NO. 93629-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

KEVIN L. GROTHAUS,

Petitioner/Cross-Respondent.

CROSS-PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington, respondent and cross-petitioner, seeks review of the Court of Appeals decision designated in part II.

II. COURT OF APPEALS DECISION

In an order filed September 1, 2016, the Court of Appeals granted reconsideration and denied the State's request for costs. A copy of this order is attached as Appendix A. A copy of the original Court of Appeals opinion is attached as Appendix B.

III. STATEMENT OF THE CASE

The defendant (petitioner and cross-respondent), Kevin Grothaus, was found guilty by a jury of first degree trafficking in stolen property and second degree theft. CP 27-28. He appealed this conviction. He claimed that he was denied a fair trial by a witness's violation of an order in limine. He also challenged the trial court's imposition of a $500 victim penalty assessment and a $100 DNA fee. The Court of Appeals rejected these claims. It affirmed the judgment and sentence in an opinion filed August 1, 2016.

The State filed a cost bill seeking $4,378.84. The overwhelming majority of this amount ($4,286.55) represented payments made by the Appellate Indigent Defense Fund on the defendant's behalf. Most of this represented the defendant's

attorney fees ($2,997.00) and the costs of preparing the transcript ($1,241.35).

The defendant filed a motion for reconsideration and an objection to the cost bill. The sole basis for the objection was that the defendant was "determined to be indigent for purposes of this appeal." In response, the State pointed out that the defendant had been sentenced to only 90 days' confinement. 1 CP 16. He has a marketable skill and is known as "one of the best" framers in the construction industry. 3/9/15 RP 61. In his affidavit for an order of indigence, he said that he had $2,000 in stocks, bonds, or notes. 2 CP 78.

The Court of Appeals granted reconsideration and denied costs. The court's order says that the panel "considered the motion for reconsideration and objection, the State's response, and the nonexclusive factors in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016)." The opinion contains no explanation of how those factors were applied.

The defendant has petitioned for review of the portion of the Court of Appeals decision that affirmed the imposition of $600 in legal financial obligations. The State now cross-petitions for review

of the portion of the amended decision that denies an award of costs.

IV. ISSUE PRESENTED FOR REVIEW

RCW 10.73.160 allows appellate courts to require convicted offenders to repay the cost of their indigent defense. Should such repayment be denied on the basis that the offender is indigent?

V. ARGUMENT

THIS COURT SHOULD ESTABLISH STANDARDS TO GOVERN AWARDS OF APPELLATE COSTS.

This case involves application of RCW 10.73.160.[1] That statute allows appellate costs to "require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1). These costs "include[e] recoupment of fees for court-appointed counsel." RCW 10.73.160(3).

This court upheld the constitutionality of RCW 10.73.160 in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). The court held that it was not necessary to determine the defendant's ability to pay before imposing appellate costs. It pointed out that "it is nearly impossible to predict ability to pay over a period of 10 years or longer." Rather, the issue of inability to pay is properly resolved via motion to remit costs under RCW 10.73.160(4). Id. at 242; see

City of Richland v. Wakefield, no. 92594-1 (9/22/16) (discussing standards for remission of costs). This court subsequently recognized that costs are discretionary with the appellate court. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In accordance with these decisions, appellate courts routinely awarded costs for around 20 years.

In 2015, this court decided State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). That decision involved a different statute dealing with awards of *trial* costs, RCW 10.01.160. That statute precludes courts from imposing costs "unless the defendant is or will be able to pay them." RCW 10.01.160(3). The court held that this statutory provision is mandatory. As already pointed out, however, RCW 10.73.160 contains no comparable provision.

Nonetheless, after Blazina defendants began regularly challenging all kinds of legal financial obligations. In January, 2016, Division One of the Court of Appeals announced that it would exercise discretion in awarding costs. "Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an

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[1] The full text of that statute is attached as Appendix C.

indispensable factor." State v. Sinclair, 192 Wn. App. 380, 389, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016).

Since this decision, the award of costs in Division One has become largely unpredictable. In most cases, the court denies the State any award of costs. In a few, it grants them. Usually this is without explanation. When the court has provided an explanation, it has focused on the defendant's ability to pay.

For example, the Court granted costs in State v. Caver, no. 73761-9-I (9/6/16). Because the defendant was only 53 years old and was in jail for only 90 days, the court found a "realistic possibility" that he would be able to pay costs in the future. Id. ¶ 28. Yet in the present case, the court denied the imposition of costs against a defendant who was sentenced to 90 days' confinement and has the prospect of lucrative employment.

The court denied costs in an unpublished opinion in State v. Howard, no. 73822-4-I (9/26/16). The defendant there was 22 years old, and the trial court found that she would probably be able to get a paying job in prison. The Court of Appeals was nonetheless not persuaded that "imposing a debt of thousands of dollars upon Howard would be a productive exercise of our discretion." The court likewise denied costs in an unpublished opinion in State v.

Hernandez, no. 73341-9-I (7/25/16). The only explanation was that the defendant had been found indigent by the trial court, and there was no finding that his financial condition was likely to improve.

These cases illustrate the need for standards governing the exercise of appellate court discretion. "Without governing standards or principles, [discretionary] provisions threaten to condone judicial 'whim' or predilection." Kirtsaeng v. John Wiley & Sons, Inc., ___ U.S. ___, 136 S.Ct. 1979, 1986, 195 L.Ed.2d 368 (2016). The varying decisions of the Court of Appeals create an appearance that the decisions are based on whim or predilection, rather than any uniform application of rules of law.

To the extent that the Court of Appeals has relied solely on defendants' indigence, it has created a "Catch-22." In the novel of that title, an airman could be removed from flight duty for mental illness, but only on his own request – and making the request proved that he wasn't mentally ill. See State v. Frederick, 100 Wn.2d 550, 558 n. 3, 674 P.2d 136 (1983), quoting J. Heller, Catch-22 (1961). Similarly, under the Court of Appeals' analysis, an indigent defendant can be required to recoup the costs of his appeal – but only if he isn't indigent. This analysis effectively negates a constitutionally-valid statute.

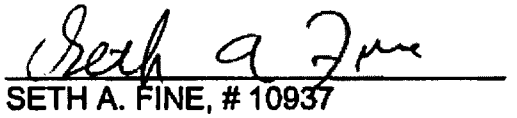
In Blank, this court recognized the near-impossibility of predicting a defendant's future ability to pay appellate costs. Blank, 131 Wn.2d at 242. 930 P.2d 1213 (1997). Yet Division One is now regularly denying costs based on precisely such a prediction. This decision conflicts with Blank. The unpredictable and seemingly arbitrary decisions as to costs create an issue of substantial public interest. Review should be granted under RAP 13.4(b)(1) and (4).

VI. CONCLUSION

This court should grant review. It should overturn the portion of the Court of Appeals decision that denies costs.

Respectfully submitted on September 27, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, # 10937
Deputy Prosecuting Attorney
Attorney for Respondent/
Cross-Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN LEE GROTHAUS, Appellant.	)	No. 73562-4-I DIVISION ONE ORDER GRANTING MOTION FOR RECONSIDERATION AND DENYING COST BILL

After the court filed the opinion in this case on August 1, 2016, the State filed a cost bill seeking $4,378.84 in appellate costs. Appellant Kevin Lee Grothaus filed a motion for reconsideration and an objection to appellate costs. At the direction of the panel, the State filed a response.

The panel has considered the cost bill, the motion for reconsideration and objection, the State's response, and the nonexclusive factors in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), and determined that the motion for reconsideration should be granted and the cost bill denied.

It is ORDERED that appellant Grothaus' motion for reconsideration is granted and the State's request for an award of any appellate costs is denied.

Done this 1st of September, 2016.

For the Court:

Judge

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 SEP -1 PM 2:08

APPENDIX A

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

STATE OF WASHINGTON, Respondent,	)	No. 73562-4-I
v.	)	UNPUBLISHED OPINION
KEVIN LEE GROTHAUS, Appellant.	)	FILED: August 1, 2016

SCHINDLER, J. — A jury convicted Kevin Lee Grothaus of trafficking in stolen property in the first degree and theft in the second degree. Grothaus argues improper opinion testimony violated his constitutional right to a fair trial. Grothaus also challenges imposition of the mandatory victim penalty assessment under RCW 7.68.035 and the mandatory DNA[1] fee under RCW 43.43.7541. We affirm the conviction and entry of the judgment and sentence.

Grothaus worked as a carpenter and owned a carpentry business. His neighbor Joe Myers owned a construction company.

In November 2012, Grothaus asked Myers to hire him as a carpenter. Myers agreed to hire Grothaus as an hourly wage employee. Myers provided Grothaus with a company truck, a cell phone, and a number of tools including air compressors, nail

[1] Deoxyribonucleic acid.

APPENDIX B

guns, sanders, drills, saws, and ladders. Between December 2012 and March 2013, Grothaus pawned a number of Myers' tools as collateral for the loans he obtained.

Myers frequently visited the jobsites where Grothaus worked. Myers noticed Grothaus was sometimes not present. Myers also noticed Grothaus did not have all of the tools that Myers had provided. When asked, Grothaus told Myers the missing tools were at his father's house.

On March 5, 2013, Myers fired Grothaus. Myers told Grothaus to return the company truck and "make sure all the tools are in the truck." Grothaus returned the truck but "a lot" of the tools were missing. Myers wrote Grothaus a letter identifying the missing tools and demanded that he return the tools.

In a letter to Myers, Grothaus promised to return the tools the next week but did not do so. Myers contacted the police.

Snohomish County Sheriff's Office Detective Stephen Clinko located a number of the missing tools in pawnshops. Specifically, three pawnshops in Everett and one in Marysville. Detective Clinko recovered 16 tools Grothaus pawned between December 12, 2012 and March 2, 2013 to secure loans totaling $1,190. Grothaus admitted he did not return the tools to Myers. Grothaus told Detective Clinko he intended to redeem the tools from the pawnshops and return them to Myers but had not done so.

The State charged Grothaus with trafficking in stolen property in the first degree in violation of RCW 9A.82.050(1) and theft in the second degree in violation of RCW 9A.56.040(1)(a).

The defense filed a number of motions in limine including a motion to "[e]xclude testimony from any witness that gives an opinion or conclusion as to whether [Grothaus]

committed the crime charged." The prosecutor agreed that whether Grothaus committed the charged crimes was an "ultimate issue[ ] for the jury" and did not "intend to ask [witnesses] if [Grothaus is] guilty of committing the crime or anything." The court granted the defense motion in limine. The court ordered the prosecutor to inform witnesses of the court's pretrial rulings.

The State called a number of witnesses to testify at trial including Myers and Detective Clinko.

During Myers' testimony, the prosecutor asked if Grothaus had permission to pawn the tools Myers had provided.

> Let me ask you this, in a straightforward fashion. The defendant, while he was permitted to use those tools, was he permitted to pawn them? Did you ever give him that say-so?

In response, Myers stated, "That's theft. No." Defense counsel objected to the response and moved for a mistrial.

The court denied the motion for a mistrial. The court ruled the jury could ignore the improper testimony if instructed to do so. Defense counsel agreed the court's proposed curative instruction was acceptable.

> THE COURT: . . . What I'm going to do when the jurors come back in, I'm going to let them know the answer to the last question was no, that the remainder of the answer will be stricken, and they should ignore that.
> [DEFENSE COUNSEL]: Thank you, Your Honor.
> THE COURT: Is that okay with you, [defense counsel]?
> [DEFENSE COUNSEL]: Yes, Your Honor.

The court instructed the jury to disregard the improper testimony.

> THE COURT: All right. Just before you left there was an objection. Regarding that objection, the portion of the answer that was "no" will stand. Anything beyond that the objection is sustained, and the jury will disregard any information beyond that.

Grothaus testified on behalf of the defense. The jury convicted Grothaus as charged.

Grothaus argues Myers' improper opinion testimony concerning his guilt violated his constitutional right to a fair trial. The State concedes Myers' testimony "That's theft" was an improper opinion on guilt but argues any prejudice was cured by the court's instruction to disregard the testimony. We agree.

As a general rule, no witness may offer testimony in the form of an opinion regarding the defendant's guilt or veracity. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Opinion testimony on guilt is unfairly prejudicial and violates the defendant's constitutional right to a jury trial. Quaale, 182 Wn.2d at 199; Kirkman, 159 Wn.2d at 927.

However, improper opinion testimony may be cured by instructing the jury to disregard the improper testimony and does not always require reversal. State v. Hager, 171 Wn.2d 151, 159, 248 P.3d 512 (2011); see State v. Hag, 166 Wn. App. 221, 264-65, 268 P.3d 997 (2012) (holding that although witness's testimony was improper, defendant was not denied the right to a fair trial because the court instructed the jury to disregard the improper testimony); State v. Thompson, 90 Wn. App. 41, 46-47, 950 P.2d 977 (1998) (same). We "presume jurors follow instructions to disregard improper evidence." Hag, 166 Wn. App. at 264; State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) ("We presume that juries follow all instructions given.").

The record establishes the court instructed the jury to disregard Myers' testimony "That's theft." The court also instructed the jury that it was their "duty to decide the facts in this case based upon the evidence presented" and that if "evidence was not admitted

or was stricken from the record, then you are not to consider it in reaching your verdict."[2]

Grothaus claims the trial court should have instructed the jury that it was the jury's duty "to independently determine guilt . . . regardless of what [Meyers] or any witness thought about [Grothaus's guilt]." But because Grothaus did not object to the curative instruction the court proposed to give, he waived his right to argue for the first time that the curative instruction was deficient. RAP 2.5(a); see State v. Williams, 156 Wn. App. 482, 492, 234 P.3d 1174 (2010) (failure to request limiting instruction constitutes a waiver of right to assign error on appeal); State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007) (failure to request limiting instruction "waives any argument on appeal that the trial court should have given the instruction").

In any event, the improper comment on guilt was harmless beyond a reasonable doubt. The "untainted evidence is so overwhelming that it necessarily leads to the same outcome." In re Pers. Restraint of Cross, 180 Wn.2d 664, 688, 327 P.3d 660 (2014).

To convict Grothaus of theft in the second degree, the State had the burden of proving he "exert[ed] unauthorized control over the property . . . of another or the value

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[2] Jury instruction 1 states, in pertinent part:

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. . . .
>
> . . . Your decisions as jurors must be made solely upon the evidence presented during these proceedings.
>
> The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.
>
> . . . .
>
> . . . If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

(Emphasis added.)

thereof, with intent to deprive him or her of such property . . . which exceed(s) seven hundred fifty dollars in value."[3] RCW 9A.56.020(1)(a), .040(1)(a). Grothaus admitted there were only "a few" tools in the truck when he returned the truck to Myers and "certainly . . . a lot" of the tools were "missing." Grothaus testified he took tools belonging to Myers to pawnshops and used them as collateral for loans. Grothaus admitted he did not have the authority to pawn Myers' tools. Grothaus also admitted he knew Myers would not be able to "retrieve those items once [he] pawned them." The overwhelming untainted evidence supports the conviction.

At sentencing, the court waived all discretionary fees and costs but ordered Grothaus to pay the mandatory victim penalty assessment in the amount of $500, the mandatory DNA fee in the amount of $100, and restitution in an amount to be determined at a later hearing.

For the first time on appeal, Grothaus argues that as applied to an indigent defendant, imposition of the mandatory victim penalty assessment under RCW 7.68.035 and the mandatory DNA fee under RCW 43.43.7541 violates substantive due process.

In State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992), the Washington Supreme Court addressed a constitutional challenge to imposition of the victim penalty assessment and held constitutional principles are implicated only when the State seeks

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[3] Jury instruction 7 states:

> To convict the defendant of the crime of theft in the second degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 23, 2012, though March 2, 2013, the defendant exerted unauthorized control over property of another or the value thereof;
>
> (2) That the property exceeded $750 in value;
>
> (3) That the defendant intended to deprive the other person of the property; and
>
> (4) That this act occurred in the State of Washington.
>
> If you find from the evidence that the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of [the] elements, then it will be your duty to return a verdict of not guilty.

to enforce collection of the mandatory assessment. The court noted that "imposition of the penalty assessment, standing alone, is not enough to raise constitutional concerns." Curry, 118 Wn.2d at 917, n.3. In State v. Shelton, No. 72848-2-I, slip op. at 3 (Wash. Ct. App. June 20, 2016), we considered and rejected the same as-applied substantive due process challenge to the mandatory DNA fee statute. We held that until the State attempts to enforce collection of the DNA fee or impose sanctions for failure to pay, the claim is not ripe for judicial review and is not an error of constitutional magnitude subject to review under RAP 2.5(a)(3). Shelton, slip op. at 11-12. We also held that "unlike discretionary legal financial obligations, the legislature unequivocally requires imposition of the mandatory DNA fee and the mandatory victim penalty assessment at sentencing without regard to finding the ability to pay." Shelton, slip op. at 11.

We affirm the conviction and entry of the judgment and sentence.

WE CONCUR:

COX, J.

West's Revised Code of Washington Annotated
Title 10. Criminal Procedure (Refs & Annos)
Chapter 10.73. Criminal Appeals (Refs & Annos)

West's RCWA 10.73.160

10.73.160. Court fees and costs

Effective: July 24, 2015
Currentness

(1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.

(2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.

(3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence.

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

(5) The parents or another person legally obligated to support a juvenile offender who has been ordered to pay appellate costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the parents or another person legally obligated to support a juvenile offender or on their immediate families, the sentencing court may remit all or part of the amount due in costs, or may modify the method of payment.

Credits
[2015 c 265 § 22, eff. July 24, 2015; 1995 c 275 § 3.]

West's RCWA 10.73.160, WA ST 10.73.160
Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent/Cross-Petitioner, v. KEVIN L. GROTHAUS, Petitioner/Cross-Respondent.	SUPREME COURT NO. 93629-3 DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of September, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

CROSS-PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Dana M. Nelson, Nielsen, Broman & Koch, nelsond@nwattorney.net; Sloanej@nwattorney.net;

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of September, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, September 27, 2016 4:23 PM
To: 'Kremenich, Diane'; nelsond@nwattorney.net; sloanej@nwattorney.net
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Sent: Tuesday, September 27, 2016 4:17 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; nelsond@nwattorney.net; sloanej@nwattorney.net
Subject: State v. Kevin L. Grothaus

Good Afternoon...

RE: State v. Kevin L. Grothaus
Supreme Court No. 93629-3

Please accept for filing the following attached document: State's Cross-Petition for Review

Thanks.

Diane.

Diane K. Kremenich
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