

NO. 48175-8

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CAMERON LEE CHUDY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge James Orlando

No. 15-1-01683-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defense counsel ineffective for failing to raise a motion to suppress the defendant's statements to police based on an alleged unlawful detention when such a motion, if it had been raised, would have been denied? (Appellant's Assignment of Error No. 1, 2, 3, 5 and 6)
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6. What procedure should the Court of Appeals use in deciding whether appellate costs should be awarded?

B. STATEMENT OF THE CASE.

1. Procedure

On May 1, 2015, CAMERON CHUDY, hereinafter "defendant," was charged with unlawful possession of a stolen vehicle and attempting to elude a pursuing police vehicle. CP 1-2. On September 28, 2015, both parties appeared for trial. RP 3.

Prior to testimony, there was argument on the admissibility of a two-minute surveillance video. RP 103. The video appears to show an unknown person entering and then driving away in the victim's Honda. RP 105. The State argued to the court that the video was relevant because it had to establish beyond a reasonable doubt that the vehicle was, in fact, stolen. RP 105. The defense objected under ER 403, arguing that it was irrelevant and confusing to the jury. RP 106. The court conducted a balancing and found that the video was more probative than prejudicial, and that it did not even appear that the person who is in the video stealing the Honda was the defendant. RP 110-111. The court stated, "Quite

honestly, I don't know what the prejudice would be to this defendant by showing the video." RP 111.

The defendant was convicted of both unlawful possession of a stolen vehicle and attempting to elude a pursuing police vehicle. CP 40-41. This timely appeal follows.

2. Facts

a. CrR 3.5 hearing

A CrR 3.5 hearing was conducted on the first day of trial. RP 18. At the CrR 3.5 hearing, Tacoma Police Officers Zachery Wolfe, Kenneth Smith and Teresa Antush testified. RP 18, 44, 62. The defendant also testified on his own behalf. RP 74. Officers Wolfe and Smith were on duty as a two man patrol unit. RP 21, 47. While on patrol, the officers ran the license plate of a Honda Accord that was traveling westbound on 96th street. RP 23. The Honda came back as having been stolen. *Id.*

Ultimately, Officer Antush received information over the radio that two white males were in a stolen Honda. RP 67. Officer Antush observed two individuals in the areas and approached them. RP 69. She asked the individuals, later identified as the defendant and another person, if they would stop and talk to her. RP 69. Officer Antush, the defendant and the other person engaged in friendly conversation. RP 71. During her contact with the defendant, the other units arrived at her location. RP 71. The defendant then turned to run away and ran directly into another officer, who detained him. RP 72.

Officer Wolfe and Officer Smith arrived at the location where Officer Antush had detained the defendant. RP 25. The defendant was advised of his *Miranda* warnings. RP 27. The defendant then made statements to the police. RP 29-32, 34. The defendant told police that he was coming from his friend's house, but could not recall the address. RP 30. When confronted with a statement that the defendant's associate had made, which indicated that the defendant was the driver of the stolen vehicle, the defendant told officers that this was going to be his fourth time getting arrested for a stolen vehicle. RP 32. The defendant did not, however, admit to being the driver of the vehicle. *Id.* The defendant told police that he and his friend were in the vehicle and that his friend was the front seat passenger. *Id.* Officer Smith asked the defendant where the key to the vehicle was, to which the defendant stated something to the effect that the key should be in the car. RP 52. During transport to the jail, as the patrol car was driving by 14th Street and Nollmeyer, the defendant made the spontaneous statement that he had parked the car and that was his apartment. RP 34, 53.

Defendant testified at the CrR 3.5 hearing and denied being advised of his *Miranda* warnings at the scene. RP 74-77. He also stated that he had given officers the address of his friend's house and denied that he was trying to run from officers. RP 76, 85. The defendant denied telling Officer Wolfe that his friend was the front seat passenger. RP 86.

The trial court found in its oral ruling that Officer Antush had conducted a *Terry* stop on the defendant. RP 96. The court found that the statements made by the defendant after he was taken into custody were admissible. RP 98-100.

b. Trial

On April 28, 2015, Erica Winscot reported that her Honda Accord had been stolen. RP 122-124. The Honda was listed as a stolen vehicle in the law enforcement database. RP 127. Winscot's Honda had been stolen from the Pacific Lutheran University parking lot. RP 171. This incident in which her Honda was taken was caught on video surveillance. RP 178-183. The video surveillance was later played for the jury. *Id.*

On April 30, 2015, two days after Winscot's Honda was stolen, Tacoma Police Officers Wolfe and Smith were working as a two-man patrol unit. RP 210-211, 302. Officers Wolfe and Smith were in the area of South 96th Street in Tacoma when they observed a Honda Accord. RP 214, 304-305. The officers conducted a records check and the Honda came back as stolen. RP 217, 305. Officers Wolfe and Smith activated their emergency lights and siren. RP 218, 307. The Honda did not stop, but picked up speed as it drove away from the officers. RP 219-220. The Honda was traveling at a high rate of speed. RP 308. Officer Wolfe was able to determine that the Honda contained two people. RP 224. The passenger was a white male and the driver was a light-skinned black male or a white male in a white or light-colored shirt. RP 224, 258. The Honda

was able to get several blocks ahead of the officers, who terminated their attempts to stop the Honda. RP 226-227. Officers Wolfe and Smith advised all other units in the area what had occurred. RP 228.

Officers Wolfe and Smith were advised that the Honda had been located and that it was unoccupied. RP 234. Prior to the officers responding to the unoccupied Honda, however, they learned that another officer had possibly located the subjects associated with the Honda. RP 234. Approximately two to four minutes had passed between when Officer Wolfe had last seen the Honda to the location where the subjects were located. RP 235, 317-318. One of the subjects, identified as the defendant, admitted to being in the vehicle. RP 249. He was wearing a white t-shirt. RP 338. The second subject, identified as Micah Ryan Frasu, was not wearing a light colored t-shirt. RP 321, 338. Defendant also told police that he had parked the vehicle at his apartment complex all night. RP 252, 282. At the time defendant was contacted by police, there were no other pedestrians in the area. RP 244.

Officer Antush was on duty at the time of this incident and heard over her radio information about a stolen vehicle. RP 351-354. She dispatched to the area, where there was no pedestrian traffic except for the defendant and his associate. RP 357. Officer Antush asked two people "Hi, guys. Can you stop and talk to me for a minute?" RP 358. The two told Officer Antush that they had come from a friend's house. RP 362. She was going to ask another question, but at that point the defendant

turned and started to run away. *Id.* At that same moment, another officer had just arrived at the scene and the defendant literally ran into the other officer. *Id.* Defendant only made it eight to ten feet. RP 363. Defendant was then detained and taken to Officer Wolfe and Officer Smith's patrol car. RP 362.

When Winscot collected her vehicle after it was recovered by police, she found it to be in very different condition from when it was first taken. The stereo had been removed, there was new damage to the wheel rims, the tail fin was missing, the driver's side door keyhole had been damaged, the window frame had been broken, and it was able to start with a screwdriver. RP 185-189. Winscot also reported that there were items in the vehicle that did not belong to her. RP 190.

c. Juror No. 8 discussion

On the second day of trial, the court indicated to the parties that Juror No. 8 had self-reported that she gets sleepy. RP 282. The court stated that it observed the juror with her eyes closed and her head down. *Id.* He further stated that the juror's response was approximately 15 seconds delayed when he had announced a recess. *Id.* The court expressed that the juror was not taking notes. *Id.* The court stated that he was going to talk to Juror No. 8 and excuse her if she was unable to pay attention. *Id.* The court later inquired directly of Juror No. 8. RP 284. The court indicated to Juror No. 8 that she was having a hard time staying awake. RP 284. The juror

responded that she had taken medication that causes drowsiness and that she tried to keep herself busy in the jury box but it was difficult. RP 284-285. She stated that she tried to stay awake. *Id.* The court advised the juror that she could stand if needed and asked her if she was able to listen to the testimony and evidence. RP 285. The juror indicated that she could do that, and that she had been taking notes. *Id.*

Later that same day, defense counsel informed the court that Juror No. 8 had been “nodding.” RP 342. Defense counsel requested that she be excused and that an alternate be assigned. *Id.* The State responded that she had not seen Juror No. 8 falling asleep. RP 343. The State noted that Juror No. 8 was standing up when she needed to stay awake. RP 343. The court also acknowledged that Juror No. 8 asked for permission to stand and she was told to do so. *Id.* Because Juror No. 8 stood when she needed to stay awake, the court declined to excuse her. *Id.*

C. ARGUMENT.

1. DEFENSE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO RAISE A MOTION TO SUPPRESS DEFENDANT’S STATEMENTS BASED ON A LAWFUL INVESTIGATIVE DETENTION OF DEFENDANT AND ANY MOTION, IF RAISED, WOULD HAVE BEEN DENIED.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S.

668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also*, ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also*, ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489.

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). When an ineffective assistance of counsel claim is being based on a failure to move to suppress evidence, the defendant must show that the motion to suppress

that evidence would have been granted. *State v. McFarland*, 127 Wn.2d 322, 333-334, 899 P.2d 1251, 1257 (1995)(citations omitted).

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.” Article I, section 7 of the Washington State Constitution mandates that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

“[A] warrantless search [or seizure] is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement.” *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Similarly, “[t]he ‘authority of law’ requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions.” *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010).

“One such exception is that an officer may briefly detain a vehicle’s driver for investigation if the circumstances satisfy the ‘reasonable suspicion’ standard under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).” *State v. Bliss*, 153 Wn. App. 197, 203-04, 222 P.3d 107 (2009); *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012). Probable cause for the stop of a person or car exists when there is a reasonable suspicion that criminal activity is afoot. *Terry v.*

Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Specifically, an investigatory stop is lawful if the officer possesses “specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* at 21. A seizure is reasonable and lawful when it is based on an officer’s objectively reasonable suspicion that an individual has engaged in criminal activity. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (2004).

The police are authorized to detain suspects a brief time for questioning when there is an articulable suspicion, based on objective facts, that the suspect is involved in some type of criminal activity. *Brown v. Texas*, 443 U.S. 47, 99 S. Ct 2637, 61 L. Ed. 2d 357 (1979). Washington law gives officers the legal right to stop a suspected person, request the person produce identification and an explanation of his or her activities as long as the officer’s “well-founded suspicion” meets the *Terry* rational. *State v. Little*, 116 Wn.2d 488, 495, 806 P.2d 749 (1991), quoting *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

A police officer’s decision to briefly detain an individual may be based on his or her own observations, other officers’ observations, tips from citizens and informants, or any combination of these. *State v. Thornton*, 41 Wn. App. 506, 705 P.2d 271 (1985); *State v. Harvey*, 41 Wn. App. 870, 707 P.2d 146 (1985). “An informant’s tip alone may provide the necessary reasonable suspicion to justify an investigatory stop.” *State v. Cardenas-Muratalla*, 179 Wn. App. 307, 319 P.3d 811

(2014). See *State v. Lee*, 147 Wn. App. 912, 918, 199 P.3d 445 (2008); *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); *State v. Hopkins*, 128 Wn. App. 855, 862, 117 P.3d 377 (2005).

“[T]he legal standard for determining whether police suspicion resulting from an informant’s tip is sufficiently reasonable to support a *Terry* stop is the ‘totality of the circumstances’ test announced in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), not the two-part reliability inquiry derived from *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584 (1969).” *State v. Marcum*, 149 Wn. App. 894, 903, 205 P.3d 969 (2009); *State v. Lee*, 147 Wn. App. 912, 916-17, 199 P.3d 445 (2008) (citing *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 527 (1983)).

In reviewing the propriety of a *Terry* stop a court should evaluate the totality of the circumstances known to the officer at the time of the inception of the stop. *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012). In evaluating an investigatory stop, a court should take into consideration an officer’s experience. An officer’s suspicion of criminal activity, based on his or her experience in interpreting what would, to the ordinary citizen, appear to be innocent conduct, may appear incriminating to the officer in light of past experience. *U.S. v. Brigoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1974); *State v. Samsel*, 39 Wn.

App. 564, 570, 694 P.2d 670 (1985); *see also United States v. Cortez*, 449 U.S. 411, 66 L. Ed. 2d 21, 629 S. Ct. 690 (1981).

While an officer must have articulable reasons for investigating, he need not be able to indicate the specific crime being investigated in order for a stop to be legitimate. *State v. Mercer*, 45 Wn. App. 769, 775, 727 P.2d 676 (1986). “The seriousness of the criminal activity” suspected “can affect the reasonableness calculus which determines whether an investigatory detention is permissible.” *State v. Sieler*, 95 Wn.2d 43, 50, 621 P.2d 1272 (1980). “Crime prevention and crime detection are legitimate purposes for investigative stops or detention...[c]ourts have not required the crime suspected or under investigation to be a felony or serious offense.” *State v. Kennedy*, 107 Wn.2d 1, 6, 728 P.2d 445 (1986). The scope of the detention may be prolonged on the basis of information obtained during the detention. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 734 P.2d 966 (1987). Finally, it is only necessary that the circumstances at the time of the stop be more consistent with criminal activity than innocent conduct. *State v. Mercer*, 45 Wn. App. 769, 727 P.2d 676 (1986).

A “social contact” is not a seizure. *State v. Harrington*, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009). It “occupies an amorphous area ... resting someplace between an officer’s saying ‘hello’ to a stranger on the street and, at the other end of the spectrum, an investigative detention.” *Harrington*, 167 Wn.2d at 664. No seizure occurs where an officer

approaches an individual in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away. *State v. O'Neill*, 148 Wn.2d 564, 577-78, 62 P.3d 489 (2003).

A social contact may involve a police officer asking for identification or to remove one's hands from his pockets. *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997); *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993). These activities, in isolation, do not amount to a seizure. *Armenta*, 134 Wn.2d at 11. But even these seemingly innocuous small intrusions may amount to a seizure when combined. *Harrington*, 167 Wn.2d at 668 (citing *State v. Soto-Garcia*, 68 Wn. App. 20, 841 P.2d 1271 (1992), *abrogated on other grounds by State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996)).

In this case, defense counsel did not commit ineffective assistance of counsel because a motion to suppress on the basis of an invalid stop would have been denied. Moreover, because the motion was not raised, the record was not developed regarding the arrest of the defendant. Trial testimony does, however, offer sufficient facts for this court to conclude that a motion to suppress would have been denied. Officer Wolfe described the occupants of the eluding vehicle. RP 224. He stated that the driver was a light-skinned black male in a white or light colored t-shirt. *Id.* The passenger was described as a white male. *Id.* When defendant and Frasu were contacted by Officer Antush, they were the only

pedestrians in the immediate area where the pursuit had ended. RP 357. The defendant, arguably a light-skinned black male, was wearing a light colored or white t-shirt—as Officer Wolfe had described. RP 224, 243, 258, 268. The person with defendant was a white male who was not wearing a light colored t-shirt. RP 243, 321, 338. During her initial social contact Officer Antush observed that defendant was sweating profusely and breathing heavily. RP 246.

While Officer Antush was initially told that the suspects were two white males, Office Wolfe responded to the scene. RP 367. Officer Wolfe knew the driver was a white *or* light skinned black male. RP 224, 258. Up to the point where Officers Wolfe and Smith arrived, Officer Antush was engaged in a social contact only¹. The defendant was not detained in any way. It was only after Officers Wolfe and Smith arrived at the scene that defendant, who had tried to flee, was detained. At that point, Officer Wolfe could have easily reported that defendant and Frasu did not match the description of the suspects. That did not occur because they *did* match his description of the suspects. Because defendant and Frasu both matched the suspects that Officer Wolfe observed, it was lawful to detain them while the investigation continued and more information was obtained. Defendant's detention and ultimate arrest were lawful. The statements made by the defendant were properly admitted.

¹ The appellant does not allege that Officer Antush made an unlawful social contact. The appellant only disputes what occurred after the defendant is handcuffed and detained.

The appellant cannot establish that a motion to suppress, if raised, would have been granted. Therefore defendant's claim is without merit.

2. THE TRIAL COURT PROERLY EXERCISED ITS DISCRETION IN ADMITTING THE VIDEO SURVEILLANCE EVIDENCE AFTER CONDUCTING AN ER 403 BALANCING, WHEN THERE IS NO RESULTING PREJUDICE, AND WHERE THE VIDEO EVIDENCE SUPPORTS AN ELEMENT OF THE CRIME CHARGED.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it 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 that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative

value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

In this case, one of the elements that the State was required to prove was that defendant possessed a stolen vehicle. While testimony from Winscot would certainly be evidence to establish that the car was stolen, the video of the car being stolen is also direct evidence. The court reviewed the surveillance video before it was played for the jury. RP 110. The court, who is in the best position to determine any prejudice of the video, found not only that it was more probative than prejudicial, but specifically stated that the person in the video stealing the car appeared to be someone other than the defendant. *Id.* The court stated that there would be minimal prejudice, then stated that he did not know what any prejudice would be, presumably because the video shows someone else stealing the car.

It appears that the appellant is unhappy with how the State chose to present its case—i.e. physical evidence instead of testimony only. Unfortunately, that is not the standard. The appellate has not stated what prejudice, if any, resulted except to argue that the defendant and the person who stole the vehicle both appear to be African American. As the

court specifically pointed out, however, the person in the video was not the defendant. The State never argued that it was the defendant or even implied that it was the defendant.² In fact, the State argued in closing argument that it did NOT have to prove the defendant was the person who stole the car, an argument that was also reiterated by defense counsel in closing. RP 386, 411.

3. ANY ERROR IN THE DELETION OF ONE SENTENCE FROM WPIC 4.01, DONE SUA SPONTE BY THE COURT, IS HARMLESS IN THIS CASE.

A non-standard reasonable doubt instruction that does not offend the constitution cannot by itself establish ineffective assistance. This is because insofar as the constitution is concerned, “no specific wording is required, jury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof.” *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241, 1243 (2007), *citing State v. Coe*, 101 Wn.2d 772, 787–88, 684 P.2d 668 (1984). In this case the reasonable doubt instruction communicated the State’s burden in clear, unmistakable terms when it said, “The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.” CP 12-39 (Instruction No. 2).

² The defendant also could have requested a limiting instruction below and did not do so. Appellant does not allege that defense counsel was deficient for failing to request a limiting instruction.

Adequate and proper explanation of reasonable doubt has challenged courts and attorneys for many years. “Scholars will continue endlessly to debate the best definition of reasonable doubt.” *State v. Castle*, 86 Wn. App. 48, 62, 935 P.2d 656, *review denied*, 133 Wn.2d 1014 (1997). *Castle* found no error in the use of a non-standard reasonable doubt instruction even though a pattern instruction existed and was in general use. The same court considered yet another non-standard reasonable doubt instruction in *State v. Cervantes*, 87 Wn. App. 440, 442, 942 P.2d 382 (1997). In *Cervantes*, the court stated, “The instruction here has both problems and virtues, but we find it satisfies due process, and we affirm.” *Id.* Eight years after *Cervantes*, the same court disapproved a similar instruction in favor of the current Supreme Court-approved, pattern reasonable doubt instruction. *State v. Castillo*, 150 Wn. App. 466, 474, 208 P.3d 1201, 1206 (2009) (“We note further that we approved, with reservations, a very similar instruction in *Cervantes*.”).

For a period of time, the instruction in *Castle* was approved for general use. *See* 11 Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01A (1998 pocket part). Eventually, however, the Supreme Court in *Bennett* simplified matters by directing that trial courts cease using the *Castle* instruction, in favor of the current standard WPIC 4.01. *State v. Bennett*, 161 Wn.2d at 318. In doing so, the court determined “as have other courts, that the *Castle* instruction satisfies the constitutional requirements of the due process clause of the United States

Constitution” but at the same time declined to “endorse the instruction” for use in Washington. *Id.* at 315.

In *State v. Cox*, 94 Wn.2d 170, 615 P.2d 465 (1980), the instructions to the jury inadvertently omitted a burden of proof instruction. *Id.* At 173-74. The court affirmed the conviction, stating as follows:

The Court of Appeals in this case, therefore, applied the correct test. It was, moreover, correct in concluding that the totality of circumstances in this case was such that the jury was adequately informed of the allocation of burden of proof. In addition to the presumption of innocence instruction which implicitly explained the allocation, the State’s possession of the burden of proof was explicitly emphasized throughout the trial. The trial judge told jurors twice at the beginning of voir dire that the State bears the burden of proof. During voir dire, defense counsel frequently emphasized that the burden of proof as to each and every element is on the State, and the prosecutor acknowledged the State’s burden at least eight times. Both the defense and the prosecution stated during closing arguments that the burden is upon the State.

Id. at 174.

In *State v. Lundy*, 162 Wn. App. 865, 256 P.2d 865 (2011), this court held that harmless error applied to the trial court’s failure to use the WPIC. *Id.* at 872. In *Lundy*, the trial court’s modification of WPIC 4.01 was harmless and involved a reordering of the paragraphs of WPIC 4.01. *Id.* The court held that Lundy could not establish that he was prejudiced by the reordering of WPIC 4.01. *Id.* at 873.

In this case, the State had proposed WPIC 4.01 in its entirety, including the sentence, “The defendant has no burden of proving that a

reasonable doubt exists as to these elements.” CP 73-103 (Instruction No.

3). Defense proposed identical language. CP 8-11 (Instruction No. 1).

The following exchange then takes place, in part:

Ms. Halvorson:

[first section of argument omitted] The only issue I raised to Mr. Burgess this morning is that it appears that both his proposed instruction as well as my proposed instruction at the very end of the first paragraph it includes the phrase “as to these elements.” In pulling up to WPIC and the comments for WPIC 4.01, the burden of proof, the note on use indicates the bracketed phrase “as to these elements” is used only for cases involving affirmative defenses upon which the defendant has the burden of proof. So it seems that neither instruction should have this last phrase “as to these elements.”

Does that make sense your honor?

The Court: Any comment, Mr. Burgess?

Mr. Burgess: I will defer to the Court. Just to make a record, Your Honor, Ms. Halvorson is correct that “as to these elements” bracketed information does have comment on it, so I will defer to the Court. I don’t believe that if we did remove it, it diminishes what the instruction is, the intent of the instruction.

The Court: Karen, can you white out just that last sentence.

RP 371.

It appears that both the State and the defense were in agreement that the last sentence of the instruction should have read, “the defendant has no burden of proving that a reasonable doubt exists.” Instead, however, the court on its own elected to remove the entire sentence for

unclear reasons. Neither party objected to the court's deletion of the entire sentence, but also had not requested the deletion of the entire sentence.

Nevertheless, the error appears to be harmless. The jury was instructed that the State has the burden of proving each element beyond a reasonable doubt. CP 12-39 (Instruction No. 2). The sentence that was deleted merely restated the converse of that principal. Defense counsel in his closing argument told the jury that as his client sat there at the time of closing, he was not guilty of both counts because they had not started deliberating. RP 405.³

4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO EXCUSE JUROR NO. 8 AFTER SHE STATED THAT SHE WAS AWAKE AND WAS OFFERED BREAKS.

A trial court has the duty to excuse a juror who is unfit for further jury service. RCW 2.36.110. Appellate courts review the trial court's determination of whether to dismiss a juror for abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P. 3d 217 (2009); *State v. Elmore*, 155 Wn.2d 758, 778, 123 P.3d 72 (2005). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

RCW 2.36.110 states:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has

³ As is common practice, the topic of burden of proof may have been discussed during voir dire, but transcripts of that proceeding were not provided by the appellant.

manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

While the trial court must have a hearing to consider dismissing a sitting juror, the trial court is not required to interview the juror who is the subject of the inquiry. In *State v. Jordan*, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), under RCW 2.36.110, a trial court properly removed a sitting juror who was sleeping during proceedings. The prosecutor had pointed out more than once to the court that the juror appeared to be sleeping. *Id.*, at 225. After declining the State's requests to remove the juror, the court itself observed the juror sleeping at different points during the trial and properly removed her for inattentiveness. *See Jordan*, at 230. The Court of Appeals specifically noted that the court did not err in failing to question the juror. *Id.*, at 228.

In the present case, the court properly exercised its discretion in declining to excuse Juror No. 8. The trial court actually observed the conduct of Juror No. 8 and is therefore in the best position to determine if she was a fit juror. The court never makes a finding that Juror No. 8 was sleeping. The court correctly observes that some jurors close their eyes in concentration. RP 282-283. It was Juror No. 8 herself that initially raised this issue to the court by self-reporting that she gets sleepy. RP 282. The juror indicated to the court that she could participate as a juror and that she had been taking notes. RP 285. On the second occasion where the issue

was raised, it was defense counsel only who reported that he believed the juror was sleeping. RP 342. This observation, however, appears to have been inconsistent with the court's own observations, which included a request by the juror to stand up. RP 343. Because the trial court was in the best position to observe the conduct of the juror, the trial court was able to determine that the juror was fit to continue as a juror. The trial court did not abuse its discretion in doing so.

5. LEGAL FINANCIAL OBLIGATIONS AND APPELLATE COSTS ARE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P. 2d 583 (1999). As the Court pointed out in *State v. Sinclair*, 192 Wn. App. 380, 612-613, 367 P.3d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See, also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976⁴, the Legislature enacted RCW 10.01.160, which permitted the trial

⁴ Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank, supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

Nolan, 141 Wn.2d 620, noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that “costs” did not include statutory attorney fees. *Keeney*, at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, at 624-625, 628.

In *Nolan*, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an

objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *Sinclair*, at *5, prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241-242. *See also State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See State v. Lundy*, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See State v. Woodward*, 116

Wn. App. 697, 703-704, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. See *Blank* at 236-237, quoting *Fuller v. Oregon*, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.*, at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.*, at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones,

should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” Obviously, all these defendants have been found indigent by the court. Under the defendant’s argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out at *5, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of “manifest hardship.” See RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant’s financial circumstances before exercising its discretion. Hopefully, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. Until such time as more and more trial courts make

such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

Here, the defendant appeared to be able-bodied and capable of working. The State has yet to “substantially prevail.” It has not submitted a cost bill. Any assertion that the defendant cannot and will never be able to pay appellate costs is belied by the record. This Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

For the above reasons, the State respectfully requests that the defendant’s convictions be affirmed.

DATED: April 19, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-19-16 Therese Kar
Date Signature

PIERCE COUNTY PROSECUTOR

April 19, 2016 - 11:37 AM

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