No. 47667-3-II
(Consolidated cases)

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

STATE OF WASHINGTON,

Respondent,

v.

SANTANA TEMPLER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY, NO. 14-1-03434-4

The Honorable Garold E. Johnson, Judge

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

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A. OVERVIEW OF ISSUES

Guilt by association is not legally sufficient to support a valid conviction in this state. Even when the defendant is accused of acting as an accomplice, more than "mere presence" is required.

The prosecution claimed that appellant Santana Templer was guilty of committing second-degree burglary as a principal, not an accomplice. The state was thus required to prove, beyond a reasonable doubt, that Templer had entered or remained unlawfully in a building other than a dwelling and that she had done so with intent to commit a crime therein. Even taken in the light most favorable to the state, the evidence presented at trial proved only that Ms. Templer was seated in a car with her child while the driver of the car loaded some items into the back which had been stolen from a nearby classroom. Because no rational trier of fact could have found all the essential elements of the crime, Templer's conviction for burglary must be reversed and dismissed with prejudice.

In addition, although Division One has apparently adopted a new pleading requirement regarding appellate costs, this Court should not follow suit, as the new requirement is inconsistent with the rules, caselaw of our highest Court and the important goals of ensuring judicial economy and decisions focused on the merits of the case.

B. ASSIGNMENTS OF ERROR

1. The prosecution failed in its burden of proving all the essential elements of second-degree burglary and the resulting conviction must be reversed as it is in violation of state and federal due process.

2. RAP 18.1(b) does not apply and this Court should summarily reject Division One's erroneous reasoning

creating a new, inefficient and duplicative pleading requirement under the theories of that rule as declared in State v. Sinclair, __ Wn. App. __, __ P.3d __ (2016 WL 393719).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove second-degree burglary, the prosecution was required to prove, beyond a reasonable doubt, that Ms. Templer entered or remained unlawfully in a building other than a dwelling, and that she did so while having the required "intent to commit a crime therein."

At trial, the prosecution proved that Ms. Templer sat in the car with her two-year old child while Jeremy Olson loaded items into the back, that the items came from a nearby classroom and that they were taken without permission. The prosecution also proved that some unknown person triggered an alarm on that classroom door and one other shortly before Olson was found loading in the items.

Was the evidence constitutionally insufficient to support Templer's conviction for second-degree burglary where the prosecution utterly failed to provide any evidence that Ms. Templer ever left the car, let alone entered the building?

2. Should this Court decline to follow the improper reasoning of Sinclair, because Division One's adoption of new pleading requirements under that rule runs afoul of the Rules of Appellate Procedure, the statute authorizing costs on appeal and decisions of our highest Court?

D. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Santana Templer was charged by information with second-degree burglary. CP 75-76; RCW 9A.52.030(1). Pretrial and trial hearings were held before the Honorable Garold E. Johnson on March 2-6, 2015, after which the jury found Templer guilty as charged. CP 108.

After a continuance on May 8, 2015, on June 12, 2015, Judge Johnson imposed a standard-range sentence. CP 119-34. Templer appealed. CP 138. An order correcting the judgment and sentence was

later filed, as was an order setting restitution. CP 139-42. This pleading follows.

2. Testimony at trial

Pierce County Sheriff's Department Deputy Eric Jank was working the evening of August 30, 2014, at about 8:20 p.m. when he was told there had been an "alarm activation" at a school in Buckley, Washington. RP 138-141. According to Jank, "dispatch" told him there were "several trips," including "two doors in motion inside the building." RP 141. An employee of the school said there had already been one alarm earlier in the day, at about 5 in the afternoon, and he had gone and checked the doors, pulling them all shut. RP 234-35, 287.

That night, when the alarm went off, Deputy Jank went to the school, arriving after about 15 minutes and pulling around to the west parking lot where he saw someone next to a "Cherokee" vehicle by a dumpster. RP 142, 144. The officer said he then saw someone "jump into the driver's seat" and start to drive, effectively headed in the officer's direction. RP 147-48. When the officer activated his overhead lights and got out of the car, the unknown driver stopped the Cherokee. RP 148. The driver, later identified as Jeremy Olson, got out and put his hands on the hood as first ordered, but then took his hands off and turned away, starting to walk to the back of the Cherokee. RP 148. Deputy Jank then pulled his weapon and ordered Olson back to the hood. RP 149-50. He detained Olson and everyone in the car until another deputy arrived. RP 149.

Jank noticed a couple of large speakers and sound equipment in

back of the Cherokee. RP 151. In fact, the officer said, when he had arrived he had seen Olson putting a speaker into the rear of the Cherokee on the driver's side and trying to close the doors, presumably before jumping in and starting to drive. RP 151-52. On the driver's side floorboard of the Cherokee, officers later found a flashlight, chisel and screwdriver. RP 152.

The officer asked Olson about the items in the car and Olson said he had gotten them from the sidewalk. RP 171. Over defense objection, the officer then gave his opinion that it "seemed unlikely," as "the items were dry and it had been raining all day." RP 172.

Jank then stated his belief that it had been raining throughout the day, at times hard and at times stopping altogether. RP 142. A school district employee also said the summer had been dry and so they were glad about the rain coming to the area, and another officer thought it had been raining that day and the ground was likely wet. RP 210, 256-57.

On cross-examination, however, Janks admitted he did not have any specific evidence as to when it was actually raining on that day. RP 178. In fact, he admitted, he lived farther away, so that it could have been raining where he lived and not where the incident occurred. RP 178. Another officer who responded also admitted that the weather patterns in the area can differ from one area to another, so that it could be raining in Bonney Lake but be sunny in Buckley. RP 226.

Olson told Jank he saw the property outside of the dumpster, on the sidewalk, which had a covered portion. RP 179-80. The officer did not ask Olson where the items were when Olson found them and whether they

were covered or not. RP 180.

A school maintenance employee admitted that there was an awning which hung over the sidewalk six feet from the building. RP 240-41.

The building complex was about half occupied and had a well-used playground, a track and other amenities people used. RP 285.

The dumpster near where the Cherokee had been parked was a "construction-type" dumpster, only about 4 or five feet high. RP 177-80, 204. A school employee testified that the dumpster had been brought out too early to the site and people had been putting things in it as if it was a free dump site. RP 247-48. Inside were such things as file cabinets, boxes and chairs. RP 177-78, 247-48.

Jank went over to look at the school and buildings to see if there was anything which looked like "forced entry" or any doors open, specifically looking for "pod numbers" he had been given for the alarms, rooms 12 and 13. RP 150. On the door bolt to door 12 there was a missing plate which made the door still locked but the bolt could be manipulated. RP 150. The door would not open if it was just pulled but it was possible it could be opened it something was put "in between the bolt plate." RP 150-51.

There was no sign of forced entry whatseover to either door, however. RP 192.

The school district employee said that the plate missing made the room easy to get into but had no idea when that plate had been removed. RP 243. He had been there in the past week and could not say if the plate had been there then, either. RP 242-44.

The way it was, Room 12 was open to anyone who wanted to go inside, essentially. RP 266-67. The employee admitted it could have been that way for quite some time. RP 260.

Jank spoke to the school district employee who had arrived at the scene and that man confirmed that three items in the back of the Cherokee appeared to be items which had previously been stored in room 12. RP 173-74. Those items were a surplus sound system, a stage light and some speakers, parts of which were "not worth anything" but which the employee still thought would not have been thrown in a dumpster. RP 243-47.

Olson continued to maintain he found the items on the sidewalk but was arrested for burglary. RP 174.

At the time it was stopped, inside the car, Santana Templer was sitting with her young child. RP 172-73. Ms. Templer was in the front passenger seat and the child was secured in the back passenger compartment. RP 172-73, 204. Templer was handcuffed initially but became upset when her child started to fuss and cry, so officers uncuffed her briefly while she was questioned. RP 221.

Templer thought Olson had gotten the items he was loading into the back of the Cherokee from inside the dumpster. RP 172, 220-21. An officer thought it would take climbing in to get access to the dumpster, but he took a picture of the inside, which had chairs and other items it looked like the school was discarding, "along with several inches of water." RP 154. The school employee admitted the water could have accumulated from a prior date also, rather than that day. RP 257.

A deputy who kept trying to get Templer to say she had seen Olson go into the building was unsuccessful in getting her to make that statement. RP 230.

The district employee was familiar with both the alarm system and the items which were in the back of the Cherokee. RP 270. He confirmed that it would not take more than one person inside to trip the alarms as they had occurred that day. RP 270. Instead, he said, it could easily have been the same person walking from room to room. RP 270.

He also affirmed that it would not have taken two people to carry the sound board, speakers and lights found in the Cherokee. RP 273-74. One person could have done it. RP 273-74.

Deputy Jank admitted he never saw Templar anywhere in the school, near Room 12 or Room 13, or even out of the vehicle until she was ordered to get out by police. RP 199-200. No fingerprints were taken from the doors or light switches or anything inside the school which might have shown who was inside. RP 200-201.

E. ARGUMENT

1. THE PROSECUTION FAILED IN ITS BURDEN OF PROVING APPELLANT GUILTY AS CHARGED BEYOND A REASONABLE DOUBT AND REVERSAL AND DISMISSAL WITH PREJUDICE IS REQUIRED

Under both the state and federal due process clauses, the prosecution bears the full burden of the weight of proving guilt, which requires proof beyond a reasonable doubt of every essential element of the charged crime. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review

denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991); Fifth Amend.; Fourteenth Amend.; Art. 1, § 9. Evidence is only sufficient if, taken in the light most favorable to the state, any rational trier of fact could have found that it proved the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Where the prosecution fails to marshal sufficient evidence to support a conviction, reversal and dismissal with prejudice is required, because double jeopardy principles prohibit giving the prosecution a second chance. See Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

In this case, Ms. Templer was charged with second-degree burglary. CP 1. That crime is defined in RCW 9A.52.030(1), as follows:

> A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or dwelling.

More specifically, Templer was accused of having "unlawfully and feloniously, with intent to commit a crime against a person of property therein, enter[ed] or remain[ed] unlawfully in a building other than a vehicle or dwelling, located at 120th Street East, Buckley, Washington[.]" CP 1. The information did not charge Templer as an accomplice, nor was the jury instructed that it could find guilt based upon that theory. CP 1; See RP 297-98, 315-38. Thus, to prove guilt, the prosecution had to prove that Ms. Templer herself "entered or remained unlawfully" in the building with the required criminal intent.

Even taken in the light most favorable to the state, the prosecution failed to meet that burden. Assuming that definition of "enter" is actually needed to make the point where, as here, there is no evidence that the defendant ever went *near* the building in question, it certainly requires some physical intrusion. Indeed, the legislature chose to define the term "enter" for the purposes of this crime, as follows "[t]he word 'enter' when constituting an element or part of a crime, shall include the entrance of the person, or the insertion of any part of his or her body, or any instrument or weapon held in his or her hand and used or intended to be used to threaten or intimidate a person or to detach or remove property." RCW 9A.52.010(4).

But the prosecution presented absolutely no evidence that Templer was ever even outside of the *car,* let alone that she entered the school building or remained there with the required intent. The first alarm occurred at 5 and no one was there when the district employee arrived and pulled on the doors. The second alarm was at about 8:09, and nearly 30 minutes later, Templer was found in the car with her young child. No one saw her at the door, or near the building, or even out of the car. She was not seen carrying anything which had been in the building. The prosecution presented no fingerprint, video or other evidence to prove that Templer was ever inside the school building. And the officers admitted that none of the items was so bulky or heavy that Olson could not have carried them himself.

Indeed, the fact that Templer's conviction was based on mere speculation rather than adequate evidence is made clear by the

prosecutor's closing, below. In initial closing argument, the prosecutor recognized the only real issue in the case was "whether the defendants entered or remained unlawfully in a building" with the required intent. RP 344. Her position was that the motion alarm going off on door 12 and door 13 showed "entry into the room, and [that] exit was made." RP 344. She pointed to the tools on the driver's side floorboard and declared that, based on "common sense," the defendant's stories" did not make any sense. RP 350. More specifically, she questioned how "coincidentally" items could have been put out by someone else when the "two defendants happened to be there" with tools. RP 350.

The prosecutor thus focused on Templer and Olson as if the evidence against them was the same. But Templer was simply sitting in the car with her child at the time police arrived to find Olson loading items into the back.

The prosecution's theory of Templer's guilt as based solely on speculation was emphasized even more clearly in rebuttal closing, when the prosecutor said "perhaps" Templer had held the door for Olson or might have handled the light bar herself. RP 388. The prosecutor posited that "[t]ime was probably spent" putting the speakers into the car, while admitting that Templer had simply been "in the car with the stolen property" when police arrived. RP 389. Finally, the prosecutor urged the jury to "infer" that Templer was guilty of second-degree burglary based not on the elements of the crime but based on "participation" -

> You can infer that Templar helped load the equipment, perhaps position the equipment, made sure that the equipment didn't hit her child in the, I think was in the backseat. Or she could have

> acted as a lookout, you know. There was plenty of involvement on [sic] Templar in this burglary as obviously Olson.

RP 390.

The prosecutor's own argument makes clear the lack of evidence to prove the essential element that Templer entered or remained unlawfully as required to prove second-degree burglary. By her own admission, the only evidence the prosecutor had was that Templer was sitting in the car into which Olson was loading items which turned out to be stolen. There was no evidence Templer was ever out of that car or to prove that she entered room 12 or anywhere else. The only way for the prosecutor to garner the conviction was to claim that Templer should be *inferred* to have been involved, what she *might have but was not proven* to have done, such as holding open a door or carrying a lighter item. But again, to prove Templer guilty of second-degree burglary as charged and submitted to the jury, the prosecutor had to prove that Templer herself physically entered or remained unlawfully somewhere with intent to commit a crime. With only the evidence that Templer was in the car and no proof she was ever out of it, the prosecution thus failed to provide sufficient evidence to prove Templer guilty of second-degree burglary.

While circumstantial evidence is considered as reliable as direct evidence, to be sufficient, evidence must be more than a mere scintilla. See State v. Fateley, 18 Wn. App. 99, 102, 56 P.2d 959 (1977). Instead, there must be "substantial evidence," defined as the quantum of evidence "necessary to establish circumstances from which the jury could reasonably infer" guilt. Id. Here, there was not such evidence to prove

that Templer entered or remained unlawfully anywhere - other than rank speculation. Reversal and dismissal is required.

Notably, mere presence is not even sufficient to support a conviction based on accomplice liability, let alone as a principal. See In re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979); State v. Rotunno, 95 Wn.2d 931, 631 P.2d 951 (1981). For example, in Wilson, the defendant was with a group of kids and weatherstripping was pulled from building windows, made into a rope and pulled across a road. The evidence was that the defendant was there on the hill at least once when the rope was pulled across the road and near the end of it, although no one saw him holding it. 91 Wn.2d at 490-91. In finding him guilty, the trial court relied on "[h]is participation in going to the scene, being with his friend, standing and being involved in the whole atmosphere of what was going on," and found that the lack of "actual touching and pulling the rope" was not required to prove he was involved in and contributing to what was going on. Id. The court of appeals recognized it was not a crime to be present but held that once the defendant knew of the theft and stretching of rope across the road, his "continued presence" was encouragement and sufficient participation for guilt as an accomplice. Id.

The Supreme Court disagreed. It found that the court of appeals had erred in using an "overly broad rule" for finding accomplice liability. Id. Indeed, the Court noted, "Washington case law has consistently stated that physical presence and assent alone are insufficient to constitute aiding and abetting." Id.

Further, while it might be sufficient that the defendant is present at

the scene of an ongoing crime if there is proof the person is "ready to assist," the Court found that such readiness is not proven by mere presence at the scene of a crime, even if that presence is "knowing." Wilson, 91 Wn.2d at 491-92. Put another way, the Court stated:

> Even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt. It is not the circumstance of "encouragement" in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage. . . We hold that something more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding . . .accomplice [liability].

Id. Similarly, in State v. Robinson, 73 Wn. App. 851, 872 P.2d 43 (1994), evidence was insufficient to prove accomplice liability where the defendant was driving friends around in a car and one jumped out and grabbed the purse of a woman. 73 Wn. App. at 852. The defendant had to have been proven to have some knowledge and have acted with intent rather than simply being aware and present. Id.

Again, Ms. Templer was not accused as an accomplice, nor was the jury instructed that it could find her guilty as such. She was alleged to have been guilty as a principal and thus had to have been shown to have committed unlawful entry or unlawful remaining herself. Not only was the evidence completely insufficient to prove that essential element, it would not have been sufficient to prove even guilt as an accomplice. Reversal and dismissal with prejudice is required.

2. THE ISSUE OF COSTS ON APPEAL IS NOT BEFORE THIS COURT UNTIL ITS DECISION ON THE MERITS AND THIS COURT SHOULD NOT ADD THE INEFFICIENT, DUPLICATIVE NEW PLEADING REQUIREMENTS DIVISION ONE ERRONEOUSLY CRAFTED IN SINCLAIR

Under RCW 10.73.160 and RAP Title 14, this Court may order the appellant in a criminal case to pay the costs of an unsuccessful appeal from his conviction. See State v. Nolan 141 Wn.2d 620, 628, 8 P.3d 300 (2000). This state, however, guarantees a constitutional right to appeal from such a conviction. See State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).

In Blank, our highest Court addressed the conflict between the constitutional right and the imposition of costs of appeal in this state, concluding that the imposition of costs was proper because "ability to pay" would be considered before any punishment could be imposed for the failure to pay. Blank, 131 Wn.2d at 244, 246, 252-53.

That premise has been effectively disproved. See State v. Blazina, 182 Wn.2d 827, 344 P.3d 640 (2015). The question before the Court at this time, however, is not whether Blank retains its validity after Blazina, or whether costs on appeal are properly imposed in this particular case. Despite the recent decision from Division One in Sinclair, supra, consideration of costs on appeal is not an issue addressed by this Court before or even as part of the merits. Instead, the question of whether costs should be imposed on appeal cannot be determined until after this Court has decided the substance of the appeal.

Both the Rules of Appellate Procedure and the statute under which

costs are imposed make this clear. RAP Title 14 provides that the court makes the decision on costs only "after the filing of a decision terminating review[.]" RAP 14.1(a). While the court has the authority to award costs in a decision on the merits, in general it is the Commissioner or Clerk of the Court which awards costs under RAP 14.2, and then only to the "party that substantially prevails on review." RAP 14.3 defines expenses which may be allowed as costs and RAP 14.1(f) requires the party claiming costs to file a cost bill "in the manner provided in rule 14.4."

Imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628. In Nolan, the court of appeals agreed with the prosecution that an award of costs on appeal was "virtually automatic" whenever the defendant in a criminal case did not prevail. But our state's highest Court rejected that idea, holding that, even if there is a "substantially prevailing party," the appellate court has considerable discretion to choose to impose costs for that party. Nolan, 141 Wn.2d at 628.

Indeed, the Court held, the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are technically entitled to costs under the rule. Nolan, 141 Wn.2d at 628.

Under RAP 14.3, the only expenses allowed as costs are statutory attorney fees and reasonable expenses "actually incurred by a party for the following items which were reasonably necessary for review may be awarded:" transcript and clerk's papers costs, copy costs at the court,

transmission of the record, filing fees and "other sums as provided by statute." RAP 14.4 provides the procedure for seeking costs, requiring that the party seeking costs must file and serve a cost bill very shortly after a decision, i.e., "within 10 days after the filing of an appellate court decision terminating review." RAP 14.4(a).

As a result, a party is not entitled to recover costs of appeal unless they timely file a request for such costs *after* a decision terminating review. Further, to be entitled to costs, the party must show that, based upon that same decision, he or she meets the standard of being the "substantially prevailing party" on review. RAP 14.2. In fact, RAP 14.2 specifically provides that, "[i]f there is no substantially prevailing party on review, the Commissioner or Clerk **will not** award costs to any party" (emphasis added). Where both parties prevail on major issues, there is actually no "substantially prevailing party" on review for the purposes of an award of appellate costs under RAP 14.2. Nolan, 141 Wn.2d 626, citing American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990).

Thus, the determination of even whether a party is entitled to costs depends wholly on the decision on the merits issued after consideration of the merits in the case. Further, the determination of what costs should be awarded and even whether, under the circumstances, the Court should exercise its considerable discretion and award costs at all also depends upon the specific facts of the decision on the merits by the Court.

In Sinclair, supra, Division One of the Court of Appeals recently

looked at the issue of costs on appeal when a defendant whose conviction was affirmed objected to imposition of costs on appeal after a cost bill was filed post-decision by the state. 2016 WL 393719. The prosecution urged the Court to automatically impose costs on appeal against indigent defendants in every case and wait to see if the defendant brings a remission hearing on his own in trial court to ask for relief from imposition of such costs. 2016 WL 393719 at 2-3.

Division One rejected that idea, holding that the future possibility that the defendant who is indigent might get some kind of relief from costs in a remission hearing does not "displace this court's obligation to exercise discretion when properly requested to do so." 2016 WL 393719 at 4-5. The Court also rejected the appellant's argument that remand for an "ability to pay" hearing akin to Blazina was required. Division One thought that such a procedure 1) would improperly "delegate" to the trial court the appellate court's duty of deciding appellate costs, and 2) appellate briefs can set forth "[f]actors that may be relevant to an exercise of discretion" to impose appellate costs under RCW 10.73.160 "at least as efficiently in appellate briefs as in a trial court hearing." 2016 WL 393719 at 5. Division One then held that it would only deem the issue of appellate costs in a criminal case "when it is raised in an *appellant's* brief." 2016 WL 393719 at 5-6.

Thus, Division One effectively appears to have held that defense counsel is required to raise the potential issue of appellate costs in the opening brief on appeal, even if the issue will not ever arise or require this Court's consideration because there might not be a substantially prevailing

party on review when the case goes further. Indeed, Division One recognized that this novel new briefing requirement "puts appellate defense counsel in the position of assuming the client may not prevail on substantive claims." 2016 WL 393719 at 2-6. Not only that, Division One recognized that its new procedure has "practical inefficiencies," because it may require counsel to "include a presumptive argument against costs in every case" even if the state does not intend to seek costs later.

Ultimately, Division One thought it would be appropriate for there to be a "rule change requiring the State to include a request for costs in the brief of respondent[.]" 2016 WL 393719 at 5-6. Absent that change in rule, however, Division One decided to adopt onto the issue of appellate costs the rule of RAP 18.1(b), which the court described as a "somewhat analogous situation." The Sinclair panel then decided to add a requirement that an appellant should "devote a section of its opening brief" to rebutting any potential request for imposition of appellate costs, with the prosecution then given "the opportunity in the brief of respondent to make counterarguments **to preserve the opportunity to submit a cost bill**." 2016 WL 393719 at 5-6 (emphasis added).

Thus, Division One of the court of appeals adopted a new requirement that a defendant must prospectively brief an objection to a prosecution request which may never be made and which will depend on facts not yet in existence - i.e., whether the court's decision results in a "substantially prevailing party," whether the equities of the situation support imposing such costs, etc. And it further required the prosecutor to

then brief the issue, too, all in advance of knowing the facts that will control.

This Court should not follow Division One's novel new pleading requirement. Even Division One did not seem to recognize the potential scope of its order or what it was going to require. Comparing the situation to that in RAP 18.1(b), the court said, "[t]ypically, a short paragraph or even a sentence is deemed compliant with the rule," and that, as a result, "we are not concerned that this approach will lead to overlength briefs." This implies that all it is requiring is a mere sentence, so that Ms. Templer's declaration herein that she remains indigent would appear to be sufficient. But Division One then stated that the parties should have sufficient information to present to the appellate court which would be relevant to the issue of whether costs should be imposed in the future if there is a substantially prevailing party and a proper request is made:

> 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.

2016 WL 393719 at 4-5. And it is not only that information the court thought was needed to support its decisions regarding appellate costs, but also "current ability to pay" and indeed other factors, because the list in Sinclair "is not intended as an exhaustive or mandatory itemization of information that may support a decision one way or another." 2016 WL 393719 at 4. Division One concluded that parties should provide such briefing in order to assist the appellate court in the exercising its discretion

"by developing fact-specific arguments from information that is available in the existing record," not only about ability to pay but also about the other factors it thought were relevant to the inquiry.

Thus, Sinclair first says there will be no real additional briefing required and then belies that claim a moment later.

Ultimately, Sinclair reached the right decision. The Sinclair Court declined to impose appellate costs, noting that there is a presumption of continued indigency throughout appellate review under RAP 15.2(f), which requires the appellate court to "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) (emphasis added). Because there was no trial court order that his financial situation had improved or is likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s, the court exercised its discretion to deny the state's request for appellate costs.

Sinclair thus appears to add three new requirements, only one of which is consistent with the rules. It is consistent with the rules for Division One to honor and apply the presumption of indigence set forth in RAP 15.2(f). But the new requirements Division One created by engrafting RAP 18.1(b) onto this situation run afoul of the Rules, the statute and Washington Supreme Court precedent.

In Blank, the Court specifically held that RCW 10.73.160 ."RCW 10.73.160 does not apply unless and until a defendant's is convicted on appeal;" and until that point, "the statute is not triggered and no liability

for costs arises." 131 Wn.2d at 251.

Further, in Blank, our highest Court specifically rejected the same claim as that raised by Division One in Sinclair - that the briefing requirements of RAP 18.1 should apply to imposition of costs on appeal. The Blank Court declared that those "expenses which ay be recouped under RCW 10.73.160 **do not fall within RAP 18.1.**" Blank, 131 Wn.2d at 250 (emphasis added).

Ultimately, Division One's decision makes no sense. It requires briefing not previously required, anticipatory to any issue even being raised, on an issue which may never need to be decided by the Court, in advance of the existence of the very facts which will be required for the decision to be made. Put simply, it is nonsensical and a waste of scarce resources to engraft a new pleading requirement in this fashion. This Court should decline to follow Division One's improper decision in Sinclair. In the alternative, it should follow Sinclair only to the extent that Division One honored the continuing presumption of indigency set forth in the Rules of Appellate Procedure, and should decline to impose costs on appeal on appellants who, like Ms. Templer, remain indigent and have no more ability to pay onerous costs for exercising their constitutional right to an appeal than they do to pay other legal financial obligations.

F. CONCLUSION

The prosecution failed to meet its burden of proof as due process requires. This Court should reverse and dismiss the conviction with prejudice. In addition, it should decline to follow Sinclair and refuse to create a new, inefficient briefing requirement. As Ms. Templer is and remains indigent, imposition of costs on appeal would be inappropriate in any case under Blazina.

DATED this 30th day of March, 2016.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, Box #176
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel by efiling this date at pcpatcecf@co.pierce.wa.us and codefendant's counsel at sccattorney@yahoo.com, both via this Court's upload portal and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Ms. Santana Templer, 1408 Main Street, Buckley, WA. 98321.

DATED this 30th day of March, 2016.

Respectfully submitted,

/s/ Kathryn A. Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, Box #176
Seattle, Washington 98115
(206) 782-3353

RUSSELL SELK LAW OFFICES

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pcpatcecf@co.pierce.wa.us
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