94723-6

No. 34498-3-III

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MANUEL ABRAHAMSON,
Petitioner.

PETITION FOR REVIEW

Kelly Vomacka
Attorney for Petitioner

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IDENTITY OF PETITIONER

The petitioner is Manuel Abrahamson, who was the appellant in the Court of Appeals and the defendant in the Superior Court.

COURT OF APPEALS DECISION

The Court of Appeals, Division Three, filed its decision on May 23, 2017. The decision is unpublished, and there was no motion for reconsideration. A copy of the opinion is attached as an Appendix.

ISSUES PRESENTED

1. The trial court erred in continuing the trial past the expiration date, where the reason for the continuance was the prosecutor's preplanned vacation, but that vacation was already planned at arraignment, the prosecutor was present at arraignment and did not object to the trial date, and the State made no effort to bring Abrahamson to trial before the expiration date.
2. The "to convict" instruction did not require the jury to find every element of the crime beyond a reasonable doubt, and the error was both structural and not harmless.

STATEMENT OF THE CASE

On January 18, 2016, Debra Purvis was at the home of her daughter and daughter-in-law, in Spokane. 2VRP 134.[1] After visiting for

[1] The transcript is in three volumes. "1VRP" refers to the transcript of the State's motion to continue on March 17. "2VRP" refers to the transcript of

a while, she realized that she didn't know where her car keys were, so all three went out to the parking lot to look for them. 2VRP 109-110, 118-119, 134-36, 139. Two of the women interacted briefly with Abrahamson, who was standing nearby. 2VRP 110, 119, 135. They did not know him, and he appeared to be drunk. 2VRP 115, 119, 127, 139. A short time later, one of the women saw the car driving away. 2VRP 111. They called the police and attracted the attention of neighbors. 2VRP 121-23. Within 10 minutes, the car returned to a different place in the parking lot. 2VRP 123, 140, 151-52. One of the women, then neighbors, and then police detained the driver, who was Abrahamson. 2VRP 112-13, 122-23, 145. The car was not damaged and nothing was taken from it. 2VRP 140. Abrahamson was injured, so he was taken to the hospital, where he was found to have methamphetamine in his system and a BAC of .27. 2VRP 146, 149.

On February 2, Abrahamson was arraigned on Theft of a Motor Vehicle. CP 14, 21. He remained in custody throughout all of the following proceedings. CP 10; 1VRP at 5. At arraignment, trial was set for March 28. CP 21.

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all other proceedings. 2VRP is in two volumes, but it is numbered continuously across the volumes.

On March 17, the State moved to continue past the expiration date, which was April 4, to accommodate the assigned prosecutor's vacation. CP 27-30; 1VRP at 3. The court continued the trial to April 11. CP 31. Trial began on April 26 and concluded on April 27. CP 218. The reason for the additional 15-day delay is not reflected in the record.

At trial, Abrahamson asserted that his voluntary intoxication prevented him from forming intent, and he testified that he had no memory of the incident. 2VRP 159-65. The jury returned a verdict of guilty, and sentencing followed on May 19. CP 214, 237. Abrahamson had an offender score of 9, and the court sentenced him within the standard range to 45 months in prison. CP 240, 242.

Abrahamson timely appealed. CP 261. In the Court of Appeals, he raised both of the issues for which he seeks review in this Court. On May 23, 2017, the Court of Appeals affirmed, and Abrahamson now seeks review in this Court.

ARGUMENT

A. The proper length of pretrial detention is an issue of substantial public interest that should be determined by this Court.

Abrahamson argued below that his right to a speedy trial was violated when the trial court continued trial past expiration. This is an

issue of substantial public interest because it directly concerns how long people—innocent people, presumably—can be held in custody pending trial.

The Court of Appeals, the drafters of CrR 3.3, and students of constitutional speedy-trial jurisprudence might all consider that 60 days of pretrial detention is a reasonable length of time to be held in custody while the lawyers prepare the case for trial. They might consider that a few extra days—in this case seven extra days, which ultimately became 22 extra days—is, essentially, no big deal. And they might consider that, because Abrahamson was eventually found guilty, it does not really matter when his trial was held, because it did not add to his overall incarceration time. But these courts, drafters, and students are mostly people who have never spent one day in jail, much less 60. Only people who have never been locked up can believe that a few more days in jail, especially of an innocent person, is not a deeply urgent and serious matter.

The public at large, and portions of the legal establishment, are awakening to the impact of pretrial detention on defendants, on society as a whole, and on the cause of justice itself. This Court devoted a full day symposium to the topic last year. The ACLU of Washington is running a

reform campaign.[2] The Washington Post,[3] the New York Times,[4] the Chicago Tribune,[5] and the Los Angeles Times[6] have published recent op-ed pieces on the topic. These are only some of the examples that show that the public is taking a substantial interest in the issue of pretrial detention. Much of this attention focuses on bail reform, but the larger question being asked is what are the proper contours of pretrial detention—including its length?

It is all too common for a person—often a poor person—to plead guilty simply to get out of jail. They can't wait any longer. Each time they do, the very notion that a criminal conviction means that the person committed a crime is undermined, taking with it the notion that courts dispense justice. And people plead guilty to get out of jail every day. The Queen of Spades' edict, "Sentence first; verdict afterwards," may still be "stuff and nonsense," as Alice declared, but it is also daily practice.

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[2] ACLU of Washington, "Campaign for Smart Justice," (https://aclu-wa.org/smart-justice).

[3] Darren Hutchinson, "There's never been a better time for bail reform," Washington Post, July 20, 2015 (https://www.washingtonpost.com/posteverything/wp/2015/07/20/theres-never-been-a-better-time-for-bail-reform/?utm_term=.d037b8eb816d).

[4] Editorial Board, "Locked Up for Being Poor," New York Times, May 5, 2017 (https://www.nytimes.com/2017/05/05/opinion/locked-up-for-being-poor.html?_r=0).

[5] Jesus "Chuy" Garcia, "While detainees sit, Cook County bail reform drags on," Chicago Tribune, March 22, 2017 (http://www.chicagotribune.com/news/opinion/commentary/ct-bail-reform-cook-county-jail-perspec-0323-20170322-story.html).

[6] The Times Editorial Board, "Jails exist for punishment or public safety, not for locking people up who can't afford bail," Los Angeles Times, May 31, 2017 (http://www.latimes.com/opinion/editorials/la-ed-bail-reform-20170531-story.html).

Here, the trial court continued the trial past expiration to accommodate the prosecutor's vacation. CrR 3.3 permits a continuance for "[u]navoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties," CrR 3.3(e)(8). The circumstances include a lawyer's vacation, as the Court of Appeals noted:

> The prescheduled vacation of counsel or counsel's unavailability due to being in trial on another matter are adequate bases to justify a continuance. *State v. Jones,* 117 Wn. App. 721, 729-30, 72 P.3d 1110 (2003).

State v. Abrahamson, 34498-3-III, slip op. at 5-6. And lawyers need vacations; that is beyond question.

But what happened here is a step too far. Here, the prosecutor scheduled his vacation before arraignment. He appeared personally at arraignment, when the trial date was set. He knew immediately that he would be gone on the trial date. And yet he waited six full weeks before he told the court that he would be unavailable. Nothing about the scheduling conflict was unforeseen or unavoidable. Instead, it was a casual, cavalier violation of Abrahamson's speedy trial right. To properly honor both the spirit and the letter of CrR 3.3, and to mitigate the larger effects of pretrial detention, the trial court should have denied the continuance and required the prosecutor to find a solution that did not require Abrahamson to be incarcerated without trial one day longer than

necessary. Because this is an issue of substantial public interest, Abrahamson asks this Court to accept review. RAP 13.4(b)(4).

B. <u>The "to convict" defect presents a significant question of law under the federal Constitution.</u>

Abrahamson argued below that the "to convict" instruction omitted an essential element of the crime. Brief of Appellant, at 16-19. The crime is Taking a Motor Vehicle Without Permission, and the omitted element is that the car belonged to another. RCW 9A.56.065. He also argued that this omission was both a structural error and not harmless. Brief of Appellant, at 16-19. The Court of Appeals found that the instruction was not defective and that, even if it were, the defect was harmless. *State v. Abrahamson,* 34498-3-III, slip op. at 10. The Court did not rule on Abrahamson's argument that the defect was structural and therefore not subject to harmless-error analysis.

An incomplete "to convict" instruction violates the constitutional rights to a jury trial and to due process:

> "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243, n. 6. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S. Ct. 2348, 2355, 147 L.Ed.2d 435, 446 (2000) (*quoting, Jones v. United States,* 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)). Here, Abrahamson asks this Court to accept review because the instruction is defective, the defect is not harmless, and the error violates the Due Process clause and the Sixth Amendment of the United States Constitution. U.S. Const, Amend XIV; U.S. Const., Amend. VI.

Additionally, the Court of Appeals erred by not analyzing the error as structural. The issue of whether a defect in the "to convict" instruction is structural is a significant issue of law under the United States Constitution. The United States Supreme Court is continuing to refine its structural-error jurisprudence, and it currently has a case pending that raises a similar issue. In that case, *Weaver v. Massachusetts,* U.S. Supreme Court 16-240 (*reviewing, Commonwealth v. Weaver,* 474 Mass. 787, 54 N.E.3d 495 (2016)), the error is not in the jury instructions but in defense counsel's performance, and the issue presented, considered broadly, is what kinds of errors are structural. Specifically, the question presented is:

> Whether a defendant who demonstrates that his lawyer's deficient performance resulted in structural error must show actual prejudice to obtain a new trial under *Strickland v. Washington,* 466 U.S. 668 (1984).

Weaver, Brief for Petitioner, Question Presented. The case was argued in April, and a decision will likely come in the next two weeks. That decision might alter structural-error analysis and alter the necessary analysis in Abrahamson's case.

The issues of whether the "to convict" instruction relieved the State of its burden of proof, whether the error was harmless, and especially whether harmless-error analysis even applies in this situation, are all significant questions of law under the federal Constitution. Therefore, Abrahamson asks this Court to accept review. RAP 13.4(b)(3).

CONCLUSION

Because the speedy-trial issue is an issue of substantial public interest that should be determined by this Court, and because the to-convict instruction presents a significant question of law under the federal Constitution, Abrahamson asks this Court to grant review.

Respectfully submitted this 22 day of Jan, 2017.

K Vomacka

Kelly Vomacka, WSBA #20090
Attorney for Petitioner

Appendix:

Court of Appeals Opinion

FILED
MAY 23, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 34498-3-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
MANUEL STEVEN ABRAHAMSON,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Manuel Steven Abrahamson appeals his conviction for theft of a motor vehicle. He argues: (1) the trial court violated his right to a speedy trial when it granted a continuance agreed to by both trial counsel but over Mr. Abrahamson's personal objection, and (2) the to-convict instruction omitted an essential element, the omission of which was a structural error not subject to harmless error analysis. Mr. Abrahamson also raises various arguments in his statement of additional grounds for review (SAG). We disagree with his arguments and affirm, but decline to award the State appellate costs.

FACTS

On January 18, 2016, Debra Purvis was visiting her daughter and daughter-in-law in Spokane, Washington. That evening, she realized she had misplaced her car keys. She and her family began to search for her keys in the parking lot where she had parked her car. While searching, two of the women interacted briefly with Manuel Steven Abrahamson. He appeared to be drunk. None of the family members knew him. Several minutes later, the family saw the car being driven away. They quickly contacted police and neighbors. Less than 10 minutes later, the driver returned the car to the parking lot but in a different location. The family and neighbors found Mr. Abrahamson in the car and detained him for police.

Mr. Abrahamson had sustained an injury during the event, so police took him to the hospital. Testing revealed that Mr. Abrahamson had a blood alcohol concentration of 0.27 percent and had methamphetamine in his system.

On February 2, 2016, the State arraigned Mr. Abrahamson on the charge of theft of a motor vehicle. The trial court set a trial date for March 28. On March 17, the State moved the court for a trial continuance. In support for its request, the State's attorney cited his prescheduled vacation (March 28-31), defense counsel's prescheduled vacation (March 30-April 6), and several prescheduled trials for the week of April 4. Both counsel

agreed to the continuance, Mr. Abrahamson objected, and the trial court reset the trial for April 11. For reasons not reflected in the record on appeal, trial actually commenced on April 26.[1]

On April 26, before jurors were first brought into the courtroom, the trial court realized that Ms. Purvis's husband was in the jury pool. The State immediately challenged him for cause, and the trial court struck him from the jury pool prior to him ever entering the courtroom. Later in voir dire, the trial court asked the venire jurors if anyone knew about the case or knew the defendant or the victim. None of them did.

During opening statements, Mr. Abrahamson said he did not dispute that he drove Ms. Purvis's car. He told the jury what he disputed was whether he *intended* to deprive Ms. Purvis of her car, given his level of intoxication.

Prior to closing arguments, the trial court reviewed its proposed jury instructions with the parties. The trial court asked Mr. Abrahamson if he had any objection to the to-convict instruction. Mr. Abrahamson responded that he did not. The to-convict instruction read:

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[1] Mr. Abrahamson mentions this 15 day delay in his briefing, notes that the record is inadequate for explaining the delay, but does not argue any trial court error based on this 15 day delay.

> To convict the defendant of the crime of theft of a motor vehicle, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 18th, 2016 the defendant wrongfully obtained or exerted unauthorized control over a motor vehicle;
>
> (2) That the defendant intended to deprive the other person of the motor vehicle; and
>
> (3) That this act occurred in the State of Washington.

Clerk's Papers (CP) at 27.

After closing arguments, the jury deliberated and returned a verdict of guilty. The trial court sentenced Mr. Abrahamson to 45 months' confinement. He timely appealed.

ANALYSIS

CONTINUANCE

Mr. Abrahamson contends the trial court violated his speedy trial rights when it granted the agreed continuance over his personal objection. We disagree.

We review alleged violations of the CrR 3.3 speedy trial rule de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). A defendant's right to a speedy trial is protected by the both the federal and state constitutions and court rule. The constitutional right to a speedy trial is broad. It is generally only implicated when a long period of time passes between the filing of charges and trial. *See State v. Iniguez*, 167 Wn.2d 273, 217 P.3d 768 (2009). Court rules are more specific and set forth standards

for adjudicating cases under fairly short time frames. The court rule applicable to Mr. Abrahamson's case is CrR 3.3.

Here, the State arraigned Mr. Abrahamson on February 2, 2016. Because he was in custody prior to trial, Mr. Abrahamson's time for speedy trial would typically expire 60 days after the day of arraignment. CrR 3.3(b)(1)(i). But that day was April 2, a Saturday. Weekends and holidays are excluded for speedy trial purposes. *See* CrR 8.1; CR 6.1(a). We therefore calculate his speedy trial expiration date as April 4. The trial court's initial March 28 trial date was well within the speedy trial deadline.

CrR 3.3(e) excludes various periods when calculating speedy trial. CrR 3.3(e)(3) excludes delay attributable to a trial court's grant of a continuance made pursuant to CrR 3.3(f). CrR 3.3(f)(2) authorizes the trial court to grant a continuance on a party's motion when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his defense.

The decision to grant or deny a trial continuance rests within the sound discretion of the trial court. *Kenyon*, 167 Wn.2d at 135. We will not disturb a trial court's decision on that issue unless there is a clear showing the trial court's decision was manifestly unreasonable, or that it based its decision on untenable grounds or reasons. *Id.* The prescheduled vacation of counsel or counsel's unavailability due to being in trial on

another matter are adequate bases to justify a continuance. *State v. Jones*, 117 Wn. App. 721, 729-30, 72 P.3d 1110 (2003).

Here, the trial court did not abuse its discretion when it granted one short trial continuance so both counsel could take preplanned vacations. Mr. Abrahamson contends the State could have assigned another attorney to try the case. We agree that this was an option. But simply because this was an option does not render the trial court's decision to grant the continuance an abuse of discretion.

Mr. Abrahamson also contends he was prejudiced, so that the trial court should not have granted a continuance under CrR 3.3(f). He argues he was prejudiced because he had to choose between his attorney and waiving his right to a speedy trial. But Mr. Abrahamson failed to argue prejudice to the trial court. He therefore failed to preserve this issue for review. *State v. O'Hara*, 167 Wn.2d 91, 97, 217 P.3d 756 (2009). But even if he did preserve the issue of prejudice, Mr. Abrahamson fails to explain how he was prejudiced as contemplated by the rule, which contemplates prejudice "in the presentation of his or her defense." CrR 3.3(f)(2). We glean nothing from the record that suggests the short continuance prejudiced Mr. Abrahamson's presentation of his defense.

Mr. Abrahamson also relies on authorities that have found an abuse of discretion for granting trial continuances. The present case is readily distinguishable on the ground

that here, the trial court granted one short trial continuance to accommodate counsel's preplanned vacations; whereas in those cases, the trial court granted numerous continuances, including one or more continuances without an adequate factual basis. *Kenyon*, 167 Wn.2d 130 (at least eight continuances, one without an adequate factual basis, and defendant made three separate motions to dismiss prior to trial); *State v. Saunders*, 153 Wn. App. 209, 220 P.3d 1238 (2009) (at least five continuances, three without adequate factual bases, and defendant made one motion to dismiss prior to trial).

JURY INSTRUCTION ERROR

Mr. Abrahamson contends the trial court erred in giving a to-convict jury instruction that did not contain all of the essential elements of theft, and that this error constitutes structural error. We disagree.

We review alleged errors of law in jury instructions de novo. *State v. Fehr*, 185 Wn. App. 505, 514, 341 P.3d 363 (2015). A jury instruction is erroneous if it relieves the State of its burden to prove every element of a crime. *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). "A to-convict instruction must contain all essential elements of a crime because it serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence." *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015). "The fact that another instruction contains the missing essential

element will not cure the error caused by the element's absence from the to-convict instruction." *Id.* at 927-28. "[T]he omission of an element of a charged crime is a manifest error affecting a constitutional right that can be considered for the first time on appeal." *Id.* at 927.

A defendant does not receive a fair trial if "the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). If a jury instruction is erroneous but does not relieve the State of its burden to prove every essential element, then the error is harmless. *State v. Brown*, 147 Wn.2d 330, 339-40, 58 P.3d 889 (2002).

A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle. RCW 9A.56.065. To convict a person of a crime involving theft the State must show that the defendant either (1) wrongfully obtained or exerted "unauthorized control over the property or services of another or the value thereof," (2) obtained "control over the property or services of another" by "color or aid of deception," or (3) appropriated "lost or misdelivered property or services of another." RCW 9A.56.020(1)(a)-(c).

The pattern instruction used by the parties and trial court at the time mirrored the language now challenged. The instruction read:

> To convict the defendant of the crime of theft of a motor vehicle, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 18th, 2016 the defendant wrongfully obtained or exerted unauthorized control over a motor vehicle;
>
> (2) That the defendant intended to deprive the other person of the motor vehicle; and
>
> (3) That this act occurred in the State of Washington.

CP at 27.

Mr. Abrahamson contends that the error appears in element one of this instruction, because a jury could have decided that he exerted unauthorized control over his own motor vehicle. This is a strained reading of that element, and it would ignore the language of the instruction as a whole. When read in context, it is clear from the second element that the motor vehicle must have belonged to another. Otherwise, a defendant could not deprive the other person of the motor vehicle. A jury would not need to guess at an essential element of theft when reading this to-convict instruction.

Nevertheless, an omission of an essential element of a crime from the to-convict jury instruction may be subject to a harmless error analysis. *Richie*, 191 Wn. App. at 929. "Such an omission is harmless when it is clear that it did not contribute to the verdict, for

example, when uncontroverted evidence supports the omitted element." *Id.*[2] Here, error, if any, would be harmless.

The evidence was uncontroverted that the car belonged to Ms. Purvis. Mr. Abrahamson conceded as early as his opening statement that he drove Ms. Purvis's car, and his only defense was that he lacked the requisite intent, because of his intoxication. We conclude there was no instructional error. Nevertheless, error, if any, would have been harmless beyond a reasonable doubt.

SAG ISSUE I: CONTINUANCE

Mr. Abrahamson reiterates that he did not agree to the trial continuance. We previously addressed this issue.

SAG ISSUE II: JURY POOL BIAS

Mr. Abrahamson next contends his jury was biased because Ms. Purvis's husband was in the initial jury pool. The court brought this to the attention of the parties before commencing voir dire. The State immediately challenged Mr. Purvis for cause, and the trial court struck Mr. Purvis from the jury.

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[2] Mr. Abrahamson argues for the first time in his reply brief that this court should depart from precedent and treat an error in the to-convict instruction as structural. His argument comes too late for this court to consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Later, the trial court made a sufficient record that Mr. Purvis did not taint the jury pool. The trial court asked the jury pool whether any venire juror had heard of the case or knew the victim or the defendant. None did.

SAG ISSUE III: OMNIBUS HEARING

Mr. Abrahamson contends he had a right to an omnibus hearing. We disagree.

CrR 4.5 contemplates the scheduling of an omnibus hearing so that parties can discuss pretrial matters and enter an order so the case can proceed expeditiously and in an organized manner. Although CrR 4.5 contemplates an omnibus hearing and entry of an order, there is nothing in the rule nor decisional authority that contemplates reversal or dismissal of charges in the event an omnibus hearing does not occur.

SAG ISSUE IV: ATTORNEY CLIENT COMMUNICATIONS

Mr. Abrahamson contends his trial counsel ignored communications and refused to give him copies of discovery. His contentions rely on information outside the trial record. If Mr. Abrahamson wishes to raise these contentions, he must do so in the form of a personal restraint petition. *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011).

APPELLATE COSTS

Mr. Abrahamson requests that we not award the State appellate costs should it substantially prevail. An appellate court has discretion to award a prevailing party

appellate costs. RAP 14.2. This includes requiring a convicted defendant to pay appellate costs. RCW 10.73.160(1).

"A 'prevailing party' is any party that receives some judgment in its favor. If neither party completely prevails, the court must decide which, if either, substantially prevailed." *Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010) (citations omitted). Generally, the party that substantially prevails on review will be awarded appellate costs, unless the court directs otherwise in its decision terminating review. RAP 14.2. Here, the State has fully prevailed on appeal.

An appellate court's authority to award costs is "permissive," and a court may, pursuant to RAP 14.2, decline to award costs at all. *See State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

On June 10, 2016, this court issued a "General Order" regarding defendants' requests to deny cost awards when the State substantially prevails on appeal. It directs defendants who want this court to exercise its discretion not to impose appellate costs to make their request, together with citations to legal authority and references to relevant parts of the record, either in their opening brief or in a motion pursuant to RAP 17. Mr. Abrahamson asked this court not to impose appellate costs in his briefing.

If inability to pay is a factor alleged to support the defendant's request, the General Order requires defendants to include in the appellate record the clerk's papers, exhibits, and the reports of proceedings relating to the trial court's determination of indigency and ability to pay discretionary legal financial obligations (LFOs). The General Order also requires defendants to file a report as to continued indigency with this court no later than 60 days after they file their opening briefs. The report provides needed detail so this court can thoughtfully consider whether a defendant lacks the current or likely future ability to pay appellate costs. A prior determination that a defendant is indigent for purposes of affording an attorney on appeal is not dispositive of a defendant's ability to pay the much lesser appellate costs.

Mr. Abrahamson designated the transcript of his sentencing hearing only. But he failed to file a report as to continued indigency. Nevertheless, the record establishes that Mr. Abrahamson was homeless at the time of his arrest, was on food stamps, has numerous felonies and misdemeanors, and likely has substantial unpaid court costs. Based on this record, we grant Mr. Abrahamson's request and deny the State an award of appellate costs.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Korsmo, J.

LAW OFFICE OF KELLY VOMACKA

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IN THE COURT OF APPEALS, DIVISION THREE
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DATED: June 22, 2017

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- 344983_Petition_for_Review_20170622135954D3953398_9083.pdf
  This File Contains:
  Petition for Review
  The Original File Name was ABRAHAMSON - 50 Petition for Review.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

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