No. 73654-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES THOMAS,

Appellant.

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

The Honorable Marybeth Dingledy

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

James Thomas was detained by employees of a retail store for shoplifting. A confrontation ensued and Mr. Thomas was charged with first degree robbery as a result. At trial, the police officer who arrested Mr. Thomas rendered, over Mr. Thomas's objection, his improper personal opinion regarding Mr. Thomas's guilt. Mr. Thomas asks this Court to reverse his conviction.

B. ASSIGNMENTS OF ERROR

1. Officer McCourt's opinion regarding the truthfulness and guilt of Mr. Thomas impermissibly invaded the province of the jury and violated his constitutionally protected right to a fair trial and right to a jury trial.

2. Mr. Thomas's right to a fair trial and right to a jury trial were violated when the trial court denied his motion for a new trial based on Officer McCourt's impermissible opinion.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A witness may not comment or opine about the credibility of another witness. Further, a witness may not render a personal opinion about the guilt of the defendant. Such improper opinions violate the defendant's right to a fair trial and right to a jury trial. Here, one of the

responding police officers rendered his opinion regarding the truthfulness of Mr. Thomas, thus rendering a personal opinion about his guilt. Did the admission of the officer's opinion violate Mr. Thomas's right to a fair trial and right to a jury trial?

D. STATEMENT OF THE CASE

On December 14, 2013, James Thomas entered a Fred Meyer store in Everett. 3/16/2015RP 141. Mr. Thomas was seen trading his old shoes for a new pair and also selecting several items and putting them in the backpack he carried. 3/16/2015RP 145-48. As Mr. Thomas walked out of the store, he was immediately confronted by two loss prevention employees of the store, Patti Owen and Patric Trattles. 3/16/2015RP 158; 3/17/2015RP 292-94. Mr. Thomas agreed to go back into the store with these employees. Ms. Owen took possession of Mr. Thomas's backpack. 3/16/2015RP 159; 3/17/2015RP 295.

Mr. Thomas had personal belongings in the backpack, and as he and the two employees went back into the store, Mr. Thomas tried to take his backpack back. 3/16/2015RP 159-61; 3/17/2015RP 295-96. Mr. Thomas began leaving the store followed by Ms. Owen, who claimed she was trying to talk Mr. Thomas into returning. 3/16/2015RP 161; 3/17/2015RP 297. According to Ms. Owen and Mr. Trattles, Mr.

Thomas returned to the store at a fast pace attempting to regain his backpack and confronted Mr. Trattles. 3/16/2015RP 163-64; 3/17/2015RP 302. According to Mr. Trattles, Mr. Thomas threatened him, then swung his fist at Mr. Trattles, striking his hand. 3/16/2015RP 165-67; 3/17/2015RP 305-07. Mr. Thomas walked away and was arrested by police a short time later. 3/16/2015RP 171; 3/17/2015RP 267-68.

Mr. Thomas was charged with first degree robbery. CP 134. During the cross-examination of Officer McCourt, the police officer who arrested and spoke with Mr. Thomas following his arrest, Mr. Thomas inquired into the quality of the officer's investigation:

> Q: Okay. You testified that you went through this conversation with Mr. Thomas, asked him about what had happened, and got various responses, and then I think you testified you verified it by going through it again with him?
>
> A: Yes.
>
> Q: Is that correct?
>
> A: Yes.
>
> Q: So if I'm understanding you correctly, you had asked him once, and then you reviewed those answers with him again, and he confirmed those were his answers?
>
> A: Yes.

Q: Is that a fair characterization of what had happened?

A: Yes.

Q: Did you ever go to the address that Mr. Thomas had given you as his home address? Did you ever go there?

A: No.

Q: Were you able to confirm that that was or was not his address?

A: No.

Q: And were you able to get in touch with anybody at his work or anywhere that -- he had said he had done some electrical work, did you follow up on that line of inquiry at all and contact any of his employers, for instance?

A: No.

Q: Did you give a call to Mr. Thomas' girlfriend who you said had -- or your testimony was that he said he had picked those shoes up for her. Did you call his girlfriend by any chance?

A: No.

Q: Did you review any bus surveillance footage, from the Everett bus that he said he went and saw -- or went and took, rather, to get from this location?

A: No.

On redirect, the prosecutor followed up on this line of questioning:

> Q: So why do you go over statements again after you've gotten them from a defendant or a witness? What's the purpose?
>
> A: To ensure that I wasn't misunderstanding what he was saying, that I was characterizing his statements correctly.
>
> Q: As far as counsel asked you about checking on the bus, checking on the address, checking on the girlfriend, why didn't you do those things?
>
> A: *They -- honestly, they weren't believable.*

3/17/2015RP 274-75 (emphasis added). Mr. Thomas immediately objected and the court sustained the objection. *Id.*

At the conclusion of the trial, Mr. Thomas was convicted as charged. CP 44. Prior to sentencing, Mr. Thomas moved for a new trial on among other grounds, that the improper opinion by Officer McCourt was so prejudicial that it required a new trial. CP 38-39; 4/14/2015RP 5-6. In denying the motion, the court noted: "I'm going to deny the motion. I do think that the *Demery* case is on point." 4/14/2015RP 12.

E. ARGUMENT

1. **The improper personal opinion of Officer McCourt concerning the guilt of Mr. Thomas impermissibly invaded the province of the jury.**

a. *A personal opinion regarding a person's guilt by a police officer violates that person's rights to a fair trial and a jury trial.*

The role of the jury is to be held "inviolate." U.S. Const. amend. VI; Const. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the right to trial by jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Under the Constitution, the jury has "the ultimate power to weigh the evidence and determine the facts." *State v. Montgomery*, 163 Wn.2d 577, 589-90, 183 P.3d 267 (2008), *quoting James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). The credibility of a witness is one such jury question. *State v. Whelchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990).

In addition, an accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. I, §§ 3, 21, 22. Lay witness opinion testimony about the defendant's guilt invades that right. *State v. Johnson*, 152 Wn.App. 924, 934, 219 P.3d 958 (2009); *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993), *citing State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because admitting such evidence "violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury." *Carlin*, 40 Wn.App. at 701; *see also Dubria v. Smith*, 224 F.3d 995, 1001-02 (9th Cir., 2000) (suggesting that the admission of taped interviews containing police statements challenging the defendant's veracity may also violate the defendant's right to due process), *cert. denied*, 531 U.S. 1148 (2001).

In determining whether such statements are impermissible opinion testimony, courts consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of

fact.'" *State v. Demery*, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001), *quoting Heatley*, 70 Wn.App. at 579.

There are some areas which are clearly inappropriate for opinion testimony in criminal trials, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. *Demery*, 144 Wn.2d at 759; *State v. Farr-Lenzini,* 93 Wn.App. 453, 463, 970 P.2d 313 (1999).[1] This is especially true for police officers because their testimony carries an "aura of reliability." *Demery*, 144 Wn.2d at 765.

b. *Officer McCourt's personal opinion regarding Mr. Thomas's guilt constituted an improper opinion testimony.*

Here, Officer McCourt opined that Mr. Thomas was not believable, thus rendering an opinion on Mr. Thomas's guilt. RP 275. This was an improper opinion that invaded the province of the jury. *State v. Kirkman,* 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (police officer's opinion testimony may be especially prejudicial because the "officer's testimony often carries a special aura of reliability.").

[1] This rule is grounded in the Rules of Evidence. Testimony that tells the jury which result to reach is likely not helpful to the jury (as required by ER 702), is probably outside the witness's area of expertise (in violation of ER 703), and is likely to be unfairly prejudicial (in violation of ER 403).

In *State v. Jones*, a police officer testified following his interview of the defendant that "you know, I just didn't believe him." 117 Wn.App. 89, 91, 68 P.3d 1153 (2003). The Court of Appeals held that the officer's testimony was an improper opinion as to the defendant's credibility and constituted reversible error. *Jones*, 117 Wn.App. at 92.

The decision in *Jones* is virtually indistinguishable from Mr. Thomas's matter. Like the police officer in *Jones*, Officer McCourt rendered his opinion regarding Mr. Thomas's credibility, and as a consequence, his guilt.

The trial court here relied solely on the decision in *Demery* to deny Mr. Thomas's motion for a new trial. 4/14/2015RP 12 ("I do think that the *Demery* case is on point."). But the trial court misunderstood the holding in *Demery*.

The issue in *Demery* was whether police officers' statements, that they believed the defendant was lying during a taped interview, constituted improper opinions regarding the veracity of the defendant where the tape was mistakenly played to the jury unredacted. *Demery*, 144 Wn.2d at 756, 758-59. Four justices found this practice not erroneous. *Id.* at 764-65. A majority of the Court found this practice

was improper opinion evidence, with four of the justices ruling that reversal was the proper remedy. *Id.* at 765-773 (Sanders, J. dissenting). One justice ruled the officers' actions constituted improper opinion evidence but the error was nevertheless harmless, thus voting to affirm the defendant's conviction. *Id.* 766 (Alexander, C.J. concurring).

The end result of the decision in *Demery* was that police officer's opinions regarding the credibility of the defendant are error. Thus, contrary to the trial court's conclusion, *Demery* supported Mr. Thomas's motion for a new trial and the trial court erred in failing to order a new trial. This Court should reverse Mr. Thomas's conviction.

c. *The error in failing to order a new trial in light of Officer McCourt's improper opinion testimony prejudiced Mr. Thomas and a new trial is the only remedy.*

Since improper opinions on guilt invade the jury's province and thus violate the defendant's constitutional right, the constitutional harmless error standard applies to determine if the error was harmless. *State v. Hudson*, 150 Wn.App. 646, 656, 208 P.3d 1236 (2009); *State v. Thach*, 126 Wn.App. 297, 312-13, 106 P.3d 782 (2005). Under this standard it is presumed that the constitutional error was prejudicial, and the State bears the burden of proving beyond a reasonable doubt that any reasonable jury would have reached the same result absent the

error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *Thach*, 126 Wn.App. at 313.

The only witnesses to the alleged acts by Mr. Thomas were Ms. Owen and Mr. Trattles. Officer McCourt's improper opinion was an explicit opinion regarding Mr. Thomas's guilt, but also an implicit opinion vouching for the credibility of the Ms. Owens and Mr. Trattles. The officer's opinion not only called out Mr. Thomas as a liar, it also undercut the defense challenge to the police investigation. Since the claim here was that this was a retail shoplift that escalated based on the minor injury to Mr. Trattles, and based solely on the testimony of Ms. Owens and Mr. Trattles, the improper vouching by Officer McCourt turned a third degree theft into a first degree robbery with its increased sentencing range and onerous collateral consequences. As a consequence, the harm done to Mr. Thomas by the improper opinion was substantial and must result in the reversal of Mr. Thomas's conviction.

Further, the prosecutor's argument cannot merely be forgotten or ignored by the jury during its deliberations, even in light of a curative instruction or an objection. "[A] bell once rung cannot be unrung." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976).

This Court must reverse Mr. Thomas's conviction and remand for a new and fair trial which comports with due process.

2. **This Court should order that no costs be awarded on appeal.**

a. *Mr. Thomas may seek an order from the Court ordering that no costs be awarded in his Brief of Appellant.*

Should this Court reject Mr. Thomas's argument on appeal, Mr. Thomas asks that this Court issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to his continued indigency. Such as request is authorized under this Court's recent decision in *State v. Sinclair*, ___ Wn.App. ___, slip op. at 10-12 (72102-0-I, January 27, 2016). (A copy of the decision is attached in the Appendix).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, slip op. at 5, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair*, slip op. at 8, *quoting Nolan*, 141 Wn.2d at 628.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. Slip op. at 9-10. This Court must then engage in an "individualized inquiry." Slip op. at 12, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

One factor this Court found persuasive in making its determination regarding costs on appeal in *Sinclair* was the trial court findings supporting its order of indigency for the purposes of the appeal pursuant to RAP 15.2. *Sinclair*, slip op. at 12-14. Here, the trial court entered the order of indigency and findings supporting its order. CP Supp ___, Sub. No. 91. As in *Sinclair*, there is no evidence that Mr. Thomas's financial situation will improve. Slip op. at 14

At the time of sentencing, Mr. Thomas was 56 years of age. CP 11. Mr. Thomas was sentenced to high end of the standard range sentence of 144 months. CP 5. Mr. Thomas is a veteran, but there was no indication from the record that he continues to receive, or will receive any benefits from his service. 4/14/2015RP 23-24. Although Mr. Thomas has skills in electrical and carpentry work, by the time he is released from prison, he will be in his mid-60's and it is questionable

he will reenter the workplace at that age. 4/14/2015RP 23-24. Further, his employment skills have been limited because of his problem with drug use and abuse. *Id.* As a result, and as in *Sinclair*, "[t]here is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs." Slip op. at 14.

Because of his current and continued indigency and likelihood that he will remain indigent while in prison and once he is released, Mr. Thomas asks this Court to order that no costs be awarded. *Sinclair,* slip op. at 14.

b. *Alternatively, this Court must remand to the trial court for a hearing where the court must determine whether Mr. Thomas has the current or future ability to pay.*

Should this Court determine that it cannot make a finding regarding ability to pay because the record is not complete, due process requires this Court to remand to the trial court for a hearing to determine Mr. Thomas's present or future ability to pay these costs.

Any award of costs becomes part of the Judgment and Sentence, thus amending that document. RCW 10.73.160(3) states that: "An award of costs shall become part of the trial court judgment and

sentence." A defendant has due process rights where the State seeks to modify or amend a Judgment and Sentence, including:

> (a) written notice (b) disclosure of evidence against him or her; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the court specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body; and (f) a written statement by the court as to the evidence relied on and reasons for the modification.

State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005), *citing Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Since adding any costs that might be requested by the State to Mr. Thomas's Judgment and Sentence necessarily amends the judgment, due process requires that there be a hearing which complies with the dictates of *Abd-Rahmann* regarding his present or future ability to pay. As such, Mr. Thomas requests that, in the absence of a finding by this Court regarding his ability to pay, this Court remand to the trial court for a hearing on his ability to pay.

F. CONCLUSION

For the reasons stated, Mr. Thomas asks this Court to reverse his conviction and remand for a new trial. Alternatively, Mr. Thomas asks this Court to order that no costs on appeal be awarded.

DATED this 17th day of February 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. ALAN JAMES SINCLAIR, II, Appellant.	No. 72102-0-I ORDER GRANTING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBTITUTING PUBLISHED OPINION

Appellant, Alan Sinclair II, has moved for reconsideration of this court's opinion filed on December 7, 2015. Respondent, State of Washington, has filed an answer to appellant's motion for reconsideration.

The court has determined that appellant's motion for reconsideration should be granted, the opinion filed on December 7, 2015, should be withdrawn, and a published substitute opinion should be filed. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is granted, the opinion filed on December 7, 2015, is withdrawn, and a published substitute opinion is filed and shall be printed in the Washington Appellate Reports.

DATED this 27th day of January 2016.

Becker, J.

Leach, J.

Dwyer, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALAN JAMES SINCLAIR, II, Appellant.	)	No. 72102-0-I DIVISION ONE PUBLISHED OPINION FILED: January 27, 2016

BECKER, J. — Appellant, convicted of sexually abusing his granddaughter, contends the trial court improperly admitted a recording of an incriminating communication obtained without the consent of the participants in the communication. The recording resulted from an inadvertent "pocket dial" from appellant's cell phone to the recipient's voice mail. Finding that any statutory violation was harmless, we affirm.

A jury found appellant Alan Sinclair guilty of two counts of second degree rape of a child, two counts of third degree child molestation, and one misdemeanor count of communication with a minor for immoral purposes. All charges arose from Sinclair's sexual abuse of his granddaughter. According to her testimony at trial, Sinclair began kissing her "tongue to tongue" when she was 11 or 12 years old and progressed to oral sex when she was 13 or 14.

The recording at issue occurred one afternoon when the granddaughter was home alone and Sinclair was visiting her. The granddaughter testified that

Sinclair kissed her "tongue to tongue" and then she and Sinclair went outside and continued a conversation. During the conversation, Sinclair unintentionally dialed the girl's mother with his cell phone. The mother did not answer. Her cell phone transferred the call to voice mail. The voice mail system recorded Sinclair saying, "I love that tongue. . . . I don't know if you love mine." The conversation continued with Sinclair making veiled threats that his dead ancestors would inflict physical injury on the girl for not being "nice." The mother later listened to the voice mail recording on her phone and heard the conversation. This led to the filing of the criminal charges against Sinclair.

Sinclair moved to suppress the voice mail under the Washington privacy act, chapter 9.73 RCW. The privacy act makes it unlawful for any "individual" to record any private conversation "without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030(1)(b). There is an exception for conversations "which convey threats," which "may be recorded with the consent of one party to the conversation." RCW 9.73.030(2). Neither Sinclair nor his granddaughter consented to the recording.

Sinclair contends the lack of consent made the recording inadmissible at trial. The trial court considered a number of issues in connection with Sinclair's motion to suppress. Was the conversation private? Did an "individual" record it? Does an individual incur criminal liability for an inadvertent recording, or must someone be acting with a criminal mens rea to engage the prohibitions of the act? It was undisputed that the call was made inadvertently. The trial court

denied the motion to suppress, concluding the privacy act did not apply because of "the absence of any unlawful act by anybody."

The issues are interesting and novel. But we conclude it is unnecessary to resolve them in this case because any error was harmless. We refrain from attempting a "definitive construction" of the statute in a case involving somewhat "bizarre" facts. State v. Smith, 85 Wn.2d 840, 846, 540 P.2d 424 (1975).

Admission of evidence in violation of the privacy act is a statutory violation, not a constitutional one. An error is not prejudicial unless the erroneous admission of the evidence materially affected the outcome of the trial. State v. Courtney, 137 Wn. App. 376, 383-84, 153 P.3d 238 (2007), review denied, 163 Wn.2d 1010 (2008). Here, there is no reasonable probability that the outcome of Sinclair's trial would have been different if the recording of the pocket-dialed voice mail had been excluded.

The granddaughter's testimony at trial provided independent, unchallenged evidence of the contents of the inadvertently recorded conversation. Her account was corroborated by sexually explicit photographs and a video seized from Sinclair's cell phone and computer. During his closing, Sinclair admitted guilt as to the charges of child molestation in the third degree and communicating with a minor for immoral purposes. The only charges Sinclair disputed were the two counts of second degree child rape. He argued that the State presented insufficient evidence to prove that he engaged in sexual intercourse with the girl before her 14th birthday. He does not make this argument on appeal.

It is unlikely that the jury's verdict of guilt on the two disputed counts was affected by the admission of the recorded conversation. There was no allusion in that conversation either to sexual intercourse or to the age of the granddaughter. Assuming the recording to be inadmissible, we conclude Sinclair has not shown that the error materially affected the outcome at trial.

We now address Sinclair's motion for reconsideration regarding the issue of appellate costs. He asks this court to exercise discretion to amend the decision terminating review by determining that an award of appellate costs to the State is not warranted.

Neither the State nor Sinclair raised the issue of costs in their appellate briefs. Generally, to timely raise an issue for review, a party must present argument in the appellate briefs, with citation to supportive authority and information in the record. Nevertheless, we will consider Sinclair's motion for reconsideration because the issue of appellate costs is systemic in nature, it needs to be addressed, and both parties' positions are well briefed.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added.) The statute provides that appellate costs "shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." RCW 10.73.160(3). Under the Rules of Appellate Procedure, the State may simply present a cost bill as provided in RAP 14.4. State v. Blank, 131 Wn.2d 230, 251, 930 P.2d 1213 (1997). The State is not obliged to request an award of costs in

its appellate briefs, although it does not appear there is any rule preventing the State from doing so. See Blank, 131 Wn.2d at 251.

The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added).[1] Consequently, it appears that a clerk or commissioner has no discretion under the rules to deny an award of costs when the State has substantially prevailed on review. See State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). The appellate court, however, may "direct otherwise in its decision." Nolan, 141 Wn.2d at 626.

An award of appellate costs becomes part of the judgment and sentence. RCW 10.73.160(3). A defendant may petition the sentencing court at any time for the remission of costs if the amount due "will impose manifest hardship on the defendant or the defendant's immediate family." RCW 10.73.160(4).

We filed our opinion affirming Sinclair's conviction on December 7, 2015. On December 9, 2015, the State filed a cost bill requesting an award of $6,983.19 in appellate costs. Of this amount, $6,923.21 would be paid to the Washington Office of Pubic Defense for recoupment of the cost of court appointed counsel ($2,917), preparation of the report of proceedings ($3,907), copies of clerk's papers ($90), and appellate court copying charges ($9.21). The remainder, $59.98, would be paid to the King County Prosecutor's Office.

[1] The definition of "a decision terminating review" is found in RAP 12.3(a).

On December 21, 2015, Sinclair filed both an objection to the cost bill and a motion for reconsideration of the opinion. Sinclair's objection to the cost bill characterized Division One's current system of handling appellate costs as "a blanket refusal to exercise discretion after a cost bill is filed" (Objection to Cost Bill, at 10). Sinclair cited the policy concerns identified in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). He argued that notwithstanding Nolan, commissioners should exercise discretion to deny a cost bill even if the court has not so directed in the decision terminating review. Alternatively, he requested that we direct the trial court to hold a hearing regarding his ability to pay. A ruling on Sinclair's objection to the cost bill was deferred pending resolution of the motion for reconsideration.

In his motion for reconsideration, Sinclair again asserts that Division One's commissioners routinely decline to exercise discretion to deny costs and that the court routinely denies motions to modify. It is unclear, he says, what must happen for this court to exercise discretion. "Must a party raise anticipatory cost objections in his or her opening brief based on the assumption the party's substantive arguments will fail? Or will elected judges exercise appropriate discretion following an indigent party's motion to modify a commissioner's ruling awarding costs?" Motion for Reconsideration at 2. "To the extent that a challenge to appellate costs must be raised in the briefs so that the court can exercise discretion in the decision terminating review, Sinclair asks this court to reconsider and amend its decision terminating review so that it can exercise this discretion." Motion for Reconsideration at 3.

On January 15, 2016, at the court's request, the State answered the motion. The State takes the position that the appellate court should not consider a cost award until after the decision terminating review is filed. The State acknowledges that an appellate court's failure to exercise discretion in the decision terminating review, coupled with the commissioner's lack of discretion under RAP 14.2, generally results in the award of costs to the State as the prevailing party. In the State's view, this is because a motion to modify a nondiscretionary commissioner's ruling awarding costs "is likely to fail, unless the commissioner has overlooked a flaw in the cost bill, or unless the objecting party has correctly identified some discrepancy between the cost bill and the information available to counsel." Answer to Motion for Reconsideration at 10.

The State maintains that a virtually automatic award of appellate costs upon request by the State is preferable to this court's exercise of discretion in the decision terminating review. The State claims there is not enough information available to this court to facilitate an exercise of discretion. Without specifically mentioning Blazina, the State argues that a future trial court remission hearing under RCW 10.73.160(4) is the solution to the problem of indigent offenders who upon release from confinement face a substantial and compounded repayment obligation in addition to the difficulties of finding housing and employment. The State points out that in Blank, 131 Wn.2d at 246, the court rejected a due process challenge to RCW 10.73.160 in part because an offender always has the right to seek remission from an award of costs.

The problem with the State's argument is that it requires this court to refrain from exercising the discretion that we indisputably possess under RCW 10.73.160 and Nolan. Contrary to the State's suggestion, our Supreme Court has rejected the proposition that the broad discretion to grant or deny appellate costs under RCW 10.73.160(1) should be exercised only in "compelling circumstances." See Nolan, 141 Wn.2d at 628.

The future availability of a remission hearing in a trial court cannot displace this court's obligation to exercise discretion when properly requested to do so. The statute vests the appellate court with discretion to deny or approve a request for an award of costs. Under RAP 14.2, that discretion may be exercised in a decision terminating review.

In his objection to the cost bill, Sinclair proposed as an alternative that we remand the cost bill to the trial court to conduct an inquiry into his current and future ability to pay $6,983.19 in appellate costs. As a model for that alternative, Sinclair submitted a cost bill ruling from Division Two. The Division Two commissioner ruled that the State, as prevailing party, was entitled to its costs, but also ruled that an award of appellate costs is a discretionary legal financial obligation that can be imposed only as provided in Blazina. The commissioner ruled that under Blazina, the costs would be imposed only upon the trial court making an individualized finding that the defendant had "the current or likely future ability to pay his appellate costs." Sinclair's Objection to Cost Bill, Appendix C.

The problem with Sinclair's suggested remedy of a remand to the trial court is twofold. Not only would it delegate the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties. We disagree with the Division Two commissioner's statement that an award of appellate costs is a discretionary legal financial obligation controlled by Blazina's decision to "remand the cases to the trial courts for new sentence hearings." Blazina, 182 Wn.2d at 839. The statute considered in Blazina, RCW 10.01.160, does not govern appellate costs. For costs that "may" be imposed upon a convicted defendant at the trial court level, it specifically sets forth parameters and limitations, prominently including the defendant's ability to pay and financial resources. RCW 10.01.160(3).

Our statute, RCW 10.73.160, does not set forth parameters for the exercise of discretion. 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 indispensable factor. Factors that may be relevant to an exercise of discretion by an appellate court under RCW 10.73.160 can be set forth and factually supported at least as efficiently in appellate briefs as in a trial court hearing.

To summarize, we are not persuaded that we should refrain from exercising our discretion on appellate costs. Nor are we attracted to the idea of delegating our discretion to a trial court. We conclude that it is appropriate for

this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief.[2]

We recognize that this approach is not without some practical inefficiencies. The State historically does not ask for an award of costs in every case. Appellate defense counsel may decide it is necessary to include a preemptive argument against costs in every case, only to find that the State does not intend to request costs. And as Sinclair points out, raising the potential issue of appellate costs in the brief of appellant puts appellate defense counsel in the position of assuming the client may not prevail on substantive claims.

A rule change requiring the State to include a request for costs in the brief of respondent would eliminate these problems, but even under the current system, it is feasible for the parties and the court to address costs in the course of appellate review. In the somewhat analogous situation created by RAP 18.1(b), a party who wishes to recover attorney fees under applicable law must "devote a section of its opening brief" to the request for fees or expenses.[3] Typically, a short paragraph or even a sentence is deemed compliant with the rule. Sinclair's motion for reconsideration devotes only half a page to outlining the reasons why this court should exercise its discretion not to impose costs, and

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[2] Sinclair's motion for reconsideration does not ask us to decide, and we do not decide, whether the appellate court has discretion to deny or substantially reduce an award of costs when asked to do so by a motion to modify a commissioner's award of costs under RAP 14.2.

[3] We say "somewhat" analogous because the costs the State is entitled to request are awardable under RAP Title 14, not under RAP 18.1. Under RAP Title 14, the State is not required to request costs in its appellate brief. Blank, 131 Wn.2d at 251. The State may simply present a cost bill as provided in RAP 14.4.

the State's response is similarly brief, so we are not concerned that this approach will lead to overlength briefs. We also point out that where the State knows at the time of receiving the notice of appeal that no cost bill will be filed, a letter so advising defense counsel would be courteous.

The State has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill. The State complains that it lacks access to pertinent information at the stage of appellate briefing. This is not a persuasive assertion. The State merely needs to articulate the factors that influenced its own discretionary decision to request costs in the first place. Both parties should be well aware during the course of appellate review of circumstances relevant to an award of appellate costs. A great deal of information about any offender is typically revealed and documented during the trial and sentencing, including the defendant's age, family, education, employment history, criminal history, and the length of the current sentence. To the extent current ability to pay is deemed an important factor, appellate records in the future may also include trial court findings under Blazina. And the foregoing list of factors is not intended as an exhaustive or mandatory itemization of information that may support a decision one way or another.

As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." Blazina, 182 Wn.2d at 835. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to

pay a bill of $6,983.19 plus accumulated interest can be quite a millstone around the neck of an indigent offender. Still, exercising discretion means making an individualized inquiry. See Blazina, 182 Wn.2d at 838 ("the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.") To decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible exercise of discretion than to decide that they should always be imposed as a matter of policy.

When this court reviews a trial court's ruling on attorney fees in a civil case, we generally require the trial court to explain its reasoning based on the specific facts of the case, or the award will be remanded "to ensure that discretion is exercised on articulable grounds." Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). Similarly, when this court decides the issue of appellate costs, it behooves us to explain the basis for the ruling. Both parties can be helpful to the appellate court's exercise of its discretion by developing fact-specific arguments from information that is available in the existing record.

In the present case, both parties focus on the factor of ability to pay. Sinclair makes the following argument:

> There are several reasons this court should exercise its discretion not to impose costs. Sinclair is currently 66 years old. CP 6. He was sentenced to a minimum term of incarceration of 280 months in June 2014. CP 142, 146. His sentence is indeterminate. CP 146. The trial court made no determination that Sinclair was able to pay any amount in trial court LFOs [legal financial obligations] and in fact waived all nonmandatory LFOs in the judgment and sentence. CP 144. The trial court appointed

> appellate counsel because Sinclair was "unable by reason of poverty to pay for any of the expenses of appellate review." See Appendix C (Indigency Order). Under the circumstances, there is no reason to believe Sinclair is or ever will be able to pay $6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent). This court should accordingly exercise discretion and deny appellate costs in the decision terminating review.

Motion for Reconsideration at 3. Attached to the motion for reconsideration is the trial court order authorizing Sinclair to appeal in forma pauperis and to have appointment of appellate counsel and preparation of the record at State expense. The order states that Sinclair "is unable by reason of poverty to pay for any of the expenses of appellate review" and "the defendant cannot contribute anything toward the costs of appellate review."

The State counters with a citation to the record at sentencing, where Sinclair's attorney stated that Sinclair was retired after 20 years of employment with a substantial local manufacturing company. Thus, the State argues it is "likely" that Sinclair is eligible for retirement income. The State also points out that the indigency order was submitted and signed ex parte, so that there is no independent check on the accuracy of the information on which the order was based.

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency. Important to our determination, the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. No evidence supports the State's speculation that Sinclair has undisclosed retirement benefits. We therefore presume Sinclair remains indigent. Sinclair is a 66-year-old man serving a minimum term of more than 20 years. There is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs. Under these circumstances, we exercise our discretion to rule that an award to the State of appellate costs is not appropriate.

The motion for reconsideration is granted. The conviction is affirmed. Appellate costs will not be awarded. The pending cost bill and objection are stricken.

Becker, J.

WE CONCUR:

Leach, J.

Dwyer, J.

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

STATE OF WASHINGTON, Respondent,	)	NO. 73654-0-I
JAMES THOMAS, Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA [sfine@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	JAMES THOMAS 906987 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 17TH DAY OF FEBRUARY, 2016.

X_____

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