not simply for collection, but also for the use, upkeep, and maintenance of the database, the number of times a sample is actually collected from a defendant is not the only relevant factor to consider. Multiple payments are rationally related to a legitimate purpose of the law. Multiple offenders impact law enforcement and the courts multiple times, and should pay multiple fees.

Statement of Additional Grounds Issue

A. There was sufficient evidence to find a firearm enhancement beyond a reasonable doubt

The standard for review when sufficiency of the evidence is questioned, is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, when the evidence is viewed in the light most favorable to the State. S*tate v. Bergeron*, 105 Wn. 2d 1 (1985). A challenge to the sufficiency of the evidence to support a criminal conviction admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. All reasonable inferences must be drawn in favor of the State and most strongly against the defendant. State v. Salinas, 119 Wn. 2d 192 (1992).

In *State v. Roth*, 131 Wn. App. 556, the court further elucidated "The appellate court does not determine whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Rather, the pertinent question is whether any rational trier of fact could have found the essential elements after viewing the evidence in the light most favorable to the State. "*State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). When there is substantial evidence, and when the evidence is of such a character that reasonable minds may differ, it is the function and the province of the jury to weigh the evidence, determine the credibility of the witnesses, and decide disputed questions of fact. *State v. Theroff*, 25 Wash.App. 590, 593,

608 P.2d 1254, aff'd, 95 Wash.2d 385, 622 P.2d 1240 (1980). This court must defer to the determinations of the trier of fact on such issues. S*tate v. Fiser*, 99 Wash.App. 714, 719, 995 P.2d 107 (2000). In reviewing the sufficiency of the evidence, circumstantial evidence is not considered any less reliable than direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638 (1980)."

The defendant in this case, Mr. Hughes was charged with a firearm enhancement, which alleged that at the time the defendant committed the crime of Burglary in the First Degree, he was armed with a firearm. (CP 1) The jury did find beyond a reasonable doubt, unanimously, that the defendant was in fact armed with a firearm during the crime. (CP 6). Mr. Hughes contends that since the firearm stolen from the house had been placed in the trunk by the time Mr. Shockey arrived home, that there was insufficient evidence to show that Mr. Hughes had a firearm "readily available for offensive or defensive purposes." (see Defendant's Statement of Additional Grounds).

It is true that in order to find the firearm enhancement, the jury was instructed that, "A person is armed with a firearm if at the time of the commission of the crime the firearm is easily accessible and readily

available for offensive or defensive use." (RP 318) This instruction is appropriate under *State v. Willis,* 153 Wn.2d 366 (2005). In that case, the firearm was found in the vehicle, and it was handled on the way to the apartment that Mr. Willis broke into. *Willis* at 374. This was sufficient to find that the gun was easily accessible and readily available for Willis' use.

In the present case, the gun was taken out of the closet. (RP 97-98) The gun was a working firearm that was used against coyotes. (RP 72, 97-98,) The evidence was that the gun was ordinarily kept unloaded in the closet, and the ammunition was kept in a different room. (RP 98) When the homeowner found the gun was missing, he pointed out the box of ammunition, now out of the room where it was kept, lying on the floor. (RP 125, 133) The gun was found in the trunk, now loaded. (RP 57, 125, 133) The keys to the car were in Mr. Hughes pocket. (RP 193, 220) Ms. Gibson Lyman said she had been asleep when that rifle was put into her trunk, so she did not know it was there. (RP 155-156) There was plenty of evidence from which a jury could conclude that Mr. Hughes handled the gun, found the ammunition, loaded it, and carried it out to the car and put it in the trunk. That would certainly qualify as being easily accessible and

readily available for offensive or defensive use.

VI. CONCLUSION

Since Mr. Hughes brought his mental status to the attention of the court and the prosecutor, and since he wanted the court to order treatment, the Court should allow the defendant to sign an agreed order or have a hearing to make the proper findings so that he can get that treatment. Or, if the defendant has changed his mind, the Court of Appeals should either strike the provision or remand it to the Trial Court to have the requisite hearing.

Since it is obvious from the context of the sentencing hearing that the substance abuse treatment language was meant to be crossed out, the Court of Appeals can simply cross off the handwritten X on the third to last page of the Judgment and Sentence.

Since the DNA fee has been held repeatedly to be constitutional, it was not

error to assess the fee to Mr. Hughes. The assessment of the fee bears a rational relationship to a legitimate state interest.

Since there was sufficient evidence to find that Mr. Hughes did have access to a firearm during the time that he was committing the burglary of Mr. Shockey's house and stealing it, there is sufficient evidence to find beyond a reasonable doubt that he was armed with a firearm, and his conviction and enhancement should be upheld.

Respectfully submitted,

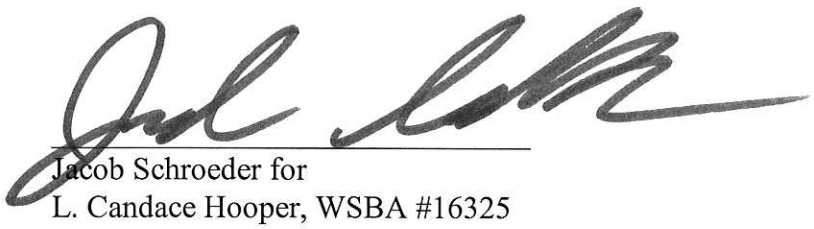
L. CANDACE HOOPER
WSBA #16325
Deputy Prosecuting Attorney

PROOF OF SERVICE

I, Jacob Schroeder, do hereby certify under penalty of perjury that on June 27, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Respondent's Brief:

Attorney:
Lisa E. Tabbut
PO Box 1319
Winthrop, WA 98862
Email: ltabbutlaw@gmail.com

Defendant:
Shane R. Hughes
DOC #816666
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326-0769



Jacob Schroeder for
L. Candace Hooper, WSBA #16325
Kittitas County Prosecuting Attorney's Office
205 W. 5th Ave, Ste. 213
Ellensburg, WA 98926
509-962-7660
candace.hooper@co.kittitas.wa.us

MOTION, AFFIDAVIT AND ORDER
EXTENDING TIME FOR FILING BRIEF