NO. 48362-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHANE MARTIN JONES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello, Judge

No. 15-1-00342-1

BRIEF OF RESPONDENT

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

1. Did the trial court properly admit evidence concerning a separate, non-convicted theft where surveillance footage showed an individual wearing the same distinct clothes that the defendant was wearing during the commission of the crime charged, with the same general build and features as the defendant, and where the trial court found that the defendant was the individual in the surveillance footage when such was admitted for the limited purpose of identification? (Appellant's Assignment of Error 1 & 2)

2. Should this Court make a determination at this point in time as to whether appellate costs are appropriate if the State seeks costs if the State prevails on appeal? (Appellant's Assignment of Error No. 2)

B. STATEMENT OF THE CASE.

1. Procedure

Shane Martin Jones, hereinafter "defendant," was charged with a violation of RCW 9A.52.030, burglary in the second degree, and with a violation of RCW 9A.56.020, RCW 9A.56.040, theft in the second degree. CP 5-6. Over the defendant's objections the trial court admitted, for the limited purpose of identity only, testimony and video surveillance evidence that showed the defendant shoplifting from an Albertson's

grocery store[1]. 10-20-15RP 100-109[2]. It was determined by the court that the man seen in the video for Incident 3 was wearing the same distinct clothing and had the same general features, including hair color and facial hair, as the burglar seen in a video for the burglary and theft from Incident 1. *Id.* Additionally, when the evidence was presented to the jury, the trial court gave the following limiting instruction, language of which was approved by the defense in its entirety:

> I am going to be allowing evidence to be presented to you regarding events occurring at an Albertson's grocery store. You may consider this evidence only for the purpose of evaluating the identity of the alleged burglar at the Olympic Pharmacy. You must not consider the evidence for any other purpose.

10-22-15RP 212-214.

A jury found the defendant guilty on both charges. CP 108-109. The trial court sentenced the defendant to a period of confinement totaling 68 months. CP 124-137.

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[1] There are three different incidents that occurred. They will be referred to in the same manner as the trial court referred to them. Incident 1 is the burglary and theft of the Olympic Pharmacy on January 1, 2015; Incident 2 is the contact of the defendant by Officer Dave Plummer and civilian Mavis MacFarlane on the morning of January 2, 2015; Incident 3 is the uncharged shoplifting from the Albertson's grocery store on the afternoon of January 3, 2015.

[2] The Verbatim Report of Proceedings is contained in seven volumes. The references to the VRPs will be by date that the testimony occurred. Some of the volumes have multiple dates contained within.

2. Facts

On January 1, 2015 at approximately 2:49 P.M, a burglar was seen on surveillance video climbing over the fence at the warehouse and yard portion of Olympic Pharmacy in Gig Harbor. 10-21-15RP 164. At approximately 4:11 P.M a video from a different angle shows a burglar leaving the property and in possession of the stolen items. 10-21-15RP 154, 161-166, 172-173, 175; Exh. P7-P9. The burglary continued to occur with the burglar removing items through at least 7:38 P.M that same day. 10-21-15RP 175; Exh. P7. The burglar was wearing a blue jacket with a grey hoodie and khaki-colored pants. Exh. P7-9.

The following day Pierce County Sheriff's Deputy Dave Plummer and a civilian, Mavis MacFarlane, both had contact with the defendant regarding a separate incident (Incident 2). 10-26-15RP 269, 274. MacFarlane testified that the clothes that the defendant was wearing when she saw him were consistent with the clothing that was seen in the surveillance video from Olympic Pharmacy. 10-26-15RP 275. The clothing the defendant was wearing when seen by MacFarlane were khaki pants and a blue or black jacket/shirt that had a light plaid pattern. 10-26-15RP 274-275. Further, MacFarlane testified that based upon the still photos that she saw from Incident 1, that the clothing was the same that she saw the defendant wearing on January 2 based upon the design of the shirt. 10-26-15RP 277.

Later that same day an individual wearing a blue jacket and khaki pants was seen at an Albertson's grocery store. 10-22-15RP 224. The front-end manager, Jaime Smith, reported that she saw the individual walk out of the store without paying. 10-22-15RP 225. Smith saw the individual load the merchandise into his car and then get into the vehicle on the passenger side. 10-22-15RP 226. At that point she wrote down the license plate number, called the police, and provided them with the license plate number. 10-22-15RP 227. Officer Dan Welch of the Gig Harbor Police Department testified that the license plate provided by Smith belonged to a vehicle belonging to an Aaron Jones. 10-22-15RP 216. Aaron Jones was determined to be the brother of the defendant. *Id.*

On January 5, 2015, Dylan Parrish, the mobile mechanic for Olympic Pharmacy returned to work following his holiday break. 10-21-15RP 140. On that day other employees of the Olympic Pharmacy informed Parrish that the tools from his work truck were not where he had left them prior to the holiday break. 10-21-15RP 140-141. Upon further investigation, Parrish noticed that the truck had been ransacked and that various items from his toolbox and other valuable equipment, including power tools and wheelchair programmers were either missing or out-of-place. 10-21-15RP 142-143. The total value of all of these materials was over $1500. *Id.*

During the early part of January, Pierce County Sheriff's Deputy Dan Wulick saw a bulletin about the Olympic Pharmacy burglary and

theft. 10-21-15RP 188-189. Based upon previous interactions with the defendant, Deputy Wulick recognized the individual in the bulletin and was able to make a positive identification of the burglar in the bulletin as being the defendant. 10-21-15RP 189. In particular Deputy Wulick identified the burglar in the bulletin as the defendant based upon the facial features of the burglar. 10-21-15RP 190.

Three weeks later on January 26, 2015, Gig Harbor Police Officer Michael Cabacungan happened to see the defendant and was aware that he was a suspect in the Olympic Pharmacy burglary. 10-22-15RP 244-245. Officer Cabacungan attempted to contact the defendant, but by the time that he had completed a U-Turn to make contact with the defendant the defendant was gone. 10-22-15RP 244-245. The officer was able to locate the residence where the defendant had gone approximately ten minutes later. 10-22-15RP 245. After receiving permission to enter the residence, Officer Cabacungan found the defendant hiding under a bed. 10-22-15RP 245-246. The defendant did not cooperate with Officer Cabacungan and as many as six police officers had to remove a mattress to physically take the defendant into custody. 10-20-15RP 90, 10-22-15RP 246. The defendant was informed that he was under arrest for the Olympic Pharmacy burglary

and was subsequently given his *Miranda*[3] warnings. 10-22-15RP 247. When the defendant was shown still photographs taken from the surveillance video from the Olympic Pharmacy robbery he stated "That's not me, but I want to make a deal." 10-22-15RP 248.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE FOR THE LIMITED PURPOSE OF ESTABLISHING THE DEFENDANT'S IDENTITY WHEN AN INDIVIDUAL MATCHING THE DEFENDANT'S DESCRIPTION WAS SEEN WEARING THE SAME CLOTHES AS THE BURGLAR FROM THE OLYMPIC PHARMACY ROBBERY.

Evidence Rule 404(b) states that

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person...however it may be admissible for other purposes, such as motive, opportunity, intent, preparation, plan, knowledge, *identity*, or absence of mistake or accident." (emphasis added).

ER 404(b). First, in the present case, the Court is considering whether the evidence in question in admissible under the identity exception. Second, even if the court were to find that the evidence was admitted in error, it was harmless.

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[3] ***Miranda v. Arizona*** 384 U.S. 436, 86 S. Ct. 1602 (1966).

a. The court properly admitted the surveillance video from the Albertson's incident for the limited purpose of identification because such showed the defendant wearing the same clothes as the individual in the Olympic Pharmacy burglary and matched what the defendant had been seen wearing at an earlier contact the same day.

Before admitting evidence of misconduct under ER 404(b) the trial court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for admitting the evidence; (3) determine the relevance of the evidence to prove an element of the charged crime; and (4) weigh the probative value against its prejudicial effect. ***State v. Gresham*** 173 Wn.2d 405, 421, 269 P.3d 207 (2012). In this case all four of the elements are met.

First, when making its ruling, the trial court specifically found by a preponderance of the evidence that the individual that was involved in Incident 2 was the defendant. 10-20-15RP 105. Second, the trial court found that the purpose of admitting the evidence was to show "the marked similarities or identical nature of [the defendant's] clothing" and how this was relevant and probative regarding identity. 10-20-15RP 107. Third, the court determined that the evidence was relevant in order to determine the identity of the thief from Incident 1. 10-20-15RP 100, 107. Fourth, the

court noted that the probative value would be strong because of how the jacket or shirt in the video was "quiet distinctive." 10-20-15RP 107.

The court noted that none of the articles of clothing seen in the video by themselves would be a powerful link, but that all three articles of clothing worn together for all three incidents had a strong probative value. *Id.* The two instances the day following the Olympic Pharmacy burglary have a strong probative value towards identifying the defendant as the individual seen in the surveillance videos from the burglary. *Id.* Additionally, the trial court found that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. 10-22-15RP 109.

An appellate court will not disturb a trial court's ruling under ER 404(b) unless there is a manifest abuse of discretion so that no reasonable judge would have ruled the same way. ***State v. Sublett*** 156 Wn. App. 160, 195, 231 P.3d 231 (2010). Further, the State must show by a preponderance of the evidence that it was the defendant that committed the uncharged act. ***State v. Stein*** 140 Wn. App 43, 66 fn. 19, 165 P.3d 16 (2007). Here, the trial court properly exercised its discretion when it admitted the video evidence from Incident 3 for the limited purpose of identity. The court noted that based upon the motions submitted, oral arguments over the course of two days, and the evidence presented by the

State, including watching the video surveillance footage from Albertson's, showed by at least a preponderance of the evidence that the person seen in the surveillance video left Albertson's without paying for the items. 10-20-15RP 99-101. The State met its burden by providing sufficient evidence necessary to show by a preponderance of the evidence that the thief[4] in the video for Incident 3 was the defendant.

While the video from Incident 3 by itself did not show that the defendant was the burglar from the video in Incident 1, the court was able to make its determination as the clothes worn were similar to clothes that the defendant had previously been seen wearing, the hair color of the thief in the Albertson's surveillance video matched the defendant's hair color, and the thief entered the passenger side of a car registered to the defendant's brother. 10-20-15RP 101-105. Based upon the clothing that was worn by the thief in the shoplifting incident, the hair color and facial features of the thief, and the fact that the thief got into a car registered to the defendant's brother, the court was able to conclude that the thief in the Albertson's surveillance video is the defendant. 10-20-15RP 107-108. The trial court met all of the requirements in order to allow for the evidence to be presented for the limited purpose of identification. Just because there

[4] The trial court referred to the individual seen in the surveillance video as a thief and for consistency purposes the same phrasing will be utilized. 10-22-15RP 104.

was a lapse in time between Incident 1 and Incident 3 does not mean that the evidence is not admissible. Rather, a lapse in time goes to the weight of the evidence. ***State v. Burgess*** 43 Wn. App. 253, 265, 716 P.2d 948 (1986).

The fact that the thief seen on the Albertson's surveillance video was wearing a blue jacket and khaki pants was highly probative for identifying the defendant. 10-22-15RP 224. The probative value of the evidence is only increased as the thief was seen getting into to a vehicle belonging to the defendant's brother. 10-22-15RP 216. Clothing that the thief in the Albertson's video was wearing is nearly identical to the identifications of what the defendant was wearing during both Incident 1 and Incident 2. First, during the Olympic Pharmacy burglary and theft (Incident 1), the burglar was identified as wearing a blue jacket with a grey hoodie and khaki-colored pants. Exh. P7-9. Second, during Incident 2 MacFarlane identified the defendant as wearing a blue or black jacket/shirt and khaki pants that had a light plaid pattern. 10-26-15RP 274-275. Deputy Plummer, identified the individual that MacFarlane spoke to during Incident 2 as the defendant. 10-26-15RP 269. MacFarlane identified the burglar from Incident 1 as wearing the same clothing that she saw the defendant wearing on January 2. 10-26-15RP 277. This identification was made based upon the design of the shirt. *Id.* All of the evidence showed consistencies between what the defendant was wearing

on January 2, based on the eye-witness identification by MacFarlane, and what the burglar in Incident 1 and the thief in Incident 3 were identified as wearing based on the respective stores' video surveillance systems. All of the evidence presented permits the jury to identify the defendant as the burglar from Incident 1. The probative value of such was that a jury could determine that it was the defendant wearing the blue jacket and khaki pants during the burglary and theft at the Olympic Pharmacy based upon the clothing consistencies between all three incidents.

Defense counsel erroneously relies on ***State v. Calegar*** 133 Wn.2d 718, 947 P.2d 235 (1997), ***State v. Perrett*** 86 Wn. App. 312, 936 P.2d 426 (1997), and ***State v. Newton*** 109 Wn.2d 69, 743 P.2d 254 (1987) to support their position that previous evidence of convictions and prior crimes is inadmissible evidence. All three cases have major factual dissimilarities to the current case before this Court. First, the defendant was not convicted of a crime resulting from the Albertson's theft[5]. 10-19-15RP 36. Second, both ***Calegar*** and ***Newton*** are cases that deal with impeachment and a defendant's credibility regarding such. Each case is focused on ER 609. There is currently no challenge under ER 609 issue before this Court as the issue surrounding this case is based upon an

[5] The defendant was charged for Theft in the Third Degree for the Albertson's theft, though the charges were ultimately dismissed. Testimony did not mention the defendant being charged for the theft, only that a shoplifting incident had occurred and the suspect was identified as wearing the same clothes that the defendant was wearing on January 2. 10-19-15RP 36.

alleged ER 404(b) violation. In fact, the defendant never took the stand in his defense in this matter and therefore, there could not have been an ER 609 violation. 10-26-15RP 277-280.

Perrett is also inapplicable in this matter. ***Perrett*** deals with the limited issue of statements by the defendant regarding past actions at the time of an arrest for an unconnected crime. Nowhere in ***Perrett*** is a 404(b) issue even considered. Additionally, the reason the State attempted to bring in the evidence of past misconduct in ***Perrett*** was to show the defendant's demeanor. Here, the State did not bring in evidence of the Albertson's theft to show a general demeanor, but rather for identification.

Defense also cites ***State v. Pam*** 98 Wn.2d 748, 659 P.2d 454 (1983) and ***Newton***, again to argue that the potential for prejudice is higher where a prior act is identical to a current charge. However, ***Pam***, like ***Newton***, was a case that focused on an ER 609 issue. In a limited portion of the opinion (two paragraphs in a twelve page majority opinion) which discussed 404(b), the Supreme Court found that an identification that occurred due to the defendant having spent time in jail was admissible evidence for purposes of identification. ***Pam*** 98 Wn.2d at 760. Also, the portion of the opinion that the defense cites is part of the concurrence, not the majority. Therefore, it can only be considered persuasive, and not binding authority. ***Pam*** 98 Wn.2d at 761-762. Moreover, ***Pam*** was overruled by ***State v. Brown*** 113 Wn.2d 520, 542-543, 782 P.2d 1013 (1989). As to ***Newton***, the quote that defense relies upon is incomplete as

quoted. The quote goes on from what defense cited to state:

> one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity.

Newton 109 Wn.2d at 77 (quoting ***Gordon v. United*** States 383 D.2d 936, 940 (D.C. Cir. 1967)).

In this case, the trial court only admitted one incident of past misconduct that was not even a conviction. Further, the circumstances indicated a strong reason for the disclosure. Admission of the evidence was used to show how the clothing that the defendant was wearing at the time of the Olympic Pharmacy burglary and theft was the same as what he was wearing during Incident 2.

In the past, courts have found that similarities in identifiable evidence are enough for the identity exception of 404(b) to apply. In ***State v. Dennison*** 115 Wn.2d 609, 620, 801 P.2d 193 (1990) the Supreme Court found that a photograph of a pillowcase found at the defendant's home from a prior investigation could be admitted to show that a similar pillowcase found at a murder scene connected the defendant to the murder scene. The Court noted that the similarities between the two pillowcases was relevant evidence to link the defendant to the alleged murder. Here, the defendant was seen wearing the same outfit in multiple incidents. Such

a showing of evidence is more likely to prove the identity of the defendant than a pillowcase.

b. Even if evidence was impermissibly admitted the error was harmless as it did not materially affect the outcome of the trial.

Evidence admitted in violation of ER 404(b) is always analyzed under the non-constitutional standard. ***State v. Gower*** 179 Wn.2d 851, 321 P.3d 1178 (2014). A non-constitutional error requires reversal only if there is a reasonable probability that the error materially affected the outcome of the trial. ***State v. Kindell*** 181 Wn. App. 844, 853, 326 P.3d 876 (2014). In determining whether an error by the trial court was harmless an appellate court must measure the admissible evidence of the defendant's guilt against the prejudice, if any, caused by the inadmissible evidence. ***State v. Barry*** 183 Wn.2d 297, 303, 352 P.3d 161 (2015). Additionally, such evidence is harmless if it is of minor significance compared to the overwhelming evidence taken as a whole. ***State v. Bourgeois*** 133 Wn.2d 389, 402, 945 P.2d 1120 (1997).

In this case, the overwhelming evidence showed that the defendant was guilty, even if the evidence from Incident 3 had not been admitted. First, Officer Wulick, upon seeing a bulletin of the Olympic Pharmacy burglary was able to positively identify the burglar in the photo on the bulletin as being the defendant. 10-21-15RP 188-190. Officer Wulick was able to make this identification based upon the facial features of the

burglar in the photo. *Id.* Due to previous interactions with the defendant, Officer Wulick was able to identify the defendant and relayed that information to other officers. *Id.* Second, based upon photographs, MacFarlane identified the individual involved in the Olympic Pharmacy burglary as wearing the same clothes that she saw the defendant wearing on January 2. 10-26-15RP 275-277. MacFarlane further testified that when she saw the defendant he was wearing a darkish blue or black shirt and khaki pants. 10-26-15RP 275. Third, upon being confronted with photo stills from the Olympic Pharmacy burglary and theft, the defendant stated to Officer Cabacungan "That's not me, but I want to make a deal." 10-22-15RP 248.

Based upon these three additional pieces of evidence a jury could conclude that the defendant was the individual who burglarized the Olympic Pharmacy. Officer Wulick was able to identify the suspect from a photo alone based on previous interactions with the defendant. 10-21-15RP 188-190. MacFarlane was able to match the clothing that the defendant was wearing on January 2 to the clothes that she was shown that the defendant was wearing at the time of the burglary. 10-26-15RP 275-277. Finally, upon being arrested the defendant made it clear that he wanted to make a deal. 10-22-15RP 248. A jury could have concluded that the defendant was guilty even without the video from Incident 3. The evidence of identification was overwhelming. As such, the evidence from

Incident 3 did not materially affect the outcome of the trial and therefore any resulting error is harmless.

2. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS

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). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000).

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 ***State v. Sinclair***, 192 Wn. App. 380, 389-390, 367 P. 3d 612 (2016), prematurely raises an issue that is not before the Court. *If* the defendant does not prevail; and *if* the State files a cost bill; the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

> A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant argues that the Court should not impose costs on indigent defendants. App. Brf. at 12. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, RCW 10.01.160(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).

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.

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). 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, ***Blazina*** does not apply to appellate costs. As ***Sinclair*** points out at 389, the Legislature did not include the "individual financial circumstances" 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).

The Legislature's intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW 10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In ***Blank***, *supra*, at 242, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as much as 12%. *Id.* RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

> (2) The court may, on motion by the offender, following the offender's *release from total confinement*, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090 (emphasis added). The rest of the "relief" is equally limited and demonstrative of the Legislature's intent and presumption that the debts be paid:

> (a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family*;
> (b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;
> (c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period,* excluding any payments mandatorily deducted by the department of corrections;
> (d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations*. The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2) (emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A, the Sentencing Reform Act, and most recently amended in 2015.

The unfortunate 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. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

Parties and the courts can criticize this legislation, its purpose and result, and that the debts accumulated by indigent defendants under RCW 10.73.160(3) (and 10.01.160) and the interest that accrues on it under RCW 10.82.090 and RCW 4.56.110 are onerous. The parties may even be in agreement in their criticism. In ***Blazina*** the Supreme Court was likewise critical of these statutes and their result. *See* 182 Wn.2d at 835-836. Yet, the Court did *not* find the statutes illegal or unconstitutional.

The question for this Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in ***Blank***, and what the Court did *not* do in ***Blazina***. It is for the Legislature to change the statute if it so desires.

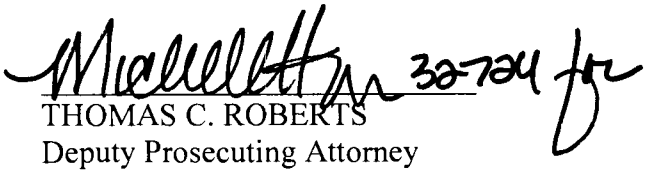
D. CONCLUSION.

The court below properly admitted evidence regarding a shoplifting incident at an Albertson's grocery store for the limited purpose of identification of the defendant. The trial court made it clear that they found by a preponderance of the evidence that the defendant was the individual identified in the surveillance video, the evidence was being admitted for the limited purpose of identification, and a limiting instruction was provided to the jury. The evidence presented demonstrated that the identification of the defendant due to his clothing was consistent with what he was seen wearing on other occasions. Even if this Court finds that the evidence admitted was in error, such was harmless as it did not materially affect the outcome of the trial because the other evidence presented would have allowed for a reasonable jury to find the defendant

guilty. Further, the Court should address the issue of appellate costs only if the State prevails and seeks enforcement.

DATED: July 11, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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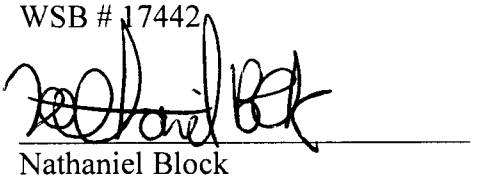
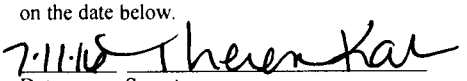


Nathaniel Block
Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. 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.



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Case Name: State v. Jones
Court of Appeals Case Number: 48362-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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