

FILED
Court of Appeals
Division I
State of Washington
12/21/2020 4:15 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
12/22/2020
BY SUSAN L. CARLSON
CLERK

NO. 99348-3
COA NO. 80601-7-I

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABDIJABAR MOHAMED,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Abdijabar Mohamed asks this Court to accept review of the Court of Appeals's decision affirming his convictions of theft of a motor vehicle and second-degree identity theft.

B. COURT OF APPEALS DECISION

Mr. Mohamed seeks review of the Court of Appeals's unpublished decision in *State v. Mohamed*, No. 80601-7-I (Wash. Ct. App. Nov. 23, 2020).

C. ISSUES PRESENTED FOR REVIEW

1. Does cropping the defendant's jail booking photo remove the photo's unfairly prejudicial effect, even if the photo is still recognizably a booking photo?

2. May a court refuse to consider an argument for failure to cite legal authority under RAP 10.3(a)(6) merely because no prior court has directly endorsed the argument?

D. STATEMENT OF THE CASE

When Mohammed Salman finished working out at a gym and returned to the parking lot, his car was missing. RP 237. Later, he received notification his credit card, which he left in the car, was used at several nearby locations. RP 239,

241–42. A friend drove Mr. Salman to look for the car, and they found it parked at a Subway restaurant. RP 243–44.

The car had a video camera attached to the rearview mirror that filmed in two directions—forward through the windshield and backward into the passenger cabin. RP 235–36, 252–53; Ex. 7. In the video, a man can be seen entering the driver’s seat of Mr. Salman’s car and driving it to a parking lot in front of a Subway restaurant. Ex. 7.

Though the driver’s face is often visible, the footage is grainy and frequently poorly lit. *E.g.*, Ex. 7, 02460009.avi at 7:59, 02550010.avi at 6:35.¹ A ball cap shades the driver’s eyes and upper face. *E.g.*, *id.* 02550010.avi at 3:14, 7:35. The footage has a sharp purple tinge, washing out facial features. *E.g.*, *id.* 03050011.avi at 7:57. A still frame published to the jury exemplifies the video’s poor quality. Ex. 9.

Between the car’s disappearance and recovery, Mr. Salman’s credit card was used three times—at a gas station, a

¹ Exhibit 7 consists of three video files with filenames 02460009.avi, 02550010.avi, and 03050011.avi. Specific portions of the video are cited by filename and timestamp.

drugstore, and a Subway restaurant. RP 210–11, 217–18.

Surveillance footage recorded at the drugstore shows a man walking to the cash register and paying with a credit card. RP 219–20; Ex. 12 at 0:16–1:05. The footage is shot from a wide, overhead angle at a low resolution. *Id.* The customer’s clothing is similar to that worn by the driver in the in-car video, but facial features are impossible to make out. *Id.*

The State charged Mr. Mohamed with theft of a motor vehicle and second-degree identity theft. CP 20. As evidence Mr. Mohamed took Mr. Salman’s car and used Mr. Salman’s credit card, the State played the surveillance videos. RP 253–54, 256, 277. Instead of allowing the jury to compare the person in the videos to Mr. Mohamed directly, however, the State first showed the jury two photos of Mr. Mohamed. RP 214–15; Exs. 1, 8. One was a driver’s license photo taken May 2, 2019, on file with the Department of Licensing (“DOL”). RP 213–14; Ex. 8. The other was a jail booking photo taken May 13, 2019. CP 22; RP 26–27, 38, 144; Ex. 1.

Though the State extracted the booking photo from the surrounding jail records and cropped out some of the red jail jumpsuit, its nature as a mugshot is immediately apparent. RP 28, 38; Ex. 1. The trial court admitted the photos over Mr. Mohamed's objection on the grounds of relevance and unfair prejudice. RP 33–35, 39.

The jury found Mr. Mohamed guilty. CP 27–28. The Court of Appeals affirmed the convictions. *Mohamed*, slip op. at 1. The Court reasoned the trial court did not abuse its discretion in determining the unfairly prejudicial effect of the photos did not outweigh their probative value. *Id.* at 5–8.

E. WHY THIS COURT SHOULD ACCEPT REVIEW

A trial court's decision to admit evidence requires reversal if it was an abuse of discretion—i.e., “is manifestly unreasonable or is based on untenable grounds or reasons.” *State v. Taylor*, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019). To be admissible, the evidence must be relevant—it must have at least some tendency to make a material fact more likely or less likely to be true. ER 401; ER 402. Even relevant evidence

“may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403.

While watching the surveillance videos, the jurors had in front of them the best possible evidence of Mr. Mohamed’s appearance—Mr. Mohamed. The DOL and booking photos were minimally relevant at best. *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). Accordingly, even slight unfair prejudice was enough to overwhelm their negligible probative value. ER 403.

The photos delivered that prejudice in two forms. First, the booking photo implied criminal propensity. Ex. 1; Br. of App. at 14–17. The Court of Appeals’s contrary conclusion clashes with published opinions of this Court and the Court of Appeals, calling for this Court’s review. RAP 13.4(b)(1), (2).

Second, showing the jury the photos before playing the videos “primed” the jury to see Mr. Mohamed in the low-quality footage. Br. of App. at 11–14. The Court of Appeals refused to consider this argument, reasoning Mr. Mohamed did not cite a case “that applies ‘priming’ in this context.”

Mohamed, slip op. at 6. This restrictive reading of the duty to cite legal authority burdens counsel's ability to argue for an extension of existing law and strains counsel's duty to consider all colorable issues that may benefit the client. This Court should review this important issue. RAP 13.4(b)(4).

1. The Court of Appeals's conclusion the booking photo did not cause unfair prejudice contradicts published opinions of this Court and the Court of Appeals.

This Court has described booking photos as “notoriously prejudicial and inflammatory.” *State v. Walker*, 182 Wn.2d 463, 489–90, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring); *see id.* at 478 n.4 (majority endorsing Justice Gordon McCloud's analysis). Because of the potential for prejudice, booking photos “are generally admissible only if specifically relevant.” *Id.* at 489–90.

Numerous opinions of the Court of Appeals echo this Court's skepticism of booking photos as evidence. Booking photos “are generally indicative of past criminal conduct and will likely create in the minds of the jurors an inference of such behavior.” *State v. Henderson*, 100 Wn. App. 794, 803,

998 P.2d 907 (2000). In other words, they “raise a prejudicial inference of criminal propensity.” *State v. Sanford*, 128 Wn. App. 280, 286, 115 P.3d 368 (2005). “[C]aution is warranted” where booking photos are concerned “because of the extra potential for prejudice.” *State v. Newton*, 42 Wn. App. 718, 726, 714 P.2d 684 (1986), *rev’d on other grounds*, 109 Wn.2d 69, 743 P.2d 254 (1987).

The Court of Appeals held the photo was admissible because “[a] booking photograph is not necessarily prejudicial.” *Mohamed*, slip op. at 7 (alteration in original) (quoting *State v. McCreven*, 170 Wn. App. 444, 485, 284 P.3d 793 (2012)). The court did not acknowledge the severe prejudice inherent in booking photos, as both this Court and other panels of the Court of Appeals have recognized. It certainly did not conclude Mr. Mohamed’s booking photo was “specifically relevant” to such a degree as to overcome this prejudice. *Walker*, 182 Wn.2d at 489–90.

The Court of Appeals noted the prosecution removed all identifying information from the photo and cropped it “so that

only [Mr.] Mohamed's face and upper shoulders were visible.” *Mohamed*, slip op. at 7. Citing *State v. Tate*, 74 Wn.2d 261, 444 P.2d 150 (1968), and *State v. Scott*, 93 Wn.2d 7, 604 P.2d 943 (1980), the court reasoned a booking photo is admissible “where identity is at issue and the photograph is redacted” in this way. *Id.* In both of those cases, however, the defendant “changed his appearance” between his initial arrest and the trial. *Tate*, 74 Wn.2d at 267; *Scott*, 93 Wn.2d at 13.

The Court of Appeals noted the May 2019 booking photo “showed [Mr.] Mohamed's appearance closer in time” to the alleged theft than Mr. Mohamed himself at the September 2019 trial. *Mohamed*, slip op. at 8; see RP 25; Ex. 1. The court pointed to no evidence Mr. Mohamed's appearance changed in the four months in between. Because the jury could just as easily compare the man in the surveillance footage to Mr. Mohamed himself, *Tate* and *Scott* provide no support for the conclusion the booking photo was more probative than prejudicial. 74 Wn.2d at 267; 93 Wn.2d at 13.

Booking photos are distinctive—they show a defendant “looking disheveled, antisocial, and tough.” *Walker*, 182 Wn.2d at 490. For this reason, “an ordinary mugshot continues to look like a mugshot no matter how it is disguised.” *Newton*, 42 Wn. App. at 726 (citing *State v. Butler*, 9 Wn. App. 347, 349, 513 P.2d 67 (1973)).

Mr. Mohamed’s photo is no exception. It shows Mr. Mohamed in harsh lighting with a stern expression, with livid marks on his right cheek and forehead. Ex. 1. The Court of Appeals’s suggestion that cropping this photo could disguise its nature contradicts longstanding case law to the contrary. *Mohamed*, slip op. at 7; *Newton*, 42 Wn. App. at 726.

The Court of Appeals’s conclusion the trial court could reasonably find the booking photo not unduly prejudicial is contrary to published opinions of this Court and the Court of Appeals. This Court should grant review. RAP 13.4(b)(1), (2).

2. The Court of Appeals’s refusal to consider Mr. Mohamed’s “priming” argument merely because no prior court has endorsed it imposes unreasonable burdens on defense attorneys’ duties to their clients.

Mr. Mohamed’s trial counsel argued that showing the DOL and booking photos to the jury before playing the in-car surveillance footage would “lead[] the jury to believe that the individual who is depicted in the video” is Mr. Mohamed. RP 33. Mr. Mohamed reiterated this point on appeal, arguing the photos would “prime” the jury to unconsciously fill gaps in the poor-quality video with facial features from the images. Br. of App. at 11–14. He supported this argument with articles describing the priming phenomenon. *Id.* & nn.4–9. Given the jury could compare the video directly to Mr. Mohamed, the photos’ prejudicial effect necessarily outweighed their negligible probative value. ER 403.

The Court of Appeals refused to consider Mr. Mohamed’s argument because Mr. Mohamed cited no “legal authority,” as RAP 10.3(a)(6) requires. *Mohamed*, slip op. at 6. This reasoning is incorrect. Mr. Mohamed cited legal authority—ER 403. Br. of App. 14. He also cited cases noting

the fallibility of human perception and its consequences in criminal cases. *Id.* at 11 (citing *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006); *State v. Henderson*, 208 N.J. 208, 245–46, 27 A.3d 872 (2011)).

No court rule or ethical principle requires Mr. Mohamed to raise an argument only when he can cite an opinion that directly endorses it. On the contrary, attorneys may base their contentions on “a good faith argument for an extension, modification or reversal of existing law.” RPC 3.1. Given the high stakes in criminal cases, defense attorneys have an affirmative duty to consider raising any issue they deem “colorable.” Am. Bar Ass’n, Criminal Justice Standards for the Defense Function, Standard 4-9.2(g) (4th ed. 2017).

The Court of Appeals noted “priming” usually arises in challenges to eyewitness identification procedures—for example, when police prime a witness with the defendant’s photo before the identification procedure takes place.

Mohamed, slip op. at 6 n.1 (citing *State v. Collins*, 152 Wn.

App. 429, 434–35, 216 P.3d 463 (2009)).² But “priming” is a psychological phenomenon, not a legal doctrine. *E.g.*, Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric To Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 259 (2010). There is no reason to believe its effects in criminal cases are limited to eyewitness identifications.³ *See* Reply at 6–7.

RAP 10.3(a)(6) does not permit appellate courts to ignore a legal argument merely because no court has recognized the argument before. To hold otherwise would frustrate counsel’s duty to explore all colorable arguments

² The Court of Appeals also cites *State v. Vickers*, 148 Wn.2d 91, 59 P.3d 58 (2002). *Mohamed*, slip op. at 6 n.1. *Vickers* did not concern priming at all—the defendant argued one of the photos in a photo array was different from the others, not that the police “primed” the witness with the defendant’s identity beforehand. 148 Wn.2d at 118–19.

³ The Court of Appeals reasoned Mr. Mohamed “fail[ed] to address how the photographs would be more likely to ‘prime’ the jury . . . than seeing him in court.” *Mohamed*, slip op. at 6–7. On the contrary, Mr. Mohamed explained how the photos dominated the jury’s perception when introduced, and how their angle more closely matched the in-car video than Mr. Mohamed’s position in the courtroom. Reply at 8–9.

and stymie counsel's ability to advocate changes to existing case law. RPC 3.1; Standard 4-9.2(g). The Court of Appeals's reading of RAP 10.3 presents an important issue concerning defense counsel's ethical duties, and this Court should review it. RAP 13.4(b)(4).

F. CONCLUSION

Mr. Mohamed asks this Court to grant review and hold the trial court abused its discretion in determining the booking photo was not substantially more prejudicial than probative. This Court should also clarify RAP 10.3(a)(6) and hold defense counsel need not refrain from making an argument merely because no court has yet accepted it.

DATED this 21st day of December, 2020.



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Petitioner's Appendix

1. *State v. Mohamed*, No. 80601-6-I (Wash. Ct. App. Nov. 23, 2020)
2. ER 403
3. RAP 10.3

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

THE STATE OF WASHINGTON,)	No. 80601-7-I
)	
Respondent,)	
)	
v.)	
)	UNPUBLISHED OPINION
ABDIJABAR AHMED MOHAMED,)	
)	
Appellant.)	

BOWMAN, J. — A jury convicted Abdijabar Ahmed Mohamed of theft of a motor vehicle and second degree identity theft after he appeared on surveillance video taken from inside a stolen minivan. Mohamed appeals the trial court’s admission of his driver’s license and jail booking photographs as evidence to compare to the surveillance video. Because the trial court did not abuse its discretion in determining the relevance of the photographs outweighed any undue prejudice, we affirm the convictions, but remand to strike the community custody supervision fees from Mohamed’s judgment and sentence.

FACTS

Mohammed Salman parked his minivan at a gym and went inside to exercise. He left his wallet with credit cards, recent clothing purchases, and other personal items inside the minivan. When Salman left the gym two hours later, his minivan was missing. Salman called 911 to report the theft.

Soon after, Salman received alerts that someone tried using his credit card at a nearby Subway restaurant, gas station, and Bartell Drugs store. A friend drove Salman to those locations to search for the missing minivan. Salman found his van abandoned outside the Subway restaurant. His wallet, a large amount of cash, and various personal items were missing.

Salman called 911 to tell the police that he found his stolen minivan. A police officer responded and began gathering information. The officer looked for latent fingerprints but found none. The minivan appeared undamaged from the theft.

Salman told the officer that the minivan had a two-way video camera attached to the rear-view mirror that records the “front of the car and the inside of the car at the same time.” Salman played the video on the camera and obtained still images of the person driving his van. The officer used his phone to take pictures of those images.

Salman gave a detective the minivan video downloaded to a thumb drive. The video consists of three files of about 10 minutes each. Partway through the first file, the video shows a man walk past the front of the minivan, stop, and turn back toward the van. The man opens the driver’s door, gets into the minivan, and immediately begins driving. Most of the remaining video shows the man in the van driving. While the video does not focus on the driver’s seat, the man’s face is often visible coming in and out of the frame. The man looks directly into the camera several times. At the end of the third video, the man pulls into a Subway parking lot, parks, and rummages around in the van, finding a new pair

of shoes. He then leaves the minivan, returns with another man about three minutes later, and continues to rummage through the contents of the van. The video ends abruptly as the man removes the charger from the camera.

The detective took still photographs of the driver's face from the minivan video and sent one to nearby law enforcement agencies for help in identifying the suspect. Several agencies responded, identifying the person driving the minivan as "Abdijabar A. Mohamed."

The detective tried to find surveillance videos from the businesses where Mohamed used Salman's credit cards. Only Bartell Drugs could produce images of Mohamed's purchase. Besides a surveillance video, Bartell Drugs provided transaction details showing the purchase Mohamed made with Salman's credit card.

The State charged Mohamed with one count of theft of a motor vehicle and one count of second degree identity theft. During the jury trial, the State moved to admit Mohamed's driver's license photograph and his jail booking photograph taken shortly after his arrest. The State argued that the photographs were relevant because they would help the jury determine whether Mohamed was the driver of the van by providing clear images of him to compare with the surveillance footage. Mohamed objected to admission of the photographs. He argued that they were unnecessary and that the booking photograph carried a significant risk of undue prejudice. The State agreed to redact the booking photograph to eliminate any indication that it was taken in the jail. The resulting

photograph showed Mohamed only from the top of his shoulders upward and was titled, "Photo of Abdijabar Mohamed Taken 5-13-19."

The trial court admitted the evidence. It concluded that the photographs were relevant, admissible, and not unduly prejudicial. Mohamed stipulated that the jail booking photograph pictured him. The State published the two photographs and played the video from Salman's minivan for the jury. The State also showed the jury surveillance video and a still photograph of Mohamed using Salman's credit card at the Bartell Drugs.

The jury convicted Mohamed as charged. The court sentenced him to a standard-range sentence of 19 and a half months. At sentencing, Mohamed asked the trial court to strike the requirement to pay supervision fees from the judgment and sentence because he is indigent. The trial court refused, leaving discretion to impose the fees with the Department of Corrections.

Mohamed appeals.

ANALYSIS

Admissibility of Photographs

Mohamed claims the trial court erred by admitting the two photographs because they were irrelevant, unduly prejudicial, and cumulative. We review a trial court's decision to admit or exclude evidence for abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). A trial court abuses its discretion when a decision is manifestly unreasonable or based on untenable grounds or reasons. Gunderson, 181 Wn.2d at 922.

According to Mohamed, the Department of Licensing and jail booking photographs had little relevance because the jury “was able to compare the driver in the video to Mr. Mohamed himself, who was present in court.” The State argues the photographs were relevant to prove the identity of the driver on the video. We agree with the State.

Generally, all relevant evidence is admissible. ER 402. “Relevant evidence” has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The threshold to admit relevant evidence is very low, and even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Here, the defense argued the video did not clearly show that Mohamed was the driver of the minivan. The State offered the photographs to prove that Mohamed was the man pictured in the videos. The photographs assisted the jury by providing known images of the defendant for comparison to the man in the videos. As such, the photographs were relevant to the central question of identity. See State v. Rivers, 129 Wn.2d 697, 711-12, 921 P.2d 495 (1996).

Mohamed contends that the prejudicial effect of the photographs outweighs any probative value because they “primed the jury” to see him in the videos. And he argues that the booking photograph was particularly prejudicial because it also implied that he has a propensity to commit crimes.

The court may exclude relevant evidence

if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or

by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403; State v. Scherf, 192 Wn.2d 350, 387, 429 P.3d 776 (2018). For the purposes of ER 403, we assume evidence is relevant and consider only whether its prejudicial effect outweighs the probative value. Carson v. Fine, 123 Wn.2d 206, 222, 867 P.2d 610 (1994). The party seeking to exclude the evidence has the burden of proving unfair prejudice. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999).

Mohamed claims that showing “both photos of [him] to the jury before playing the video” in court caused the jury to “unconsciously fill the gaps in the low-quality footage with features observed in the photos.” At trial, Mohamed argued that admitting the photographs “is basically leading the jury to believe that the individual who is depicted in the video is this individual here.” He offered no expert opinion or legal authority in support of his argument. On appeal, Mohamed cites multiple law review articles discussing brain science and cognitive functioning, arguing that the jury had been “primed” by the photographs of Mohamed. But Mohamed’s argument still lacks citation to legal authority that applies “priming” in this context.¹ We need not consider issues unsupported by citations to legal authority. State v. Bello, 142 Wn. App. 930, 932 n.3, 176 P.3d 554 (2008); RAP 10.3(a)(6). And Mohamed fails to address how the

¹ Generally, “priming” applies in the context of a due process challenge to unduly suggestive procedures used by the police to procure victim or witness identification of a suspect. See State v. Collins, 152 Wn. App. 429, 434-35, 216 P.3d 463 (2009); State v. Vickers, 148 Wn.2d 91, 118-19, 59 P.3d 58 (2002).

photographs would be more likely to “prime” the jury to identify him in the surveillance videos than seeing him in court as the named defendant at trial.

Mohamed also argues the jail booking photograph created “ ‘extra potential for prejudice’ ” by implying a past arrest and inviting an inference of criminal propensity.² But “[a] booking photograph is not necessarily prejudicial.” State v. McCreven, 170 Wn. App. 444, 485, 284 P.3d 793 (2012). Admission is proper where identity is at issue and the photograph is redacted to remove the identifiable aspects of a “mug shot.” See State v. Tate, 74 Wn.2d 261, 267, 444 P.2d 150 (1968); State v. Scott, 93 Wn.2d 7, 13, 604 P.2d 943 (1980); McCreven, 170 Wn. App. at 485. Here, the State cropped the booking photograph so that only Mohamed’s face and upper shoulders were visible.

Finally, Mohamed claims the trial court abused its discretion by admitting the photographs because they were unnecessary and cumulative given his presence in the courtroom. Generally, the prosecution is “entitled to prove its case by evidence of its own choice.” State v. Taylor, 193 Wn.2d 691, 698, 444 P.3d 1194 (2019) (citing Old Chief v. United States, 519 U.S. 172, 186-87, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)). The State has the right to present “ample evidence” to prove every element of the crime. State v. Rahier, 37 Wn. App. 571, 574, 681 P.2d 1299 (1984). Exclusion of unduly cumulative evidence is appropriate only where the evidence substantially outweighs its probative value. See State v. Price, 126 Wn. App. 617, 644, 109 P.3d 27 (2005), abrogated on other grounds by State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015). This

² Quoting State v. Newton, 42 Wn. App. 718, 726, 714 P.2d 684 (1986), rev’d on other grounds, 109 Wn.2d 69, 743 P.2d 254 (1987).

is not the case here. The photographs provided the jury with two other images of Mohamed for comparison to the man in the videos. And the image in the booking photograph showed Mohamed's appearance closer in time to the date the videos were taken. Mohamed fails to show that admission of the two photographs was unduly cumulative.

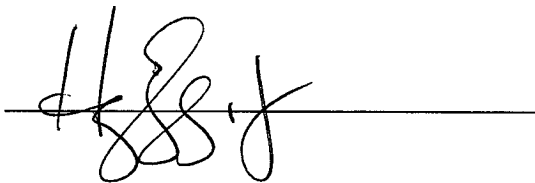
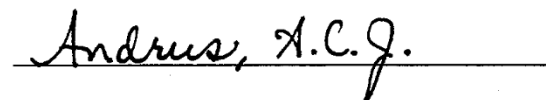
Supervision fees

Mohamed argues the trial court improperly imposed community custody supervision fees despite a finding of indigence. The State concedes the court should strike this discretionary legal financial obligation from the judgment and sentence. We accept the State's concession. See State v. Dillon, 12 Wn. App. 2d 133, 153, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020).

We affirm Mohamed's convictions for theft of a motor vehicle and second degree identity theft but remand to strike the community custody supervision fees from the judgment and sentence.

A handwritten signature in cursive script, appearing to read "Brunner, J.", written above a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "H. S. J.", written above a horizontal line.A handwritten signature in cursive script, appearing to read "Andrus, A.C.J.", written above a horizontal line.

ER 403
**EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE,
CONFUSION, OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[Adopted effective April 2, 1979.]

Comment 403

[Deleted effective September 1, 2006.]

RAP 10.3
CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(1) *Title Page.* A title page, which is the cover.

(2) *Tables.* A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.

(3) *Introduction.* A concise introduction. This section is optional. The introduction need not contain citations to the record for authority.

(4) *Assignments of Error.* A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(5) *Statement of the Case.* A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(6) *Argument.* The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

(7) *Conclusion.* A short conclusion stating the precise relief sought.

(8) *Appendix.* An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

(b) Brief of Respondent. The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.

(c) Reply Brief. A reply brief should conform with subsections (1), (2), (6), (7), and (8) of section (a) and be limited to a response to the issues in the brief to which the reply brief is directed.

(d) [Reserved; see rule 10.10.]

(e) Amicus Curiae Brief. The brief of amicus curiae should conform to section (a), except assignments of error are not required and the brief should set forth a separate section regarding the identity and interest of amicus and be limited to the issues of concern to amicus. Amicus must review all briefs on file and avoid repetition of matters in other briefs.

(f) Answer to Brief of Amicus Curiae. The brief in answer to a brief of amicus curiae should be limited solely to the new matters raised in the brief of amicus curiae.

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error

for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

(h) Assignments of Error on Review of Certain Administrative Orders. In addition to the assignments of error required by rules 10.3(a)(4) and 10.3(g), the brief of an appellant or respondent who is challenging an administrative adjudicative order under chapter 34.05 RCW shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.

References

Form 5, Title Page for all Briefs and Petition for Review; Form 6, Brief of Appellant; Rule 3.4, Title of Case and Designation of Parties; Rule 18.1, Attorney Fees and Expenses, (b) Argument in brief.

[Adopted effective July 1, 1976; Amended effective September 1, 1985; September 1, 1994; September 1, 1997; September 1, 1998; December 24, 2002; September 1, 2006; September 1, 2010; September 1, 2014; April 21, 2020.]

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80601-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Gavriel Jacobs, DPA
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King County Prosecutor's Office-Appellate Unit
[PAOAppellateUnitMail@kingcounty.gov]
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 21, 2020

WASHINGTON APPELLATE PROJECT

December 21, 2020 - 4:15 PM

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