73702-3

No. 73702-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT JACKSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Mr. Jackson was denied his right to a unanimous jury, and reversal is required.

The State does not dispute that commercial sexual abuse of a minor is an alternative means crime, and that reversal is required if sufficient evidence does not support one of the charged means. Resp. Br. at 10; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). Instead, it argues the State presented sufficient evidence that Mr. Jackson attempted to solicit a minor because Mr. Jackson responded to the original posting with an offer and later asked clarifying questions about where he should meet the Craiglist poster. Resp. Br. at 11. This argument is meritless.

As Mr. Jackson explained in his opening brief, the only time Mr. Jackson used words that could be construed as an offer was when he responded to the posting and asked, "Do you still need that lovin'?" However, at time he made that statement, he understood the poster to be 20 years of age, and there had been no mention of payment for services. Exhibits 8 & 10; *see also* Op. Br. at 11. Contrary to the State's suggestion, the fact that the posting advertised a "young" body provides no evidence Mr. Jackson was attempting to solicit a minor, given that the poster's identified age was 20 years old, which is

congruent with the use of the term "young." *See* Resp. Br. at 11. Thus, Mr. Jackson's initial statement does not provide evidence of attempting to solicit a minor to engage in a sexual conduct for a fee.

Mr. Jackson's remaining questions, regarding where he should meet the poster, cannot fairly be characterized as an attempt to solicit, offer, or request to engage in conduct. RCW 9.68A.100(c). The poster stated, "baby come see me," and once Mr. Jackson agreed, the poster provided a general location, an explanation about why there would be no exchange of photographs, a representation that the poster was "almost 16" but looked 25, and stated that at least $100 would be required. Exhibit 8. The poster asked, "when do you want to meet" and Mr. Jackson responded by stating that he could come to the poster and asking where he should go. Exhibit 8. His words indicated agreement, not solicitation.

In addition, the State pulls these statements out of context, eliminating Mr. Jackson's expression of agreement before each question. Resp. Br. at 11. Subsequent to expressing his initial agreement to meet the poster, Mr. Jackson engaged in the following exchange:

> [Detective:] hell no just telling you that I cant send pics of myself Is and that I don't have any. I just wanted to tell you about myself. I am not a cop baby
>
> [Mr. Jackson:] *Okay* can come to you now. Where do we meet?
>
> [Detective:] renton I am ready need to take a quick shower
>
> [Mr. Jackson:] *Okay*. You have a place we can go to, right?

Exhibit 8 (emphasis added). In each instance, Mr. Jackson expressed agreement with the detective's plan. His questions inquiring about where to meet does not provide sufficient evidence of an attempted solicitation, offer, or request.

The State also argues it correctly distinguished between solicitation and agreement in its closing argument, but does not address the fact the deputy prosecuting attorney conflated the two alternative means when applying the law to the facts of Mr. Jackson's case. Resp. Br. at 12. As discussed in Mr. Jackson's opening brief, the prosecutor drew no distinction between agreement and solicitation when addressing the jury about how Mr. Jackson's satisfied the elements of the crime. Op. Br. at 8-9. The State argued Mr. Jackson indicated agreement, but then grouped agreement with a solicitation, offer, or request, and stated that it was the "back-and-forth" between the

detective and Mr. Jackson that constituted the crime. 5/7/15 RP 435-26. Because sufficient evidence did not support the allegation that Mr. Jackson attempted to solicit a minor, reversal is required. *Ortega-Martinez*, 124 Wn.2d at 707-08; *State v. Boiko*, 131 Wn. App. 595, 601, 128 P.3d 143 (2006).

2. The trial court erroneously granted the State's request for a jury instruction on expert testimony after the State failed to identify its police officers as "experts" until after the close of evidence.

Under CrR 4.7(a)(2)(ii), the State was required to disclose during discovery any experts it planned to call at trial. The State concedes it failed to comply with this rule. Resp. Br. at 15-16. The State makes the untenable arguments that the court's ruling was nevertheless correct because the State's intent to produce at least one expert witness[1] was "evident" prior to trial and because the jury instruction was proper regardless of whether the defense had notice. Resp. Br. at 15, 17, 19.

The State provides no basis for its claim that because the defense could have inferred the State would present Detective Garske

[1] The State concedes four of the five members of law enforcement who testified at Mr. Jackson's trial did not qualify as experts. While the parties referenced Detective Garske specifically in the hearing before the trial court, the trial prosecutor argued the instruction was proper because several of the officers qualified as expert witnesses. 5/7/15 RP 413.

as an expert, the State was relieved of its duty to comply with the discovery rules. The Court should reject this argument.

In addition, the State's reliance on *Bodin v. City of Stanwood* for its assertion that "a jury instruction is only improper" for one of three reasons is misguided. 130 Wn.2d 726, 732, 927 P.2d 240 (1996); Resp. Br. at 19. In *Bodin*, the plaintiffs assigned error to the trial court's refusal to give an instruction that was virtually identical to the instruction actually given at trial. 130 Wn.2d at 732. In finding that the specific language of an instruction is left to the trial court's discretion, our supreme court noted instances where such language was sufficient. *Id*. The court's analysis provides no guidance here.

The State's argument focuses primarily on the harm created by the error, suggesting that because Mr. Jackson was able to rely on Detective Garske's skills and experience in his closing argument, the trial court's error was harmless. Resp. Br. at 21. However, the court's erroneous ruling occurred prior to closing argument. Simply because defense counsel attempted to mitigate the damage of the court's ruling, by relying on Detective Garske's testimony where he could, does not demonstrate the error was harmless.

As defense counsel explained to the trial court, he would have made different objections, and asked different questions, had he known the State would later have them qualified as expert witnesses. 5/7/15 RP 414. Where the defense was not placed on notice of the State's experts, and operated throughout the trial without that critical information, Mr. Jackson has shown prejudice. *See Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). This Court should reverse.

3. The State's misconduct denied Mr. Jackson a fair trial.

A prosecutor is prohibited from impugning the role or integrity of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). He is also prohibited from using facts not in evidence to appeal to the jurors' passion and prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Here, the deputy prosecuting attorney violated both of these prohibitions when he told the jurors the defendant was engaged in "the time-honored tradition of trying to cut his losses" by asking the jury to convict on a lesser charge. 5/7/15 RP 458-59.

The State concedes that the prosecutor's language about the "time-honored tradition" referenced facts not in evidence. Resp. Br. at

26. It argues that this comment did not disparage defense counsel, however, because such an attack was leveled at the defendant, rather than defense counsel. Resp. Br. at 25.

This claim is misguided, as it cannot be disputed that defense counsel acts on behalf of the defendant. By telling jurors that this was a "time-honored tradition," and the jury should "cut [Mr. Jackson] loose" rather than fall for such a tactic, the State suggested that defense counsel had acted to intentionally mislead or confuse the jury. Such a comment maligned defense counsel. *Lindsay*, 180 Wn.2d at 431-32. And contrary to the State's claim, this was neither a fair, nor accurate, characterization of Mr. Jackson's defense. Resp. Br. at 25.

Finally, the State's claim that defense counsel's objection was limited to the statement, "[i]f you believe his story, cut him loose," is incorrect. Resp. Br. at 23. A fair reading of the record indicates that defense counsel's objection encompassed the State's argument that the jury should acquit rather than convict on the lesser count. 5/7/15 RP 458-59. As explained in Mr. Jackson's opening brief, this Court should apply the constitutional harmless error standard and reverse. Op. Br. at 22; *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

4. The Court should not impose costs against Mr. Jackson on appeal.

In *State v. Sinclair*, this Court held "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." 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Despite the fact that the State is only entitled to costs *if* it prevails on review, Mr. Jackson addressed this issue in his opening brief in accordance with *Sinclair*. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

In its response, the State claims, as it did in *Sinclair*, that it does not have access to the information it needs to preserve the opportunity to submit a cost bill. Resp. Br. at 29; *Sinclair*, 192 Wn. App. at 391. However, as this Court stated in *Sinclair*, "[t]his is not a persuasive assertion." 192 Wn. App. at 391. The Court explained:

> 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*.

Sinclair, 192 Wn. App. at 391 (citing *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015)).

Mr. Jackson is 47 years old. 5/6/15 RP 333. Before he was convicted, he was employed as a "merchandiser." 5/6/15 333. Four days each week he went to assigned Fred Meyer stores and moved products from one shelf to another. 5/6/15 RP 333-34. He had also recently moved back in with his parents. 5/6/15 RP 333.

At sentencing, the State argued that only the mandatory costs be imposed against Mr. Jackson. 6/26/15 RP 9. This included a two-thirds reduction of the mandatory fine under RCW 9.68.105 due to Mr. Jackson's indigency. 6/26/15 RP 9-10. The trial court agreed that only the mandatory legal financial obligations were appropriate, including the reduction in the fine. 6/26/15 RP 22; CP 89.

Mr. Jackson was sentenced to 15.75 months in prison and has since been released. CP 90. However, Mr. Jackson's employment prospects will likely be worse now that he has a felony conviction on his record. At best, his prospects will be the same. In addition, now that Mr. Jackson has been released he must obtain a sexual deviancy

evaluation and attend all recommended treatment at his own expense. CP 95.

The record reflects that Mr. Jackson was appointed counsel for both his trial and on appeal, both of which requires an order of indigency. Under RAP 15.2(f), Mr. Jackson is entitled to the presumption that his indigency has continued. In the event the State were to be the prevailing party on appeal, the record does not demonstrate Mr. Jackson has the ability to pay the costs of appeal.

As our supreme court recently reiterated in *City of Richland v. Wakefield*, the consequences of legal financial obligations for indigent individuals are particularly punitive. __ Wn.2d __, __ P.3d __, 2016 WL 5344247 at *5 (No. 92594-1, September 22, 2016). In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. Jackson's conviction.

DATED this 30th day of September, 2016.

Respectfully submitted,

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DIVISION ONE

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	)	
ROBERT JACKSON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **REPLY 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] KRISTIN RELYEA, DPA [paoappellateunitmail@kingcounty.gov] [kristin.relyea@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] ROBERT JACKSON 15629 129TH CT SE RENTON, WA 98058	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2016.

X_____

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