

No. 95396-1

No. 48525-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shelly Arndt,

Appellant.

Kitsap County Superior Court Cause No. 14-1-00428-0

The Honorable Judge Leila Mills

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Ms. Arndt's Sixth and Fourteenth Amendment right to present a defense.
2. The court violated Ms. Arndt's right to present a defense under Wash. Const. art. I, §§ 3 and 22.
3. The court misinterpreted ER 702 and ER 703.
4. The court violated Ms. Arndt's right to present a defense by excluding critical evidence that was relevant and admissible.
5. The court violated Ms. Arndt's right to present a defense by excluding Mann's expert opinion that flashover occurred in the room where the fire originated.
6. The court violated Ms. Arndt's right to present a defense by excluding the facts underlying Mann's expert opinions.
7. The court violated Ms. Arndt's right to present a defense by excluding all evidence that Mann obtained through his own investigation and laboratory testing.
8. The court violated Ms. Arndt's right to present a defense by prohibiting Mann from testifying regarding his review of police, coroner, and firefighter reports.
9. The court violated Ms. Arndt's right to present a defense by excluding photos of a demonstration Mann performed to illustrate certain scientific principles.
10. The court violated Ms. Arndt's right to present a defense by excluding Craig Hanson's testimony regarding Fire Marshal Lynam's biases.
11. The court violated Ms. Arndt's right to present a defense by excluding Hanson's testimony deficiencies in the fire marshal's policies and procedures.

ISSUE 1: An accused person has a constitutional right to present relevant, admissible evidence necessary to the defense. Did the court violate Ms. Arndt's right to present a defense by excluding relevant, admissible evidence critical to her theory of the case?

12. The trial court violated Ms. Arndt's Fifth and Fourteenth Amendment right to be free from double jeopardy by entering multiple convictions stemming from the arson-related death of Darcy Veeder, Jr.

13. Ms. Arndt's convictions for aggravated premeditated first-degree murder (based on first-degree arson), felony first-degree murder (based on first-degree arson), and first-degree arson were all based on the same evidence.
14. The felony murder and first-degree arson convictions merged with the premeditated first-degree murder conviction because they elevated that charge to an aggravated offense.

ISSUE 2: Multiple convictions violate double jeopardy if the evidence necessary to prove one offense is sufficient to convict for another offense. Did the court violate the Fifth and Fourteenth Amendment prohibition against double jeopardy by entering multiple convictions for offenses that rested on the same evidence?

ISSUE 3: When multiple offenses merge for double jeopardy purposes, the defendant may only be convicted of the highest offense. Did the court violate the Fifth and Fourteenth Amendment prohibition against double jeopardy by entering convictions for offenses that merged into the aggravated premeditated first-degree murder conviction?

15. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 4: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Ms. Arndt is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS¹

1. The prosecution called five expert witnesses at Shelly Arndt's trial for murder, arson, and assault.

¹ Trial started on September 28, 2015 and concluded on November 18, 2015. With one exception, the transcripts of the trial dates were sequentially numbered and will be cited as RP. The transcript includes duplicate numbers in the range 3562-3599. These numbers were first used for the hearing that occurred on November 11, 2015. Transcript pages in that range from that date will be cited RP (11/10/15). These same numbers were used again on November 12; pages from that date will be cited RP without further specification. Citations to pretrial and post-trial hearings will also include the date.

Attorney David LaCross was assigned to represent Shelly Arndt. Order Assigning Lawyer (entered 4/30/2014), Supp. CP. She had been accused of setting the fire that killed her boyfriend Darcy Veeder Jr., destroyed her twin sister's house, and endangered numerous people including her sister's children. CP 352-358.

LaCross knew that he'd have an uphill battle at trial. Ms. Arndt had a prior fire-setting incident: more than two years earlier, she'd set two fires, apparently to protest Veeder's drinking and to persuade him to move with her out of his parents' house. RP 1776, 1829-1830, 2369, 2962, 3254, 3270-3271; CP 148, 151-152.

Kitsap County's fire marshal David Lynam provided additional evidence against LaCross's client. Lynam had investigated the fire, found what he believed to be the point of origin,² decided on the likely ignition sequence,³ and concluded that the fire was incendiary rather than accidental. RP 2749, 2841-2852, 2887-2892, 2992.

Fires are classified as accidental, natural, incendiary, and undetermined. Incendiary fires are those that are purposefully started. RP 1541, 1890-92. Lynam opined that someone started the fire by holding an

² In any fire investigation, the origin of the fire must be accurately determined before the cause can be ascertained. RP 1724, 1876-1877, 3042, 3692.

³ The "ignition sequence" is the process by which a fire's primary fuels are ignited. RP 4047. It requires an ignition source, and a first-ignited fuel, which may or may not be the fire's main fuel. RP 4047.

open flame to a beanbag chair near a couch in the basement of the house. RP 2842, 2851, 2887-2893, 2906-2908, 2915-2923, 3013-3014, 3016-3017, 3156-3157, 3165, 3183-3184, 3195.⁴

Lynam concluded early in the process that the fire originated adjacent to a couch in the basement. RP 2993, 3032.⁵ After reaching this conclusion, Lynam and his team performed only a cursory investigation of other areas in the basement. These areas that received only minimal attention included a severely burned foosball table, where three beanbag chairs had been placed prior to the fire. RP 2831-2832, 3036, 3040-3042, 3057-3059, 3084-3088, 3095, 3114-3115, 3162, 3813, 3945, 4041, 4252.⁶ This also included a spot immediately below two ceiling vents. These vents connected the basement with the living room directly above, where a wood and presto-log fire had been burning in a fireplace insert prior to the fire. The fire marshal's office did not excavate debris in this area immediately below the living room fireplace insert. RP 957, 1386, 2814, 3860, 3959-3960; CP 447.

⁴ After the defense expert testified, Lynam backed away from his beanbag theory; however, the prosecutor relied on it as evidence of premeditation in closing. RP 4248, 4333-4334, 4403-4404.

⁵ RP 2993, 3032.

⁶ In addition, the foosball table had the remnants of an electrical device, which the fire marshal's team apparently did not notice. CP 448. The defense expert later identified this device as a possible ignition source for the fire. CP 448.

Given Ms. Arndt's prior history, LaCross knew that Lynam's conclusion—if accepted by a jury—made conviction inevitable. Furthermore, the case was made all the more challenging for LaCross because the state bolstered Lynam's findings with the testimony of several other expert witnesses.

Ed Iskra, an insurance investigator, did a partial investigation at the scene.⁷ RP 1856, 2481. Although he initially categorized the fire as undetermined, he later changed his conclusion to incendiary. He did this after reading Lynam's supplemental report. RP 68, 1633, 1785-1788, 1796, 1824, 1838-1839, 1841.

The prosecution also retained Ken Rice of Case Forensics to evaluate Lynam's conclusions.⁸ RP 1862. Rice reviewed all the available information, including Lynam's materials, Iskra's materials, police reports, firefighter reports, and coroner's reports.⁹ He also joined Lynam to conduct several tests. RP 21, 2433, 2449-2452, 2510, 2481, 3392. Rice performed what is known as a "technical review." RP 1894. Based on testing and review of available materials, Rice supported Lynam's

⁷ Iskra's insurance company client had apparently directed him to cease investigating once the fire marshal concluded that the fire was incendiary. RP 1775, 1856, 2481.

⁸ The state waited to retain Rice's services until two weeks before the trial's scheduled start date. CP 447. The trial was postponed over LaCross's objection, to allow Rice to conduct his evaluation and tests. RP (7/31/15) 2-14. RP (8/7/15) 2-17.

⁹ He also reviewed materials prepared by the defense expert, Dale Mann. RP 1895, 2422-2423, 2472.

conclusion that the fire was incendiary.¹⁰ He also agreed with Lynam that a beanbag chair could have been the first fuel that ignited the couch.¹¹ RP 2402, 2407, 2420, 2514, 2557.

Lynam, Iskra, and Rice all testified at Ms. Arndt's trial. All three agreed that the fire should be classified as incendiary. RP 1635, 1796-1798, 2407, 2516, 2852. Their testimony was further supported by the testimony of an electrical engineer (who examined two outlets taken from the scene) and a forensic scientist from the state patrol's crime lab (whose test of materials for the presence of accelerants yielded negative results). RP 2186-2260, 2267-2305, 1422-1461. In all, the state's expert testimony in this case spanned roughly 48 hours. RP 1468-3363; Clerk's Trial Minutes filed 11/23/15, Supp. CP.

2. At trial, the court prohibited the sole defense expert from rebutting the state's case with any evidence derived from police reports, his own investigation, and laboratory testing.

To review Lynam's investigation and rebut the state's expert testimony, LaCross retained an expert named Dale Mann. Mann is a former state patrol crime lab supervisor and certified arson

¹⁰ From available data, Rice agreed with Lynam's assessment of the area of origin, but could not determine the point of origin. RP 2407.

¹¹ In his testimony, Rice relied on photographs of the scene taken by the defense expert, Dale Mann, rather than photographs taken by Lynam or Iskra. *See, e.g.*, RP 2492; CP 449. He did not ever speak to Mann about those photographs. RP 2474. According to Mann, Rice misinterpreted the photos and used them inappropriately in his testimony. CP 449.

investigator. RP 3403, 3573, 3576, 3580, 3717, 4050; CP 446. Mann was often hired to evaluate the work of others, and had done many such reviews. RP 4150; CP 450.

Like Rice, Mann performed a “technical review.” *See* National Fire Protection Association 921: *Guide for Fire and Explosion Investigations* (2011) (NFPA 921) Section 4.6.2.¹² However, Mann resisted the label “technical review.” RP 4094, 4137. The NFPA 921 guide refers to technical reviews as susceptible to bias “introduced in the context of working relationships or friendships.” *Id.*, Section 4.6.2.2; *see also* RP 2475.¹³ Mann had no prior relationship with Lynam or others in the fire marshal’s office.¹⁴ RP 3733. Because of this, Mann referred to his own review as a hybrid between a technical review and a “peer review.” RP 4094-4095, 4137. Unlike a technical review, a peer review “carries with it connotations of both independence and objectivity.” NFPA 921, Section 4.6.3.¹⁵

¹² available at: <http://www.nfpa.org/Assets/files/AboutTheCodes/921/Ch%204%20methodology.pdf> (last accessed 8/12/16).

¹³ As an example, Mann described his business partner’s review of his own report as a “technical review.” RP 4132-4135.

¹⁴ By contrast, Iskra knew and had a good relationship with Lynam. RP 1636.

¹⁵ While the hybrid label didn’t sit well with Iskra, he did not criticize Mann’s actual methodology. RP 4224. Furthermore, Iskra did not himself perform any kind of professional reviews of others’ work. RP 4224.

Mann's insistence on this technicality and the proper label for his review became a major distraction for the prosecution team. *See, e.g.*, RP 3407-3411, 3529, 3533, 3583, 3663. The prosecutors repeatedly sought to limit Mann's testimony, failing to understand that Mann performed the same kind of review as Rice despite Mann's quibble with the label. *See, e.g.*, 3407-3411, 3480-3506, 3525, 3529, 3533, 3534-3535, 3540-3550.

Like Iskra and Rice, Mann examined all available materials, including the fire marshal's reports, numerous photographs and other documentation, police reports, coroner's reports, and firefighter reports.¹⁶ RP 3761-3764. Mann went to the scene twice and, like Iskra, performed his own partial investigation. RP 3528, RP 1856, 2481, 3617, 3667-3682, 3762; CP 447. Like Lynam and Rice, he performed tests and considered the results in formulating his opinions. RP (11/10/15) 3564-3580; RP 3679-3682; CP 448.

In the end, Mann concluded that the fire marshal's office failed to conduct a proper investigation. RP 3402-3407, 4147-4149, 4155, 4158-4159; CP 450. He determined that Lynam's data—even when considered in conjunction with Iskra's information, Rice's testing, and all other available data—did not support Lynam's proposed point of origin, ignition

¹⁶ He also reviewed the materials and documentation provided by Iskra and Rice. RP 3762-3764.

sequence, or classification of the fire as incendiary. RP 3537-3538, 3664-3665; RP 3674, 3680, 3682, 4048; CP 450. He believed Lynam allowed his objectivity to be compromised by his knowledge of Ms. Arndt's history, resulting in truncation of the investigation. RP 3771, 3774-3775, 3779, 3788-3789, 3809-3817, 3836-3843, 3855-3862, 3884-3888, 3919-3920, 3945, 3952-3953, 3959-3960, 4047-4048, 4112, 4127-4129, 4147-4149, 4152-4155, 4157-4159; CP 447.

In the absence of additional evidence, Mann classified the fire as undetermined, rather than incendiary. RP 3537-3538, 3664-3665; CP 450. However, when it came time for trial, the judge excluded this opinion.¹⁷ RP 3664-3665.

The judge also excluded all information and related opinions that Mann obtained through his own investigation.¹⁸ She excluded all testimony relating to his review of the police and coroner reports, and the laboratory testing of debris he took from the scene. RP 3652, 3661-3662, 3667-3686, 3745, 3760, 3895-3903, 4266-4270; *see also* Ex. 345-347, Supp. CP.

¹⁷ Instead, the court permitted him to testify that Lynam's conclusions were unsupported, and did not allow him to offer his complete explanation. RP 3664.

¹⁸ The court defined "investigation" very broadly, to include anything other than what Mann observed in plain view at the scene. RP 3661-3662, 3667, 3684. For example, the state persuaded the court that Mann kicking an item to see if it was stuck to the floor qualified as "investigation." RP 3980-3982.

Instead, the trial judge limited Mann's testimony to information and opinions based only on the three other investigators' materials and Mann's own "plain view" observations at the scene.¹⁹ RP 3661-3662, 3666-3667, 3684. She did not impose similar restrictions on Iskra or Rice. This was despite the fact that they, like Mann, did not conduct a complete fire investigation of the scene. RP 1856, 1894, 2481, 2296, 2406, 2471-2472.

LaCross vigorously and repeatedly objected to the court's rulings, and asked the court to reconsider. RP (11/10/15) 3526-3552, 3565-3589; RP 3650-3661, 3664-3667, 3687-3690, 3742-3744, 3754-3759, 3800-3802, 3894, 4001-4005, 4027-4030, 4266-4270. He argued that the evidence was relevant and admissible, that the limitations violated Ms. Arndt's constitutional right to present a defense. He also argued that the state had opened the door to Mann's testimony. RP 3411-3412, 4118, 4266-4270. The court refused to reconsider.

3. The excluded testimony and exhibits would have undermined the conclusions drawn by the state's expert witnesses.

In addition to excluding Mann's opinion that the fire should be classified as undetermined (rather than incendiary), the court barred him

¹⁹ The judge was apparently persuaded that Mann should be limited in this way because he had not personally conducted a complete origin and cause investigation of the scene. *See* RP 3528, 3531, 3536, 3661-3662, 3665-3667.

from testifying about critical physical evidence he'd discovered at the scene. The court further prevented Mann's testimony about the results of laboratory testing performed on materials recovered from the scene.

One critical piece of excluded evidence LaCross hoped to introduce related to a melted bucket remnant which Mann found adhered to the basement floor near Lynam's hypothesized point of origin. RP 3667-3686, 4022-4023; CP 448-119; Ex. 345-347, Supp. CP. The court allowed LaCross to elicit Mann's testimony that he'd seen the bucket remnant (in plain view), but prohibited Mann from testifying that it had melted in place near the point of origin during the fire. RP 3684, 4029.²⁰

The excluded testimony (and underlying facts) were crucial to Mann's conclusions. Lynam, his deputies, and Iskra had conducted shoddy investigations of the scene, Lyman's point of origin was suspect, and the hypothesized ignition sequence was incorrect. *See* RP 3667-3682.²¹ The court did not allow Mann to testify to these facts to support his expert conclusions.

²⁰ The court also excluded all the underlying facts showing that the bucket had melted in place (near the point of origin) during the fire and that it had gone undisturbed through the fire marshal's investigation of the scene. RP 3667-3678; CP 448-449. In addition, the court excluded pictures showing (a) the undisturbed patch of floor (Ex. 345, Supp. CP) and (b) the white underside of the melted remnant after Mann had pried it up with a shovel (Ex. 346, 347, Supp. CP). These photos showed that the bucket was in place during the fire and had not been moved after it. CP 448-449.

²¹ The bucket's significance is explained in further detail in the argument section of this brief.

Iskra testified on rebuttal that the melted bucket remnant had not been there during his investigation, which was prior to Mann's arrival at the scene. Even so, the court did not allow LaCross to respond with Mann's testimony. RP 3677, 4223, 4266-4270.

Mann also found the remains of another melted plastic bucket or storage bin stuck to the basement floor beneath vents leading through the ceiling and up into the living room.²² RP 3959-3960. The melted storage bin's presence showed that the area below the vents hadn't been thoroughly examined. RP 3860, 3959-3960; CP 447.

Mann believed this area to be significant. Any highly combustible material below the vent could have ignited if flaming material fell through the vent from the wood stove above.²³ A wood and presto-log fire had been burning in the living room stove insert prior to the fire. Furthermore, photographs taken after the fire showed that the living room stove's door may have been open.²⁴ Additional testimony established that Veeder, who

²² Although the prosecutor did not make a timely objection, she persuaded the court that kicking something to see if it was stuck to the floor amounted to "investigation," and should be excluded. RP 3980-3982.

²³ Rice (and Lynam) performed a test to determine if a presto-log ember could start a fire if dropped through a vent. However, they did not test to see if burning kindling embers could start a fire. RP 1929; 2505, 2872-2874, 2860. Furthermore, because they didn't properly investigate the floor below, they did not know the composition of any materials a burning ember would land on. RP 1934-1936, 2383, 2813, 2817, 2881.

²⁴ Iskra testified that the photograph of the open door suggested that the door had actually been closed during the fire. RP 1779-1780.

had a blood alcohol content of .26, had attempted to stoke the upstairs fire.²⁵ RP 1054, 1206-1207, 1419, 1582, 1780, 1782, 1902, 2095, 2356, 2498, 2520, 2558, 2774, 2814, 2985, 3294, 3511, 3923-3924. In addition, one of the homeowners initially theorized that a log might have rolled out of the fireplace insert and started the fire. RP 3135.

LaCross hoped to introduce Mann's opinion that the area around the basement hearth had not been properly examined. RP 3860, 3950, 3959-3960, CP 447. In addition to the melted storage bin, Mann found protected areas and other evidence of combustible material on and around the hearth. CP 447. Before the state objected, Mann made passing reference to the melted plastic stuck to the floor. However, the court's general ruling excluding the results of his investigation prohibited Mann from going into detail or talking about the presence of other combustible material.²⁶ RP 3650-3652, 3661, 3665-3667, 3684-3685, 3740-3741, 3745, 3760, 3800-3803, 3893-3894, 3900-3903, 3956-3957, 3980-3982, 4004, 4022, 4029, 4266-4270; CP 447.

The court also prohibited LaCross from introducing Mann's conclusions drawn from reports authored by police, firefighters, and the

²⁵ Evidence on this point was conflicting; some testimony indicated that Ms. Arndt and/or another person (Donny Thomas) had attempted to restart the fire. RP 2814, 2982.

²⁶ In his review, Rice ignored the hearth area after noting that the hearth itself was made of ceramic tile. RP 2383.

coroner's office. RP 3745, 3760. Lynam and Rice both reviewed and discussed these reports in their testimony.²⁷ Mann testified that fire experts reasonably and routinely rely on such reports in forming their opinions. RP (9/11/15) 21; RP 1895, 2422-2423, 2449-2452, 2481, 2988; 3749-3751. The court refused to allow Mann to point out deficiencies in the state's investigation based on information derived from such reports. RP 3745, 3760.

The court also prohibited LaCross from introducing Mann's lab test results showing the presence of polystyrene around the foosball table.²⁸ RP (11/10/15) 3565, 3574, 3576; RP 3652; CP 448. Lynam had not collected or tested any debris from the remnants of the foosball table,²⁹ and had not tested any material for the presence of polystyrene.³⁰ RP 1458, 3057-3060. Lynam claimed that testing charred debris for polystyrene wouldn't yield results.³¹ RP 3059, 3179-3180, 3196.

²⁷ Iskra was not asked if he reviewed such reports.

²⁸ The court's ruling on this point changed more than once; however, in the end, the evidence was excluded. RP (11/10/15) 3573-3574, 3579-3580; RP 3564-3567, 3652.

²⁹ Lynam recovered material from his hypothesized point of origin, and had it tested for accelerants but not for polystyrene. RP 1458, 3057-3060, 3179-3180, 3196.

³⁰ Polystyrene is the fill material for beanbag chairs. RP 2513. Lynam believed a beanbag chair to have been the first fuel. RP 2842, 2851, 2887-2893, 2906-2908, 2915-2923, 3013-3014, 3016-3017, 3156-3157, 3165, 3183-3184, 3195

³¹ In his written report, Lynam wrote that he was "unable to identify the presence of the three beanbag chairs that were placed on or near the foosball table." RP 4041.

LaCross had planned to have Mann testify that he'd recovered charred debris from the area of the foosball table, tested it, and confirmed the presence of polystyrene. RP (11/10/15) 3565, 3574, 3576; RP 3652; CP 448. Mann also tested debris recovered from the point of origin (near the couch), and found no polystyrene. RP 3679; CP 448. At the prosecutor's request, the court excluded all of these results. RP 3652.

The court also prohibited LaCross from introducing Mann's opinion that the room went to "flashover," an event with the potential to skew the investigation. RP 1626, 1882, 2468, 3023, 3706, 3891, 3893-3894; CP 449. Flashover occurs when a room gets hot enough to simultaneously ignite combustibles within it.³² RP 1502-1503, 1883, 3021. Flashover affects the burn patterns left by a fire, and can make it difficult to determine origin and cause. RP 1626, 1882, 2468, 3023, 3706; CP 449. Flashover can produce evidence of multiple origins,³³ so when a room goes to flashover, an investigation into origin and cause must include close examination of the entire room. RP 3814, 3891.

³² The technical definition of flashover involves a heat flux of 20 kilowatts per square meter at floor level. RP 3022, 3819.

³³ As previously noted, a correct determination of origin must precede any theory about cause. RP 1724, 1876-1877, 3042, 3692.

Mann concluded that the room went to flashover.³⁴ RP 3820, 3891; CP 449. He believed the state's experts' failure to recognize this and accord it due significance severely undermined their conclusions. The state witnesses quickly focused on Lynam's hypothesized area of origin rather than thoroughly investigating the whole room. RP 2831-2832, 3036, 3040-3042, 3057-3059, 3084-3088, 3095, 3114-3115, 3162, 3813-3814, 3860, 3945, 3959-3960, 4041, 4252; CP 449, 450.

The trial judge excluded Mann's opinion that flashover occurred, ruling that it was "beyond the scope." RP 3893-3894. Instead, she permitted LaCross to elicit testimony showing that the room had indicators of flashover. RP 3893.

The court did not impose similar restrictions on the state's experts. Lynam and Rice both concluded that the room did not go to flashover.³⁵ RP 1925, 4234. Iskra conceded that the room may have flashed over. RP 1652, 1737-1738, 1768-1769. He also testified that it did not flash over. RP 1622, 1652.

Mann also evaluated Lyman's belief (shared by Rice) that occupants of the living room would have immediately seen smoke coming

³⁴ In addition to other indicators of flashover, Mann found evidence that the heat flux at floor level exceeded 20 kilowatts per square meter, the technical definition of flashover. RP 3022, 3819-3820.

³⁵ Lynam agreed that many indicators of flashover were present. RP 3030-3031.

through the vent had an accidental fire started in the basement directly below the wood stove. But the court refused to allow this either. RP 2383-2385, 2482, 2552, 2868-2869, 3129-3133, 3895-3903.

In the end, the defense expert's testimony spanned less than 15 hours. Clerk's Trial Minutes filed 11/18/15, Supp. CP. During this time, defense attorney LaCross had to address fourteen additional state objections that required the jury to leave the courtroom for lengthy arguments, offers of proof, and voir dire of Mann. RP 3573-4048.

4. The trial judge prohibited LaCross from calling Craig Hanson to testify about bias and procedural deficiencies within the fire marshal's office.

On cross-examination, Lynam testified that his office had no written policies or procedures for investigating fires. RP 2923. LaCross sought to introduce evidence through the fire marshal's former employee Craig Hanson. Hanson would tell the jury that Lynam instructed his investigators not to videotape fire scenes and to limit the number of photographs taken. RP 333-334.

According to Hanson, Lynam told him that less documentation was preferable when it came time to testify, in order to "limit the amount of information that people have to use against [him] in trial." RP 335-336, 345. LaCross also proposed to have Hanson testify about problems with chain of custody and evidence handling at the fire marshal's office. RP

334, 347. Throughout the case, the defense team expressed concern about the poor evidence-handling and record-keeping procedures in the fire marshal's office. Key pieces of evidence sat on shelves in an unsecured office, with no documentation relating to its examination or movement. RP (8/28/15) 2-12; RP (9/4/15) 2-18.

Over LaCross's objection, the court excluded Hanson's testimony because it covered "a different time frame,"³⁶ and because he was not an expert who could explain proper procedures. RP 347.

5. Ms. Arndt was convicted of three offenses arising from the arson-related death: aggravated premeditated murder, felony murder, and arson.

At the conclusion of the trial, jurors convicted Ms. Arndt as charged. CP 430-432. This included one conviction for premeditated intentional murder, one conviction for felony murder based on arson, and one conviction for first-degree arson. CP 430. The jury also found that the premeditated murder occurred in the course of first-degree arson. CP 433.

LaCross moved for a new trial. CP 442. He argued that the trial court violated her constitutional right to present a defense by excluding significant portions of Mann's testimony. CP 442-445. In connection with his motion, he submitted a declaration from Mann, reiterating the excluded

³⁶ Hanson left the fire marshal's office in 2013, possibly in August. RP 331-339. The fire here took place in February of 2014. CP 352.

information. CP 446-451.³⁷ The court denied the motion. Minutes (filed 12/17/15), Supp. CP.

The court sentenced Ms. Arndt to life in prison without possibility of parole on the aggravated murder charge. CP 474. No sentence was imposed on the felony murder charge; however, the court did not vacate the conviction. CP 472. The court imposed 144 months on the arson charge. CP 474.

Ms. Arndt timely appealed. CP 484; Amended Notice of Appeal (filed 6/16/16), Supp. CP.

ARGUMENT

I. THE COURT VIOLATED MS. ARNDT’S RIGHT TO PRESENT A DEFENSE BY PROHIBITING HER FROM INTRODUCING RELEVANT AND ADMISSIBLE EVIDENCE THAT WAS CRITICAL TO HER DEFENSE.

The entire defense prepared by LaCross rested on Lynam’s failure to properly investigate the fire. According to the defense expert (Dale Mann) Lynam’s investigation required a finding that the fire’s origin and cause were undetermined, even when considered in conjunction with all other known facts. RP 3537-3538, 3664-3665; CP 450.

Mann based his conclusions on evidence reasonably relied upon by other experts in the field, including police reports, his own investigation of

³⁷ It does not appear that the court ruled on the motion.

the scene, and the results of laboratory testing. RP 1487, 1508, 1525, 1528, 1754-1755, 1783, 2833, 3617, 3749-3750; CP 447-450. The trial judge erroneously prohibited him from testifying about critical information from these sources, and excluded key parts of his expert conclusions. RP 3650-3652, 3661, 3665-3667, 3684-3685, 3740-3741, 3745, 3760, 3800-3803, 3893-3894, 3900-3903, 3956-3957, 3980-3982, 4004, 4022, 4029, 4266-4270. This infringed Ms. Arndt's state and federal right to present her defense.

A. Because the trial court infringed Ms. Arndt's constitutional right to present a defense, review is *de novo*.

Constitutional errors are reviewed *de novo*. *State v. Samalia*, 91532-6, 2016 WL 4053202, at *2 (Wash. July 28, 2016). Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,³⁸ a court necessarily abuses its discretion by violating an accused person's constitutional rights. *See, e.g., State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009).³⁹

Thus, courts review *de novo* an argument that the trial court violated an accused person's right to present a defense. *State v. Jones*, 168

³⁸ A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

³⁹ *See also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).

Wn.2d 713, 719, 230 P.3d 576 (2010). What this means is that the reviewing court must apply a *de novo* standard to questions of admissibility, even though evidentiary rulings are ordinarily reviewed for an abuse of discretion. *Id.*

B. Due process guaranteed Ms. Arndt a meaningful opportunity to present her defense.

An accused person has a constitutional right to present a defense. U.S. Const. Amends. VI, XIV; art. I, §§3, 22; *Jones*, 168 Wn.2d at 720; *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) and *Holmes v. S. Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). The right to present a defense includes the right to introduce relevant⁴⁰ and admissible evidence. *Jones*, 168 Wn.2d at 720.

Once the accused has established that proffered evidence is relevant and admissible, it can only be excluded if the state proves that it is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.* No state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

⁴⁰ Evidence is relevant if it has any tendency to prove a material fact. ER 401. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

Here, LaCross sought to introduce evidence undermining Lynam's conclusion that the fire was incendiary rather than accidental. The testimony was relevant and admissible, and should have been considered by the jury. *Id.*

C. The court erroneously limited Mann's testimony, precluding LaCross from effectively challenging the prosecution's evidence that the fire was of incendiary (rather than undetermined) origin.

A qualified expert⁴¹ may provide opinion testimony based on scientific, technical, or other specialized knowledge if it would "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. Under the rule, expert testimony is admissible if it will be helpful to the trier of fact, with "helpfulness" construed "broadly." *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (citing *Miller v. Likins*, 109 Wn.App. 140, 148, 34 P.3d 835 (2001)). The rule favors admissibility in doubtful cases. *Likins*, 109 Wn. App. at 148.

In addition, the underlying facts supporting an expert opinion are "admissible for the limited purpose of explaining the basis for [that] opinion." *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 579, 157 P.3d 406 (2007). This is so even if the underlying facts would otherwise be inadmissible. *Id.*, ER 703.

⁴¹ The prosecutor indicated that "[n]obody is questioning Mr. Mann's credentials." RP 3407. Ample evidence supported his qualifications as an expert. RP 3573-3596.

Here, the trial court imposed restrictions on defense attorney LaCross's presentation of Mann's testimony in four different areas. Applying a *de novo* standard of review,⁴² these restrictions were improper under ER 702 and ER 703 and therefore violated Ms. Arndt's constitutional right to present a defense. *Jones*, 168 Wn.2d at 719-20.

In essence, the trial court limited Mann to testimony based on Lynam's photographs and Mann's own "plain view" observations at the scene.⁴³ According to the court, Mann couldn't testify to anything else because he didn't personally perform a full origin and cause investigation.⁴⁴ *See, e.g.*, RP 3661-3662, 3666-3667.

1. The trial court improperly limited Mann's testimony and excluded his photographs regarding evidence he found very close to Lynam's hypothesized point of origin.

A key piece of evidence for the defense involved a melted bucket remnant that Mann found very close to the point where Lynam believed the fire originated. RP 3666-3686; CP 448-449; Ex. 345, 346, 347, Supp. CP. Mann could not lift the remnant by hand; instead, he was forced to pry it up with a shovel because it had adhered to the cement floor. RP 3667-

⁴² *Jones*, 168 Wn.2d at 719.

⁴³ The court apparently allowed him to also consider documentation from Iskra's partial investigation and the results of Rice's testing. *See, e.g.*, RP 3762, 3778-3780, 3809, 3825, 3853, 4035-4036, 4043.

⁴⁴ This didn't prevent Iskra and Rice from providing opinions, even though neither one had performed a complete origin and cause investigation.

3678. The underside of the bucket was white, undamaged by fire. RP 3668, 3678. The bucket also created a protected area on the cement floor. RP 3678; CP 448.

All of these facts established that the bucket melted in place during the fire. RP 3676-3678; CP 448. The melted bucket's proximity to the hypothesized point of origin made it important to LaCross's theory of the case for three reasons.

First, it showed the shoddiness of the investigation performed by Lynam. Although the melted bucket remnant made incidental appearances in photographs taken by the fire marshal's office, Lynam made no mention of it in any of his reports or his testimony. RP 3677; CP 448. This was a significant omission, because of the bucket's proximity to the hypothesized point of origin.⁴⁵ RP 3667, 3674; CP 448.

Second, it undermined Iskra's conclusions and his credibility. Iskra denied that the melted remnant had been present when he investigated the scene, even though it appeared in photos he'd taken before Mann ever went to the scene.⁴⁶ RP 3677, 4223; CP 448. The fact that he missed the bucket suggests that he did not conduct a careful examination of the area surrounding the couch. His insistence that the bucket hadn't been there,

⁴⁵ Even on rebuttal, the state did not ask Lynam about the melted bucket. RP 4225-4271.

⁴⁶ In addition, the position of the bucket remnant undermined Iskra's apparent support for Lynam's ignition sequence, as outlined below. CP 448-449.

even in the face of photographic evidence, suggests that he was not a credible witness. RP 3677, 4223; CP 448.

Third, the melted remnant's presence disproved Lynam's hypothesized ignition sequence.⁴⁷ According to Lynam, the fire could have started by the application of open flame to one of the available beanbag chairs.⁴⁸ RP 2840-2842. The state introduced evidence through several witnesses that there were beanbag chairs downstairs. RP 967, 980, 1063, 1084, 1110, 2381, 2723, 2831. Lynam testified that a person could have started the fire by moving a beanbag chair to the point of origin and lighting it with a lighter. 3013-3017. Furthermore, with Rice's assistance, Lynam performed two separate experiments to test his hypothesized ignition sequence. RP 2386-2402, 2420, 2512-2514, 2557, 2842-2852, 2887-2922, 3142, 3165, 3183-3184, 3195-3196, 4251. Rice supported Lynam's hypothesized ignition sequence.⁴⁹ RP 2386-2402, 2407, 2512-2514, 2557-2558.

In fact, however, the melted bucket's presence established that a beanbag chair could not have been the first-ignited fuel. RP 3667-3682;

⁴⁷ The "ignition sequence" is "the process by which the primary fuels in the fire are ignited," requiring an ignition source and the first-ignited fuel. RP 4047.

⁴⁸ Three beanbag chairs had been piled on a foosball table some distance from the hypothesized point of origin prior to the fire. RP 2381, 2723, 2831.

⁴⁹ Iskra apparently supported the hypothesis as well, although he was not asked directly. RP 1816, 1819, 1825.

CP 448-449. Had fire destroyed a beanbag chair next to the bucket, the bucket would have been entirely consumed without leaving any remnant. RP 3673; CP 448-449. This is so, Mann explained, because the bucket was made of a material with lower melting and boiling points than polystyrene, the fill material for the beanbag chairs. RP 2513, 3667-3682, 3960, 4032-4034, 4046; CP 448-449.⁵⁰

Although Lynam backed away from his beanbag theory in rebuttal testimony, the prosecution did not abandon the theory. RP 4248, 4333-4334, 4403-4404. Instead, the state relied on it heavily in closing, arguing that Ms. Arndt's placement of the beanbag chair established premeditation. RP 4333-4334, 4403-4404. Mr. LaCross also discussed the beanbag theory at length in closing, although he was severely hampered by the lack of admitted evidence supporting his position. RP 4032-4034, 4046, 4391-4393, 4397.

For all these reasons, the fact that the bucket melted in place during the fire was relevant under ER 401. Because of the court's ruling,

⁵⁰ After the court excluded important evidence about the bucket, LaCross sought to introduce photographs of a demonstration Mann performed to illustrate what happens to a surface (such as the basement floor) when flammable liquids (or melted solids) pool and burn. RP 3965-4005. The court excluded testimony about Mann's demonstration and the photographic exhibits that illustrated the principles involved. RP 4004-4005; Ex. 465-474, Supp. CP. The exclusion of this demonstrative evidence deprived Ms. Arndt of her constitutional right to present a defense. *Jones*, 168 Wn.2d at 719-720. Although not as critical as the other excluded evidence, this error added to the prejudice Ms. Arndt suffered, and requires reversal.

however, jurors never heard that the bucket remnant melted in place during the fire, or even that it was stuck to the floor. RP 3666-3667, 3684-3685, 4029. They never learned that Mann had used a shovel to pry it free, or that the underside of the bucket and the cement beneath it had been protected from the fire. RP 3666-3686. Nor did they see the photographs in which Mann documented his observations. Ex. 345-347, Supp. CP.

Mann was not even allowed to contradict Iskra's rebuttal testimony. RP 4266-4270. The state recalled Iskra to tell jurors that the bucket had not been there when he investigated, prior to Mann's arrival. RP 4223. Jurors who believed Iskra may well have thought Mann incompetent.⁵¹

Because Mann was limited in what he could say about the bucket, the jury never heard critical facts supporting the conclusions Mann drew from the melted remnant's proximity to the hypothesized area of origin. This severely impaired their understanding of Mann's critique of the investigation. Furthermore, if jurors believed that the bucket hadn't melted in place, they would have dismissed all of the conclusions Mann drew from his discovery of it.

⁵¹ In fact, Iskra missed the bucket, which made incidental appearances in his photos as well as Lynam's. RP 3677; CP 448.

Because it was relevant, the evidence should have been admitted ER 402. The facts surrounding the bucket were within Mann’s personal knowledge. He is the one who observed the bucket, pried it up with a shovel, and photographed its underside. RP 3667-3678. Accordingly, nothing prohibited its admission as ordinary factual testimony based on personal knowledge. ER 401-402; ER 601; ER 602.⁵² Furthermore, even if the evidence were otherwise inadmissible, it should have been admitted under ER 703 as the underlying factual basis for Mann’s conclusions about Lynam’s investigation. *Allen*, 138 Wn. App. at 579.

The fact that the bucket melted near what the state’s experts considered the point of origin during the fire was critically important to the defense case. It showed the shoddiness of the investigation and disproved Lynam’s hypothesized ignition sequence. However, without the excluded evidence, LaCross could not establish that the bucket melted in place during the fire.

The melted bucket proved nothing if jurors didn’t believe it melted in place near the hypothesized point of origin. Without the excluded

⁵² A fact witness is one who testifies to personal knowledge rather than scientific or technical information. *See, e.g., State v. Davis*, 175 Wn.2d 287, 327, 290 P.3d 43 (2012); ER 602; ER 702. A witness “may be an expert as to some matters and an ‘actor’ or ‘viewer’ as to others.” *Peters v. Ballard*, 58 Wn. App. 921, 927, 795 P.2d 1158 (1990) (summarizing and applying precedent from other jurisdictions to CR 26). For example, a forensic scientist is a fact witness when the subject of her testimony is the state’s mishandling of DNA evidence within the state patrol crime lab. *State v. Davila*, 184 Wn.2d 55, 73, 357 P.3d 636 (2015).

evidence, the foundation for much of Mann's testimony and a great deal of defense counsel's closing argument lacked support. RP 4032-4034, 4046, 4391-4393, 4397. The trial court violated Ms. Arndt's constitutional right to present a defense by excluding the testimony. *Jones*, 168 Wn.2d at 720.

2. The trial court improperly refused to allow Mann to testify about other evidence he found at the scene during his investigation.

Mann found the remains of a second melted plastic bucket (or storage bin) stuck to the floor near the downstairs hearth. RP 3959-3960;⁵³ CP 447. In addition, after removing debris from the hearth he found protected areas. CP 447.

These protected areas demonstrated that other combustibles were present on the hearth. CP 447. However, Mann was not allowed to tell jurors about the significance of the bucket and the protected areas because of the court's prior rulings excluding testimony based on investigation. RP 3650-3652, 3661, 3665-3667, 3684-3685, 3740-3741, 3745, 3760, 3800-3803, 3893-3894; CP 447.

The court's rulings excluding such testimony violated Ms. Arndt's right to present a defense. *Jones*, 168 Wn.2d at 720. The excluded

⁵³ The prosecutor did not make a timely objection to this evidence, but later persuaded the court that kicking the bucket to see if it was stuck qualified as impermissible "investigation." RP 3980-3982.

evidence was relevant and admissible. The fruits of his investigation were within Mann's personal knowledge, and thus nothing precluded admission. ER 401, 402, 601, 602. The evidence should also have been admitted as the basis for his expert opinions: that Lynam and Iskra failed to adequately investigate the basement room or rule out the area below the living room fireplace as the point of origin. ER 703; *Allen*, 138 Wn. App. at 579.

The testimony also undermined Lynam and Rice's ember testing. Their test rested on the assumption that the tile below the vents was either bare or had nothing more combustible than newspaper and tissue.⁵⁴ RP 1934-1936, 2383, 2813, 2817, 2881. No one performed a thorough investigation of the area under the vents or recovered material for testing. CP 447. Because of this, Lynam and Rice failed to rule out the possibility of accidental ignition by means of an ember, despite the test results.

The trial court erred by excluding the evidence. The error violated Ms. Arndt's constitutional right to present a defense. *Jones*, 168 Wn.2d at 720.

⁵⁴ In performing the ember test, Lynam and Rice apparently assumed that any sparks at the O'Neil house came from the presto logs, rather than the kindling used to start the fire. RP 1929; 2505, 2872-2874, 2860. Presto logs don't produce sparks. RP 1583, 3160.

3. The trial court erred by excluding Mann's testimony that he reviewed police reports and other available materials as part of his evaluation of the state's fire investigation.

Both Lynam and Rice reviewed reports such as those prepared by police, firefighters, and the coroner. RP (9/11/15) 21; RP 1895, 2422-2423, 2449-2452, 2481, 2988. In an offer of proof, Mann testified that fire experts reasonably and routinely rely on such reports. RP 3749-3751.

Mann himself relied on these reports in reaching his conclusion that Lynam's investigation was deficient. LaCross planned to have Mann point out that Lynam reached his conclusions before reviewing all available information. He also intended to have Mann explain that Lynam ignored discrepancies apparent upon review of the material. For example, Donny Thomas gave the police an account that differed from that he'd given when interviewed by Lynam. RP 3742-3744.

Had the court allowed this testimony, it would have cast doubt on Lynam's methods and would have further undermined his conclusions. However, the court prohibited Mann from even mentioning that he'd reviewed such reports, and excluded the opinions he drew from that review. RP 3740-3741, 3745, 3760. No such restriction was imposed on any of the other experts.

The evidence was admissible under ER 703. Even the hearsay contained in each report could have been admitted to show the basis for Mann's opinions. ER 703; *Allen*, 138 Wn. App. at 579.

The trial court erred by excluding Mann's opinion on Lynam's methodology and by prohibiting Mann from mentioning that he'd reviewed police reports and other available materials. The court's ruling made Mann seem less than thorough in comparison to the other experts, who testified that they reviewed such reports. RP 1895, 2422-2423, 2449-2452, 2481, 2988. By excluding the evidence, the court prevented the jury from hearing another basis for Mann's conclusion that Lynam's investigation was deficient.

The court violated Ms. Arndt's constitutional right to present her defense. *Jones*, 168 Wn.2d at 720.

4. The trial court improperly excluded laboratory test results showing the presence of polystyrene in material found near the foosball table and the absence of polystyrene in debris collected from the point of origin.

The court excluded evidence that Mann found polystyrene near the foosball table, and that items recovered from the vicinity of the couch did not contain polystyrene. RP (11/10/15) 3565, 3574, 3576; RP 3652, 3679;

CP 448.⁵⁵ These results undermined Lynam's claim that testing would have proven useless, when it came to material gathered from his hypothesized area of origin near the couch.⁵⁶ RP 3059, 3179-3180, 3196. Mann's test results suggested that no beanbag chair had been placed near the couch.

The evidence was relevant. Lynam gave extensive testimony regarding his proposed ignition sequence, and the state relied on the beanbag hypothesis to show premeditation. The evidence was admissible under ER 702 because it would have been helpful to the jury in evaluating Lynam's proposed ignition sequence. It was also admissible under ER 703, as a data point supporting Mann's conclusion that Lynam failed to do a complete investigation before reaching his conclusions.

By excluding the test results, the trial court violated Ms. Arndt's constitutional right to present a defense.

5. The trial court improperly excluded Mann's opinion that the room where the fire originated went to flashover.

The court excluded Mann's opinion that the basement room went to flashover. RP 3893-3894; CP 449. The opinion was admissible under

⁵⁵ The court vacillated several times on this issue. RP (11/10/15) 3564-3565, 3573-3574, 3579-3580.

⁵⁶ In addition, Lynam wrote in his report that he was "unable to identify the presence of the three beanbag chairs that were placed on or near the foosball table." RP 4041.

ER 702. All four fire investigators agreed that flashover affects the patterns left by a fire. RP 1508, 1626, 1741, 1882, 2468, 2470, 3023, 3706, 3891, 3893-3894, 3944; CP 449. Furthermore, all four experts used burn patterns to determine the area and/or point of origin. RP 1516, 1560, 1582, 1596, 1613, 1614, 1652, 1790, 1881, 1913, 2290, 2662, 2698, 2708, 2756, 2779, 2804, 2826, 3099, 3701, 3830.

If flashover does occur, the investigator must search the entire room for evidence, and may find evidence of multiple points of origin. RP 3814, 3891; CP 450. Because an accurate determination of origin is a precondition to a valid finding of cause,⁵⁷ it is essential to determine whether or not flashover occurred.⁵⁸ RP 1626, 1628, 1741, 3023, 3703, 3706, 3814, 3891, 4262. Thus, an investigator's failure to properly identify flashover undermines confidence in the investigator's ultimate conclusions, including the classification of a fire as incendiary. CP 450.

Although the judge allowed Mann to testify that the room showed all the signs of flashover, she excluded his opinion that the room did flash over. RP 3893-3894. She did not impose a similar restriction on Lynam, Iskra, or Rice, who gave varying opinions on the issue. RP 1652, 1737-

⁵⁷ RP 1724, 1876-1877, 3042, 3692.

⁵⁸ Iskra gave conflicting testimony on this point, sometimes admitting that flashover is important and other times saying that it made no difference. Compare RP 1628 with RP 1744 (Iskra's testimony). Rice believed flashover to be irrelevant. RP 1885, 1925.

1738, 1768-1769, 1925, 3030-3031, 4234. There was no suggestion that Mann's conclusions were based on anything other than proper application of sound principles within the field of fire investigation. The prosecutor apparently persuaded the court that Mann's opinion on flashover amounted to an "investigation." RP 3892-3893. It was thus "beyond the scope," and fell within the court's earlier prohibition on testimony based on investigation. RP 3893-3894.

Mann's opinion that the room went to flashover would have been helpful to the jury under the broad definition of helpfulness applicable to ER 702. *Philippides*, 151 Wash.2d at 393. It would have provided jurors with information they needed to evaluate Lynam's conclusions. According to Mann, Lynam's failure to properly identify flashover undermined the whole investigation. RP 1626, 1628, 1741, 3023, 3703, 3706, 3814, 3891, 4262; CP 449.

Mann's opinion on flashover was also necessary to counterbalance the testimony of the state's experts. Iskra admitted that the room may have flashed over, but also testified that it did not flash over. RP 1622, 1652, 1737-38, 1768-1769. Lynam and Rice both testified that flashover did not occur. RP 1925, 4234.

Without Mann's opinion, the jury was left with the weight of the testimony suggesting that flashover had not occurred. RP 1622, 1652, 737-

38, 1768-1769, 1925, 4234. This removed from their consideration a significant attack on the validity of Lynam's determination of the point of origin and the cause of the fire. The trial judge violated Ms. Arndt's right to present a defense by excluding the evidence. *Jones*, 168 Wn.2d at 720.

6. The trial court improperly excluded Mann's testimony regarding the visibility of smoke in the living room.

The court excluded Mann's testimony regarding the visibility of smoke coming through the vents in the living room floor. RP 3895-3903. Lynam and Rice both suggested that smoke would have been immediately visible had an accidental fire started directly below the living room stove. RP 2383-2385, 2482, 2552, 2868-69, 3129-3133.

Mann wanted to outline information he'd obtained to analyze this conclusion.⁵⁹ But the court sustained the state's objection because such testimony involved "gathering data." RP 3902.⁶⁰ This left the jury without sufficient information to evaluate the claim that smoke would have been immediately visible if the fire had started below the vents in the floor of the living room. RP 2383-85, 2482, 2552, 2868-69, 3129-33.

⁵⁹ Mann wished to determine whether lighting conditions would have allowed people to see any smoke coming through the vent. He went online and used tools provided by Google to estimate the distance to a streetlight that might arguably have illuminated the living room. RP 3898-3899.

⁶⁰ The court did not strike the testimony, but warned Mr. LaCross that "questions can't seek out these type of answers." RP 3902.

The trial court erred by sustaining the state's objection. The error violated Ms. Arndt's right to present a defense.

7. By presenting the testimony of Iskra and Rice, the state opened the door to Mann's testimony; both Iskra and Rice conducted the same kind of investigation and review that Mann did, and both gave their opinions on Lynam's work.

The trial court limited Mann's testimony because of the way he conducted his review of Lynam's investigation. RP 3650-3652, 3661, 3665-3667, 3684-3685, 3740-3741, 3745, 3760, 3800-3803, 3893-3894, 3900-3903, 3956-3957, 3980-3982, 4004, 4022, 4029, 4266-4270; CP 447. But Iskra and Rice were allowed to testify fully, even though their manner of investigation paralleled Mann's.

A party may open the door to relevant evidence that would otherwise be inadmissible. *State v. Young*, 158 Wn. App. 707, 719, 243 P.3d 172 (2010); *State v. Hartzell*, 156 Wn. App. 918, 934, 237 P.3d 928 (2010). Here, Mann's evidence should have been admitted to rebut the evidence provided by Iskra and Rice. The state opened the door by presenting testimony based on the same investigative techniques employed by Mann.⁶¹

Like Mann, both Lyman and Rice relied on outside reports and documentation. RP (9/11/15) 21; RP 1895, 2422-2423, 2449-2452, 2481,

⁶¹ LaCross advanced this argument to the trial court. RP 3411-3412.

2988. In addition, Iskra acknowledged that he conducted only a partial origin and cause investigation at the scene⁶²—the very criticism leveled by the state against Mann, and accepted by the trial judge in her ruling limiting his testimony. Furthermore, Rice’s review of Lynam’s investigation, like Mann’s, included additional testing of hypotheses. RP 2433, 2510, 3392. Indeed, the prosecutor highlighted this in closing argument, implying that the testing showed Rice’s thoroughness. RP 4347.⁶³

By presenting the testimony of Iskra and Rice, the state opened the door to Mann’s testimony, even if it would otherwise have been inadmissible. *Young*, 158 Wn. App. at 719. It was fundamentally unfair to deny Ms. Arndt the same opportunity to present relevant evidence obtained in the same manner as evidence presented by state witnesses. The trial judge should have admitted the evidence; its exclusion violated Arndt’s right to present a defense. *Jones*, 168 Wn.2d at 720.

8. The trial court’s decision excluding portions of Mann’s evidence rested on a misunderstanding of the law.

The evidence excluded by the court was highly probative. As outlined above, it called into question all of Lynam’s conclusions as well

⁶² RP 1856, 2481.

⁶³ In fact, the prosecutor claimed that Rice “did an origin and cause investigation of his own,” even though he never visited the scene. RP 4347.

as those advanced by Iskra and Rice. For reasons already described, the excluded evidence suggested that Lynam failed to conduct a thorough investigation, undermined his hypotheses regarding the fire's point of origin, disproved his ignition sequence, and invalidated his characterization of the fire as incendiary rather than accidental, natural or undetermined.⁶⁴

The evidence was necessary for Ms. Arndt's defense. No state interest could have been compelling enough to preclude the admission of the highly probative evidence. *Jones*, 168 Wn.2d at 720.

Mann's evaluation of Lynam's investigation was within his area of expertise. It was a kind of evaluation commonly performed by other experts in the field—including Rice—and one Mann himself had performed numerous times.⁶⁵ RP 4150; CP 449-450. Furthermore, Mann reviewed information reasonably relied upon by other experts. Indeed, he reviewed much the same information as both Iskra and Rice.

There was no basis to restrict his testimony. The trial court's reason for doing so was that Mann "exceed[ed] his limits," and went "beyond the scope." RP 3652, 3893-3894. Apparently, the trial court

⁶⁴ It also revealed problems with Iskra's partial investigation and his credibility.

⁶⁵ As noted elsewhere in this brief, Mann's review qualified as a "technical review." He described it as a combination technical review and peer review because he had no prior association with Lynam. RP 4094-4095, 4137. *See* NFPA 921, sections 4.6.2-4.6.3.

believed that Mann’s assignment—evaluating Lynam’s investigation—meant that he could only examine materials Lynam collected or produced.⁶⁶ RP 3650-3652, 3661, 3665-3667, 3684-3685, 3740-3741, 3745, 3760, 3800-3803, 3893-3894, 3900-3903, 3956-3957, 3980-3982, 4004, 4022, 4029, 4266-4270; CP 447.

The court did not impose such a restriction on Rice, who was also charged with evaluating Lynam’s investigation. In fact, the prosecutor argued in closing that Rice’s review was superior to Mann’s because Rice did his own testing. RP 4347.

The trial court’s ruling is not supported by any authority. Mann did not seek to prove a different area of origin or to establish the “true” cause of the fire. Instead, his investigation and his testimony focused on flaws in Lynam’s investigation. LaCross repeatedly told the court that Mann was not retained to do a complete origin and cause investigation, but rather to evaluate Lynam’s. RP 3402, 3405, 3536-3538, 3717, 4050; *see also* CP 446.

The state’s objections and the court’s rulings rested on a misunderstanding of Mann’s role and of the law. To perform his function, Mann was not required to independently repeat every test performed by

⁶⁶ Under this rationale, it is not clear why the court allowed him to convey his plain view observations from the scene, or why he was permitted to rely on materials produced by Iskra and Rice.

Lynam. Nothing required him to do more than focus on what he perceived to be weak points in Lynam’s investigation—the lack of documentation, the reliance on outmoded theories, the failure to diagnose flashover or to appreciate its effects, and so forth.

In its argument, the state relied primarily on three cases. *See* CP 375-383 (citing *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013)); *In re Det. of McGary*, 175 Wn. App. 328, 306 P.3d 1005 (2013); and *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 719 P.2d 569 (1986)); *see also* RP 3392, 3410, 3491-3492, 3534, 3644, 3647, 3660, 3661, 3666, 4003.⁶⁷ The court’s rulings apparently adopted the state’s misreading of those cases. RP 3650-3652, 3661, 3665-3667, 3684-3685, 3740-3741, 3745, 3760, 3800-3803, 3893-3894, 3900-3903, 3956-3957, 3980-3982, 4004, 4022, 4029, 4266-4270; CP 447.

All three cases are inapplicable. Both the prosecutor and the court used them inappropriately in the context of this case. In *Lahey*, the plaintiff’s expert sought to prove that electromagnetic fields cause health

⁶⁷ Based on the context in which they appear, the prosecutor’s repeated oral references to the “Carpenter case” are likely intended to refer to *Lahey*. RP 3666. The expert at issue in *Lahey* was a Dr. David Carpenter. *Lahey*, 176 Wn.2d at 915. Initially, the prosecutor made frequent references to Dr. Carpenter when discussing *Lahey*. RP 3392, 3410, 3491-3492, 3534. She apparently began substituting “Carpenter” for *Lahey* starting on November 12, 2015. RP 3644. It does not appear that the state cited a case named “Carpenter” in any of its written materials.

problems. *Lakey*, 176 Wn.2d at 914-15. He was not tasked with evaluating another person's methodology. *Id.*, at 918-21.

Similarly, in *McGary*, an RCW 71.09 detainee's expert wanted to establish the detainee's low risk of recidivism using a new actuarial instrument. *McGary*, 175 Wn. App. at 333. As in *Lakey*, the excluded testimony was not an evaluation of another expert's methodology. *Id.*, at 338-41.

Finally, in *Davidson*, two experts sought to testify that Seattle Metro was negligent in connection with an injury the plaintiff sustained while riding the bus. *Davidson*, 43 Wn. App. at 570-571. Again, neither expert was tasked with evaluating anyone else's methodology. *Id.*

Mann was not in the same position as any of these experts. He was not trying to prove the true location of the fire's origin.⁶⁸ Nor was he trying to establish the fire's true cause. Instead, his testimony focused on weaknesses in Lynam's investigation. This did not require him to do a complete origin and cause investigation. *Cf. Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 913, 792 P.2d 520 (1990) (defendants'

⁶⁸ Mann agreed with Lynam's conclusion that the fire originated in the basement room. RP 3526-3528, 3530. There is no showing that he based this opinion on an unreliable methodology. Although he did not do a complete origin and cause investigation, there was no showing that his determination of the area of origin was lacking in some way. Accordingly, the trial court erred by excluding Mann's opinion on the general area of origin. ER 702; ER 703. However, because none of the experts disputed that the fire originated in the basement, the error does not require reversal.

expert performed an independent origin and cause investigation, and determined that a faulty outlet started a smoldering fire within a wall).

Had Mann attempted to testify (for example) that the fire started “in the upstairs back bedroom,” the state’s objection would have been well-taken. RP 3530-3531. The same would hold true if he’d identified an outlet, the ceiling fan, a cigarette, or the electrical equipment near the foosball table as the fire’s actual cause.

Mann did not locate a point of origin, and did not perform enough testing to rule out all competing hypotheses. Had LaCross offered Mann’s testimony to *prove* a particular origin or a specific cause, *Lakey*, *McGary*, and *Davidson* would likely have barred his testimony.

But LaCross did not propose to have Mann testify as to the origin and cause of the fire. His investigation was sufficient to critique Lynam’s failures, and should not have been limited. The trial court violated Ms. Arndt’s constitutional right to present a defense. *Jones*, 168 Wn.2d at 720.

D. The court violated Ms. Arndt’s right to present a defense by excluding Hanson’s testimony regarding bias and procedural deficiencies within the fire marshal’s office

According to Lynam’s former employee Craig Hanson, Lynam told his investigators not to videotape fire scenes and to limit the number of photographs taken. RP 333-334. Lynam did so to limit the amount of ammunition available for cross-examination should a case go to trial. RP

335-336, 345. In addition, Hanson could have testified about problems with evidence handling procedures at the fire marshal's office. RP 334, 347.

The trial court erred by excluding the testimony. RP 347.

First, Hanson's testimony was relevant under ER 401. Any fact "bearing on the credibility or probative value of other evidence is relevant." *State v. Mollet*, 181 Wn. App. 701, 713, 326 P.3d 851 (2014), *review denied*, 339 P.3d 635 (Wash. 2014). The testimony would have put into context Lynam's failure to adequately document certain key parts of the scene. Lynam claimed that he took as many photos as were warranted, and that he didn't need to specifically document such possible ignition sources as the ceiling fan, the TV, or the plug of the pedestal fan, because he had ruled them out. *See, e.g.*, RP 2999, 3062-3064, 3075; CP 447. Hanson's testimony was at least minimally relevant, because it undermined Lynam's credibility, showed his bias, and outlined some of the inadequate procedures he put in place. *Salas*, 168 Wn.2d at 669; *Mollet*, 181 Wn. App. at 713.

Second, the evidence was admissible under ER 402. Lynam's made his statements to Hanson; thus, they were within his personal knowledge. Accordingly, nothing prohibited their admission. ER 401-402; ER 601; ER 602.

Contrary to the prosecutor's argument, Lynam's directives were not hearsay. RP 340-347. A statement is not hearsay if it is not offered for its truth. *State v. Gonzalez-Hernandez*, 122 Wn. App. 53, 57, 92 P.3d 789 (2004). Statements which are "not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay." *State v. Crowder*, 103 Wn. App. 20, 26, 11 P.3d 828, 831 (2000), *as amended* (Oct. 27, 2000).

Lynam's instructions were not offered for their truth, but rather to undermine Lynam's credibility, to show his bias, and to explain the agency's inadequate procedures. *See* ER 801; *see, e.g., State v. Fish*, 99 Wn. App. 86, 95-96, 992 P.2d 505 (1999) (directive to "pull over" is not hearsay). Hanson's testimony would have raised questions about Lynam's practices, his testimony, and the adequacy of his investigation. The trial judge violated Ms. Arndt's right to present a defense by excluding the evidence. *Jones*, 168 Wn.2d at 720.

E. The errors are not harmless beyond a reasonable doubt.

Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way

affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

Here, the state cannot prove beyond a reasonable doubt that “any reasonable jury would have reached the same result without the error.” *Jones* 168 Wn.2d at 724. The entire defense was a challenge to the validity of Lynam’s conclusions. This included focus on Lynam’s opined point of origin, his hypothesized ignition sequence, and his characterization of the fire as incendiary.⁶⁹ The excluded evidence went directly to those issues.

Mann believed that Lynam’s investigation was deficient. RP 3402-3407, 4147-4149, 4155, 4158-4159; CP 450. The court excluded his conclusion that the fire’s origin remained undetermined. RP 3664-3665. The court refused to allow him to testify that the room went to flashover. The court also excluded key pieces of physical evidence, including the melted bucket Mann found near the hypothesized point of origin, the melted bucket (or storage bin) he found near the basement hearth, and the polystyrene he discovered near the foosball table. RP 3650-3652, 3661, 3665-3667, 3684-3685, 3740-3741, 3745, 3760, 3800-3803, 3893-3894,

⁶⁹ Supported by Iskra and Rice.

3900-3903, 3956-3957, 3980-3982, 4004, 4022, 4029, 4266-4270; CP 447-449.

The melted buckets and the lab test results were especially significant. CP 447-449. They illustrated gaps in Lynam's investigation—Lynam and Iskra both missed the melted buckets, and Lynam failed to test for polystyrene despite its relevance to his proposed ignition sequence. RP 1458, 3057-3060, 3179-3180, 3196. The presence of a melted bucket at the point of origin also directly undermined his beanbag theory, which the prosecutor relied upon in closing as evidence of premeditation. RP 4334, 4403-4404.

The trial court violated Ms. Arndt's constitutional right to present a defense. *Jones*, 168 Wn.2d at 720. The state cannot show that the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. Ms. Arndt's convictions must be reversed. *Id.*

II. THE TRIAL COURT VIOLATED THE FIFTH AND FOURTEENTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

The state relied on the same evidence to prove aggravated premeditated murder, felony murder, and arson. Because of this, the trial judge should have vacated the lesser offenses. *State v. Womac*, 160 Wn.2d 643, 658-660, 160 P.3d 40 (2007).

Furthermore, the first-degree premeditated murder charge was elevated to an aggravated offense (carrying a mandatory sentence of life without possibility of parole) because it was committed during the course of arson. Accordingly, both the arson and the felony murder (based on arson) merged into the greater charge. *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

- A. The double jeopardy violation may be raised for the first time on appeal, and review is *de novo*.

Double jeopardy claims present manifest error affecting a constitutional right, and may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Whittaker*, 192 Wn. App. 395, 411, 367 P.3d 1092 (2016) (citing *State v. Ralph*, 175 Wn. App. 814, 823, 308 P.3d 729 (2013)). Double jeopardy claims are reviewed *de novo*. *State v. Fuller*, 185 Wn.2d 30, 34, 367 P.3d 1057 (2016).

- B. The trial judge should have vacated the first-degree felony murder and first-degree arson convictions.

The state and federal constitutions prohibit multiple punishments for a single offense. U.S. Const. Amends. V, XIV; Wash. Const. art. I, §9. Whether two offenses are the same is “ultimately ‘a question of statutory interpretation and legislative intent.’” *State v. Villanueva-Gonzalez*, 180

Wn.2d 975, 980, 329 P.3d 78 (2014) (quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)).

Courts first determine “if the applicable statutes expressly permit punishment for the same act or transaction.” *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). In the absence of express statutory language, courts apply the “same evidence” test and the “merger” doctrine. *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

There are no express statutory provisions permitting multiple punishments for aggravated first-degree murder and other crimes arising from the same transaction. RCW 9A.32.030; RCW 10.95.030.

Accordingly, the offenses here must be analyzed under the “same evidence” test and the “merger” doctrine. *Id.*

1. Ms. Arndt’s convictions for aggravated murder, felony murder, and arson violate double jeopardy under the “same evidence” test.

Under the “same evidence” test, multiple convictions violate double jeopardy if the evidence necessary to convict on one offense is sufficient to convict on the other. *In re Orange*, 152 Wn. 2d 795, 816, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005). The test does not rest on a comparison of the legal elements of each offense. *Hughes*, 166 Wn.2d at 684. Convictions for two crimes can

violate double jeopardy even if the two offenses do not have the same elements. *Id.*; *Orange*, 152 Wn.2d at 820.

Instead, the inquiry focuses on the evidence the state produced to prove each offense. *Orange*, 152 Wn.2d at 818-820. If the evidence necessary to convict the accused person on one offense also proves guilt on the other, the double jeopardy clause prohibits convictions for both. *Orange*, 152 Wn.2d at 816; *see also In re Francis*, 170 Wn.2d 517, 525, 242 P.3d 866 (2010).

Here, the same evidence supported Ms. Arndt's convictions for aggravated murder, felony murder, and arson. Accordingly, double jeopardy should have prohibited entry of convictions for the felony murder and arson charges. *Womac*, 160 Wn.2d at 658-660.

To convict Ms. Arndt of aggravated first-degree premeditated murder, the prosecution relied on evidence that she premeditated Veeder's death (while setting up a beanbag chair in the basement. The state also relied on testimony that she lit the beanbag chair on fire, that Veeder died as a result of the fire, and that she committed the murder in the course of arson in the first degree. CP 352-356; RP 4333-4417; RCW 9A.32.030(1)(a); RCW 10.95.020(11)(e).

The evidence necessarily proved first-degree felony murder based on first-degree arson. RCW 9A.32.030(1)(c). That crime requires proof

that a person cause the death of another in the course of committing first-degree arson. RCW 9A.32.030(1)(c).

The same evidence also necessarily proved first-degree arson. RCW 9A.48.020(1). A person is guilty of that offense if she knowingly and maliciously causes a fire which is manifestly dangerous to human life or damages a dwelling, or if she knowingly and maliciously causes a fire in any occupied building. RCW 9A.48.020(1)(a)-(c).

Because the same evidence supported all three charges, the trial court should have vacated Counts II and III and the associated aggravating factors. *Womac*, 160 Wn.2d at 658-660. Entry of these convictions violated Ms. Arndt's double jeopardy rights. CP 472; *Womac*, 160 Wn.2d at 658-660. The convictions for first-degree felony murder and first-degree arson must be vacated, and the case remanded for a new sentencing hearing.⁷⁰ *Id.*

2. The first-degree arson and the felony murder charges both elevated the premeditated murder charge to an aggravated offense, and thus merged with that conviction.

The merger doctrine applies “when the degree of one offense is raised by conduct separately criminalized by the legislature.” *State v.*

⁷⁰ If Count I is not reversed, Ms. Arndt's overall sentence will not change. However, the 144-month sentence on Count III will be stricken, and her offender score and standard ranges for Counts IV-IX will be reduced. CP 473-475.

Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005). In such cases, courts presume that “the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Id.* Reviewing courts “look at how the offenses were charged and proved, and do not look at the crimes in the abstract.” *Whittaker*, 192 Wn. App. at 411.

Here, the premeditated murder charge was elevated to an aggravated offense because it was committed in the course of first-degree arson. CP 352-356; RCW 10.95.020(11)(e).

Factually, Count I was also aggravated by the state’s proof of first-degree felony murder: Count II (felony murder) required the state to prove that Ms. Arndt committed first-degree arson. CP 352-356. Thus both the arson and the felony murder, as charged and proved, elevated the premeditated murder charge to an aggravated offense.

Counts II and III merged with Count I. *Freeman*, 153 Wn.2d at 772-73. The convictions for felony murder and arson must be vacated. *Id.* The associated aggravating factors must be stricken and the case remanded for a new sentencing hearing. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant

can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).⁷¹

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, “[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals’] obligation to exercise discretion when properly requested to do so.” *Sinclair*, 192 Wn. App. at 388.

Ms. Arndt has been sentenced to life in prison without possibility of parole. CP 474. The trial court determined that she is indigent for purposes of this appeal. CP 485. There is no reason to believe that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

⁷¹ Division III does not appear to have addressed the *Sinclair* approach to appellate costs.

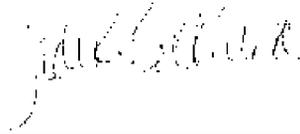
CONCLUSION

For the foregoing reasons, Ms. Arndt's convictions must be reversed and the case remanded for a new trial. In the alternative, if the convictions are not reversed, Counts II and III must be vacated and the case remanded for resentencing.

If the state substantially prevails on review, the Court of Appeals should decline to impose appellate costs.

Respectfully submitted on August 16, 2016,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

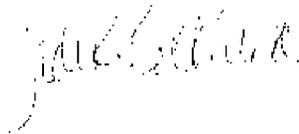
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 16, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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