FILED
8/28/2017 2:48 PM
Court of Appeals
Division III
State of Washington

Supreme Court No. ________________
Division III, No. 34059-7-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN LOPEZ,

Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Judge Vic Vanderschoor

PETITION FOR REVIEW

Kristina M. Nichols, WSBA #35918
Nichols and Reuter, PLLC
Eastern Washington Appellate Law
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
admin@ewalaw.com

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER ...…………………… ……….....1

B. DECISION ON REVIEW……………………...……………..…1

C. ISSUES PRESENTED FOR REVIEW…………………...…....1

D. STATEMENT OF THE CASE………………………………..…...1

E. ARGUMENT………………………………………………….……..

Issue 1: Whether this Court should accept review under RAP 13.4(b), because the defendant was denied his right to a fair trial when the prosecutor quantified the burden of proof by describing the beyond a reasonable doubt standard as "more than 50 percent but it's not a 100 percent."……………...4

Issue 2: Whether the Court of Appeals' decision to affirm legal financial obligations of $3,112.44 against this indigent defendant conflicts with decisions of this Court and other Courts of Appeal and merits review as a matter of substantial public interest…………………………………...12

Issue 3: Whether, in the event appellate costs are imposed, this Court should accept review pursuant to RAP 13.4(b)(1), (2), and/or (4)……………………………..15

F. CONCLUSION……………………..…………………………18

Washington Supreme Court

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)………………12-17

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995)…………………..6

State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014)…………....7, 9, 10

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011)………………..6, 7

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)…………………….5

Washington Court of Appeals

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996)……………...10

State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012),
review denied, 176 Wn.2d 1006 (2013)……………………………….9, 10

State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010)……….5, 10, 11

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013)……….……13, 14

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, 618 (2016)…………15

Washington Constitution and Court Rules

Division III's General Court Order issued on June 10, 2016………..15, 16

GR 34…………………………………………………………...13, 17

RAP 13.4(b)……………………………………………………*passim*

RAP 15.2(f)……………………………………………………………17

RCW 9.94A.760(1)……………………………………………………13

RCW 10.01.160………………………………………………………13

RCW 10.73.160………………………………………………………16

Wash. Const. art. I, §22. ……………………………………………..4, 5

Federal Authorities

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781,
61 L.Ed.2d 560 (1979)……………………………………………………….5

U.S. Const. Amends. VI, XIV………………………………….........4, 5

A. IDENTITY OF PETITIONER

Petitioner Adrian Lopez asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction of two counts of rape of a child and one count of child molestation.

B. DECISION FOR WHICH REVIEW IS SOUGHT

Mr. Lopez seeks review of the Court of Appeals, Division III, unpublished opinion filed on August 1, 2017. A copy of the unpublished opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court should accept review under RAP 13.4(b), because the defendant was denied his right to a fair trial when the prosecutor quantified the burden of proof by describing the beyond a reasonable doubt standard as "more than 50 percent but it's not a 100 percent."

Issue 2: Whether the Court of Appeals' decision to affirm legal financial obligations of $3,112.44 against this indigent defendant conflicts with decisions of this Court and other Courts of Appeal and merits review as a matter of substantial public interest.

Issue 3: Whether, in the event appellate costs are imposed, this Court should accept review pursuant to RAP 13.4(b)(1), (2), and/or (4).

D. STATEMENT OF THE CASE

Petitioner Adrian Lopez (DOB: 2-7-1991) lived periodically with his father and stepmother starting in 2009. RP 117-19, 143. In 2013, Mr. Lopez's step-sister I.G. (DOB: 12-20-2002), who lived in the home as well, told her mother and step-father that Mr. Lopez had touched her inappropriately two years before. RP 146. Law enforcement investigated, but no physical evidence corroborated the allegations, and no one had

witnessed the alleged incidences. RP 98. Nonetheless, I.G. said that, over the span of a couple of months during the summer of 2011, her brother had inserted his fingers in her vagina one time, encouraged her to put her mouth on his penis on another occasion, and touched her vagina over her clothing once. RP 79-80, 145, 175, 177, 183-86, 199, 217.

The evidence against Mr. Lopez relied on I.G.'s testimony (and the testimony of family members and law enforcement to whom I.G. had repeated her allegations). RP 98. While I.G. testified to the allegations, there were also inconsistencies that may have created reasonable doubt in the minds of jurors in this case. For instance, after the summer of 2011, Mr. Lopez acted as I.G.'s babysitter without incident, family members did not see I.G. behave reluctantly around Mr. Lopez, and I.G. appeared excited and unafraid when seeing her brother. RP 133-35, 159-63, 168, 215-16, 224, 226. The adult family members were divided as to whom to believe in this case. *See id*. Also, I.G.'s descriptions of the various touching incidences varied between her multiple interviews that took place from 2013 through 2015. RP 43, 67, 107-08, 178, 203-12, 230-32, 271-76, 281. A detective confirmed there was no physical or other first-hand evidence to corroborate the child's allegations. RP 47, 58, 60, 88, 98 ("[Defense counsel:] The only thing we know is [I.G.] said it happened and that's it? [Detective:] Correct." RP 98.) A first jury was unable to reach a unanimous verdict based on the evidence against Mr. Lopez. CP 119.

A second trial was held in December 2015. During closing arguments, the prosecutor described the State's burden of proof in pertinent part as follows:

> The State has the burden of proof… Every element of every crime beyond a reasonable doubt. It's a burden I accept and a burden I welcome. It's a high burden. <u>It's more than 50 percent but it's not a 100 percent.</u> The reasonable doubt doesn't mean beyond all doubt or a shadow of a doubt but beyond a reasonable doubt…

RP 248 (emphasis added).

This time, the jury returned a verdict, finding Mr. Lopez guilty of two counts of first-degree rape of a child and one count of child molestation. RP 294; CP 193-95. Mr. Lopez, who had no criminal history, was sentenced to a minimum standard range indeterminate sentence of 162 months to life. CP 227, 232. Despite Mr. Lopez's indigent status on the day of sentencing (CP 246-48), the trial court imposed total mandatory and discretionary costs of $3,112.44 after confirming the defendant was physically able to work (2RP 11). CP 228-29. The Court of Appeals affirmed the trial court costs but deferred its decision on appellate costs to a commissioner of the Court, which is currently pending (with appellate costs sought of $4,591.15). See Division III's Slip Opinion at pg. 15 (August 1, 2017).

Mr. Lopez herein timely seeks review of the Court of Appeals' decision.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Issue 1: Whether this Court should accept review under RAP 13.4(b), because the defendant was denied his right to a fair trial when the prosecutor quantified the burden of proof by describing the beyond a reasonable doubt standard as "more than 50 percent but it's not a 100 percent."

Review by this Court is necessary because the Court of Appeals' decision conflicts with federal and state constitutions, decisions of this Court and decisions of other Courts of Appeal, which hold that a prosecutor's quantifying of the State's "beyond a reasonable doubt" standard denies a defendant a fair trial. The Court of Appeals' decision conflicts with existing law that specifies a more heightened standard of review must be applied when a prosecutor's misconduct infringes on significant constitutional rights, meriting review under RAP 13.4(b)(1)-(3). Also, it is in the public's interest to know whether a mere 51 percent of proof – as suggested by this case – would satisfy the State's high burden of proof in criminal matters. RAP 13.4(b)(4).

Defendants in criminal matters have the constitutional right to due process and a fair trial. U.S. Const. Amends. VI, XIV; Wash. Const. art. I,

§22. Among these constitutional protections is for the State to prove each element of the charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 22; *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). This presumption of innocence makes up the "bedrock principle upon which our criminal justice system stands." *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010).

A prosecutor's misstatement of the State's burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Johnson*, 158 Wn. App. at 685-86. In *State v. Johnson*, the Court of Appeals reversed the defendant's conviction when the prosecutor improperly quantified the State's burden of proof by stating, "You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma." *Id.* The court explained the prosecutor's arguments trivialized the State's burden and focused on the degree of certainty the jurors needed to act. *Id.* at 685. The court reversed the conviction, holding "a misstatement about the law and the presumption of innocence due a defendant… constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights.'" *Id.* at 685-86.

Contrary to Division III's analysis, the issue here cannot be decided simply by reviewing classic prosecutorial misconduct standards – i.e.,

reviewing for whether flagrant and ill-intentioned misconduct had a substantial likelihood of incurably affecting the jury's verdict. Slip Opinion pg. 6-7 (The Court of Appeals described this issue as "problematic," but ultimately found the prosecutor's remarks were not sufficiently "flagrant and ill-intentioned" to result in enduring prejudice that could not be cured by a proper objection and jury instruction). Division III's Slip Opinion at pgs. 6-7 (August 1, 2017) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)).

Instead, contrary to Division III's analysis, the issue presented herein involves the deprivation of the defendant's right to a fair trial, which requires a heightened standard of review under a constitutional error test. *State v. Monday*, 171 Wn.2d 667, 679-80, 257 P.3d 551 (2011). In other words, the Court of Appeals failed to apply the correct test for prosecutorial misconduct that also violates constitutional rights. The question is not simply whether the misconduct affected the jury's verdict or whether the prejudice could have been neutralized by a curative instruction to the jury; instead, a new trial is required unless the flagrant or intentional constitutional error was harmless beyond a reasonable doubt. *Monday*, 171 Wn.2d at 679-80.

In *State v. Monday, supra*, the prosecutor committed flagrant, improper misconduct by injecting racial prejudice into the trial proceedings. 171 Wn.2d at 678. The Supreme Court held the prosecutor's misconduct was a violation of our State constitution, article I, section 22, and the Sixth Amendment. *Id*. at 680. As such, the Court rejected the State's argument

that Monday must show a substantial likelihood the misconduct affected the verdict and that the conduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. *Id*. at 679. Instead, because the misconduct involved constitutional error, this Court stated it "must apply other tested and proven tests." *Id*. at 680. That is, "constitutional harmless error" test applies. *Id*. "Under that standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict." *Id*.

Here, the Court of Appeals failed to review the prosecutor's statements under a constitutional harmless error analysis. Had the Court done so, it would have been clear that a new trial is required in this case due to the flagrantly improper and unconstitutional quantification of the State's burden of proof, as will be addressed further below.

Besides applying a less-stringent test to the issue at hand than is required by our state and federal constitutions (which also conflicted with this Court's decision in *Monday, supra*), the Court of Appeals' decision merits review as it conflicts with other appellate decisions in this state regarding the quantification of the beyond a reasonable doubt standard. The Court of Appeals acknowledged it would be inappropriate for a prosecutor to quantify the beyond a reasonable doubt standard. Division III's Slip Opinion at pg. 6 (August 1, 2017), citing *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014)). But it then held the prosecutor's statement about the burden of proof

being “more than 50 percent but it’s not a 100 percent” (RP 248) “could not be construed as suggesting that 50 percent is enough to satisfy the beyond a reasonable doubt standard” (Slip Opinion, pg. 6). The Court of Appeals held the prosecutor’s statement was not an attempted quantification, although it did “strongly discourage arguments that apply numerical concepts to the burden of proof beyond a reasonable doubt.” Slip Opinion pg. 6 n.3.

The Court of Appeals’ decision that the prosecutor’s statements did not constitute a quantification of the State’s burden of proof ignores the plain language of the prosecutor’s statement. The prosecutor very succinctly and directly stated,

> The State has the burden of proof… Every element of every crime beyond a reasonable doubt. It’s a burden I accept and a burden I welcome. It’s a high burden. <u>It’s more than 50 percent but it’s not a 100 percent.</u> The reasonable doubt doesn’t mean beyond all doubt or a shadow of a doubt but beyond a reasonable doubt…

RP 248 (emphasis added). As a lay juror hearing this description of the State’s burden of proof, it was axiomatic that a verdict of guilty may be reached where the jury is convinced somewhere between 50 percent and 100 percent. By implication, a level of proof of something more than 50 percent may be enough to convict a defendant beyond a reasonable doubt. It is inconceivable how this description of the burden of proof would escape being characterized as a quantification. The Court of Appeals may be correct that the prosecutor’s statements “could not be construed as suggesting that “50 percent” is enough to satisfy the beyond a reasonable doubt standard. Slip Opinion, pg. 6. But, contrary to Division III’s decision, the prosecutor’s

statements could certainly be construed as suggesting that **50.1** percent is sufficient, since the prosecutor stated that something "more than 50 percent" is required. RP 248.

This Court has made it clear "that the quantifying of the standard of proof" by referring to particular numbers or percentages is improper. *Lindsay*, 180 Wn.2d at 436. In *State v. Lindsay*, the prosecutor stated, "you put in about 10 more pieces and see this picture of the Space Needle. Now, <u>you can be halfway done with that puzzle</u> and you know beyond a reasonable doubt that it's Seattle. <u>You could have 50 percent</u> of those puzzle pieces missing and you know it's Seattle." *Id*. at 436 (emphases added). The Court reversed in *Lindsay* where there was a reference to the number or percentage for proof that could satisfy the State's burden. *Id*. The Court explained that a prosecutor commits misconduct by quantifying the level of certainty necessary the minimum threshold of the beyond a reasonable doubt standard. *Id*. *See also State v. Fuller*, 169 Wn. App. 797, 827, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013) (A prosecutor commits misconduct by attempting to "quantif[y] the level of certainty required to satisfy its burden of proof.")

The quantification of the burden of proof in this case was even more obvious than in *Lindsay* and *Fuller*, *supra*, where the prosecutors made puzzle analogies that also happened to reference a percentage of proof. Here, there was no puzzle analogy. Instead, the prosecutor made a direct quantification that was not even hidden within a puzzle analogy; the

quantification in this case could be considered even more egregious than that in other cases reviewed by this Court. Here, the prosecutor directly stated that the burden of proof is "more than 50 percent but it's not a 100 percent." So, if a juror was convinced by slightly more than half, he could feel confident returning a verdict of guilty. This type of quantification would turn the beyond a reasonable doubt standard on its head from the common understanding of what proof is required to overcome the presumption of innocence, an issue that is substantially in the public interest.

Finally, had the Court of Appeals viewed the issue in light of proper heightened constitutional standards, and had it acknowledged the statements about quantification as improper, reversal would have resulted because the flagrant misconduct was not harmless beyond a reasonable doubt.

First, the prosecutor's conduct was indeed flagrant, as there was an abundance of case-law prior to the trial warning the prosecutor that this type of quantification of the State's burden of proof is constitutional error. *See e.g., Johnson*, 158 Wn. App. at 685; *Lindsay*, 180 Wn.2d at 436; *Fuller*, 169 Wn. App. at 827 (all holding that the quantification of the State's burden of proof constitutes error). *And see State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (finding a prosecutor's arguments could be considered flagrant and ill-intentioned where published case law had previously recognized those same arguments as improper).

Regardless, even if there had not been an abundance of published case law deeming the same types of arguments unconstitutional, the error that

occurred in this case demands a new trial due to the unconstitutional erosion of the defendant's presumption of innocence. *See e.g. Johnson*, 158 Wn. App. at 685-86 (regardless of previous published case law, the court found flagrant misconduct by applying a constitutional harmless error analysis. After considering the conflicting evidence and the misstatement of the reasonable doubt standard in that case, the court reversed because it could not conclude the misstatements did not affect the jury's verdict.)

Here, the law was well settled that it is constitutional error for a prosecutor to quantify the State's burden of proof by reference to a particular percentage or number. The prosecutor's comments were, thus, flagrant. Regardless, like in *Johnson, supra*, a constitutional analysis of this issue considers the evidence in the case and reverses where the reviewing court cannot conclude that the misconduct affected the jury's verdict. In this case, the evidence was certainly conflicted, to say the least. A prior jury was unable to reach a verdict. Adult family members were divided on whether to believe I.G. or Mr. Lopez. Law enforcement confirmed there was no corroborating evidence and the proof in this case came down to deciding whether to believe the child's accusations from years prior. The child's description of the details of the events changed over the course of several interviews through the years. I.G. did not make her accusations until years after the alleged events, and she was seen behaving normally – and even excitedly – when Mr. Lopez was present, despite the egregious allegations she made against him. The evidence was certainly not overwhelming. The

State cannot carry its burden of establishing that the misstatement of the reasonable doubt standard had no affect on the jury's verdict.

Based on the foregoing, the Court of Appeals' decision merits review in this case pursuant to RAP 13.4(b)(1)-(4).

Issue 2: Whether the Court of Appeals' decision to affirm legal financial obligations against this indigent defendant conflicts with decisions of this Court and other Courts of Appeal and merits review as a matter of substantial public interest.

The Court of Appeals held the trial court did not abuse its discretion by imposing legal financial obligations (LFOs) against Mr. Lopez, because Mr. Lopez had a history of working for several years and supporting himself and voluntarily supporting others. Slip Opinion, pg. 15. The Court of Appeals noted that Mr. Lopez was not found indigent until after sentencing, so the trial court's decision to impose LFOs was tenable.[1] However, the trial court did not make an adequate inquiry into Mr. Lopez's <u>present</u> or <u>likely future</u> ability to pay prior to imposing LFOs, as it is required to do, and it improperly relied upon his past means that no longer existed by the time of sentencing. The imposition of discretionary costs of $2,362.44 against this indigent defendant who faces 13 years of incarceration as an indigent person (while the interest accrues on his LFOs) violates the principles enumerated in *State v. Blazina*, *infra*, and its progeny. Review of this issue is warranted pursuant to RAP 13.4(b)(1), (2), and (4).

---

[1] Technically, Mr. Lopez was found indigent the same day as sentencing. CP 225, 247-48. Certainly his financial means were not greater in the moments preceding sentencing, as opposed to directly after sentencing when the order of indigency was entered.

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). "Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant's present or likely future ability to pay." *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). The applicable statute states:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court *shall* consider the defendant's current or future ability to pay and the burden that payment will impose based on the particular facts of the defendant's case. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). "[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." *Id*. (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets "the GR 34 standard of indigency, courts should seriously question that person's ability to pay LFOs." *Id*. at 839.

If LFOs are imposed, the record must reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability

to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Blazina*, 182 Wn.2d at 837–39. This inquiry requires the court to consider important factors, such as incarceration and a defendant's other debts, including any restitution. *Id*. at 838-39 ("[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." (quoting RCW 10.01.160(3)).

Here, the trial court's finding that Mr. Lopez had the current or likely future ability to pay LFOs was clearly erroneous. *Lundy*, 176 Wn. App. at 105 (setting forth this standard of review where a specific finding is made on the ability to pay discretionary court costs). Even if Mr. Lopez was capable of physical work, and had done so in the past so that he was able to support himself and others, this information would not support the conclusion that Mr. Lopez was able to pay costs at the time of sentencing or in the future. Indeed, by the time of sentencing, Mr. Lopez could no longer afford private counsel and his assets had essentially been consumed. The court's finding otherwise is inconsistent with the evidence before the court. The trial court neglected to "seriously question" this indigent defendant's ability to pay LFOs prior to imposing them.

Moreover, there is a substantial public interest in not imposing LFOs against defendants like Mr. Lopez who are and will likely be unable to repay the debt. Imposing LFOs in such circumstances has a detrimental effect on society as a whole. Indeed, as this Court acknowledged in *State v. Blazina,*

based on reports published by the ACLU, imposing LFOs in cases like this makes it more difficult for the offender to successfully reenter society, increases the likelihood that he will reoffend or be re-incarcerated for inability to pay, and increases the burden on the government as expenditures are made to collect a debt that has a low-likelihood of successful collection. 182 Wn.2d at 834-37. LFO debts in this type of situation, particularly those growing at a rate of twelve percent interest, necessitate court oversight for long periods after release, having a negative impact on employment, housing and rehabilitation. *Id*. There is a substantial public interest in accepting review of the Court of Appeals' decision on financials in this case.

In sum, the trial court here did not consider the policy issues involved above, let alone make the individualized inquiry of Mr. Lopez's financial abilities and burdens, when it ordered thousands of dollars against the defendant in LFOs. The court failed to "seriously question" Mr. Lopez's ability to pay where, by the day of sentencing, he was clearly indigent. *Blazina*, 182 Wn.2d at 838-39. The Court of Appeals' decision to affirm the imposition of LFOs in this case merits review under RAP 13.4(b)(1), (2), and (4).

Issue 3: Whether, in the event appellate costs are imposed, this Court should accept review pursuant to RAP 13.4(b)(1), (2), and/or (4).

Mr. Lopez argued the Court of Appeals should preemptively deny the imposition of costs on appeal in the event the State was the substantially prevailing party, consistent with the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), and Division

III's General Court Order issued on June 10, 2016 (requiring the defendant to timely file a Report as to Continued Indigency along with his opening brief). The Court of Appeals acknowledged Mr. Lopez complied with its General Order (Slip Opinion, pg. 15), but it refused to preemptively deny appellate costs and referred the matter to a Commissioner of the Court (cost bill and objection thereto is pending before the Commissioner as of this writing). In the event the Commissioner awards the State its requested $4,591.15 in appellate costs, Mr. Lopez asks this Court to accept discretionary review of the Court of Appeals' decision to do so.

An order finding Mr. Lopez indigent was entered by the trial court, and there has been no known improvement to this indigent status. CP 247-48. To the contrary, Mr. Lopez's report as to continued indigency, filed in this Court on the same day as his opening brief, shows Mr. Lopez remains indigent. The report shows that Mr. Lopez's financial circumstances have not improved since the date he was sentenced in this case. It shows he has no assets and over $6,000 in other debts.

The *Blazina* Court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants'

ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

The *Blazina* court said, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. Lopez met this standard for indigency. CP 247-48. Furthermore, the appellate court is required to give a party the benefit 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). If the Court of Appeals imposes appellate costs, it would be doing so contrary to the directive in RAP 15.2(f) to give Mr. Lopez the benefit of the trial court's indigency order throughout the appeal.

It does not appear to be the burden of Mr. Lopez to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during his appeal. Nonetheless, Mr. Lopez's report as to continued indigency, filed in the Court of Appeals on the same day as his opening brief, shows Mr. Lopez remains indigent. No known financial improvement has occurred during Mr. Lopez's ongoing incarceration. Under these circumstances, it is not possible for the State to overcome the presumption that Mr. Lopez remains indigent and unable to pay appellate costs. RAP 15.2(f). There is no evidence Mr. Lopez's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. Appellate costs are not supported

by law or public interest concerns. Should Division III award such costs to the State and reject Mr. Lopez's objection to the same, review of this issue is warranted pursuant to RAP 13.4(b).

F. CONCLUSION

For the reasons stated herein, Mr. Lopez respectfully requests this Court grant review.

Respectfully submitted this 28th day of August, 2017.

Kristina M. Nichols, WSBA #35918
Attorney for the Petitioner

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent	)	Supreme Court No. _____
vs.	)	COA No. 34059-7-III
ADRIAN RAY LOPEZ, Petitioner	)	PROOF OF SERVICE

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 28, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Petition for Review to:

Adrian Ray Lopez
c/o Shawna Garcia
6 N. Sheppard Place, Apt. D
Kennewick, WA 99336

Having obtained prior permission from Franklin County Prosecutor's Office, I also served the same document on the Respondent at appeals@co.franklin.wa.us by e-mail.

Dated this 28th day of August, 2017.

Kristina M. Nichols, WSBA #35918
Nichols and Reuter, PLLC
Eastern Washington Appellate Law
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
admin@ewalaw.com

APPENDIX A

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

August 1, 2017

E-mail:
Kristina M. Nichols
Jill Shumaker Reuter
Nichols and Reuter, PLLC
PO Box 19203
Eastern Washington Appellate Law
Spokane, WA 99219-9203

E-mail:
Shawn P. Sant
Teresa Jeanne Chen
Franklin County Prosecutor's Office
1016 N 4th Ave
Pasco, WA 99301-3706

CASE # 340597
State of Washington v. Adrian Ray Lopez
FRANKLIN COUNTY SUPERIOR COURT No. 131505125

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. Vic Vanderschoor
c: Adrian Ray Lopez
c/o Shawna Garcia
6 N. Sheppard Place, Apt. D
Kennewick, WA 99336

FILED
AUGUST 1, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 34059-7-III
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ADRIAN RAY LOPEZ,	)	
	)	
Appellant.	)	

KORSMO, J. — Adrian Lopez appeals from convictions for first degree child rape and child molestation, raising objections to evidentiary rulings and the prosecutor's closing argument. We affirm.

FACTS

Mr. Lopez, 20, would sometimes babysit his two youngest siblings in the summer of 2011.[1] I.G. was 8 and N.L. was 5 that summer. In 2013, I.G. reported that Mr. Lopez had sexually touched her in the summer of 2011. The parents reported the disclosure to the Pasco Police Department and an investigation ensued.

[1] Living in a blended family, he had a half-brother, a stepsister, and a brother and sister. The charges involve his stepsister.

Four charges were filed involving I.G. The jury was unable to return a verdict at the first trial in September 2015. A second trial was conducted in December 2015, over four years after the last of the alleged incidents. Prior to the retrial, several rulings were entered that have some bearing on this appeal.

The State moved in limine to exclude allegation of a third party perpetrator. Mr. Lopez alleged that his father, N.L., had sexually assaulted his sister (N.L.'s oldest daughter), A.L. The court ruled that Mr. Lopez could not suggest that N.L. had committed the crime against I.G., but he was allowed to question detectives concerning their investigation of members of the household. At trial, the court reversed itself and sustained the prosecutor's objection to a question asking a detective if any other household member had been investigated.

During motions in limine, defense counsel stated "this case, it's a he said, she said case, where a little girl made up a story." Report of Proceedings (RP) at 27. Pursuing the strategy at trial, the defense asked the detective questions about whether it was important to corroborate whether the child was telling the truth, why I.G.'s stories did not match, and whether the detective had made a critical examination of the child's statements. The prosecutor promptly asked the next witness, I.G.'s father, if I.G. was "the type of child that would make up a story to get attention." Over objection, the father was allowed to answer, "no."

Also, during the mother's testimony, the State sought to admit three photographs of I.G. at age 8. The defense objected on relevance grounds and the prosecutor argued that they were necessary to illustrate her size and what I.G. looked like at that time. The court permitted use of one photo that was shown to the jury for demonstrative purposes only and was not admitted into evidence.

Several times questions were asked or answers given that used the word "victim" in reference to I.G. There was no motion in limine concerning use of the term and no objections to its use raised during testimony. In closing argument, the defense unsuccessfully objected to the prosecutor's repeated use of the word "re-victimized" in the same sentence. Also, during closing, the prosecutor referred to the burden of proof beyond a reasonable doubt as "more than 50 percent, but it's not a 100 percent." There was no objection to the argument.

The prosecutor conceded in argument that one of the counts was not proved and, the court dismissed the count. The jury returned guilty verdicts on the three counts submitted to it. The court ordered a thorough presentence investigation (PSI) as required for convicted sex offenders. The court considered the information in the PSI when imposing legal financial obligations (LFOs). Mr. Lopez had been represented by retained counsel at trial, but was found indigent for purposes of appeal.

An appeal was timely taken and counsel was appointed for Mr. Lopez at public expense. A panel considered this case without argument.

ANALYSIS

The appeal raises an argument concerning two aspects of the prosecutor's closing argument and several arguments concerning the noted trial testimony. We first address the closing argument claim before turning to the evidentiary arguments. We finally address two contentions concerning financial aspects of this case.

Closing Argument

Mr. Lopez contends that the prosecutor erred in closing argument by using the word "re-victimized" and in referring to the burden of proof in statistical terms. There was no error.

Familiar standards govern review of these claims. The appellant bears the burden of demonstrating prosecutorial misconduct on appeal and must establish that the conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 718-19. The allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Reversal is not required where the alleged error could have been obviated by a curative instruction. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). The failure to object constitutes a waiver unless the remark was so flagrant and ill-intentioned

that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.*; *State v. Swan*, 114 Wn.2d 613, 665, 790 P.2d 610 (1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Finally, a prosecutor has "wide latitude" in arguing inferences from the evidence presented. *Stenson*, 132 Wn.2d at 727.

The prosecutor argued that inconsistencies arose due to all of the times I.G. had to tell her story; she described those repeated retellings of the child's story as "re-victimizing" I.G. The court overruled defense counsel's objection to "[t]he characterization of re-victimized," citing "[i]t's closing." RP at 290-291. Mr. Lopez now claims that this statement constituted "a comment on the evidence." Br. of Appellant at 23. It is doubtful that his trial objection can be stretched into that claim. Assuming, however, that it was an objection on the same basis now being argued, it is without merit.

The context is telling in this instance. The prosecutor used the word "re-victimized" in reference to the number of occasions I.G. had to disclose details of the sexual abuse rather than in references to the existence of sexual abuse. As such, it was not a comment on the truthfulness of her testimony about the crimes. There was no error.[2]

---

[2] Even if the prosecutor had been referring to the sexual assaults, using the term "victim" in closing argument would not have constituted error. I.G.'s testimony supported a determination that she was a victim of sexual assault and the prosecutor could argue that the evidence supported that characterization.

More problematic is the reference to proof beyond a reasonable doubt as greater than 50 percent and less than 100 percent. This statement was not challenged, so relief is appropriate only if the remark meets the standard of "flagrant and ill-intentioned," with resulting nonremediable enduring prejudice. *Gentry*, 125 Wn.2d at 596. It does not.

Mr. Lopez likens this to cases where prosecutors, using analogies to incomplete puzzle pictures, argued that a juror could be satisfied beyond a reasonable doubt with only 50 percent of the pieces in place, an argument that improperly lowers the burden of proof. *E.g.*, *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014). One problem with such arguments is that they attempt to quantify the concept of reasonable doubt. *Id.* Our courts have not attempted to quantify that concept in the past and are unlikely to do so in the future.

The prosecutor did not attempt here to do so and the prosecutor's remarks could not be construed as suggesting that 50 percent is enough to satisfy the beyond a reasonable doubt standard. The remark was made in the context of trying to say that absolute certainty was not required to satisfy the standard, but that the prosecutor did not know what level of lesser certainty was appropriate. This statement did not fall into the category of an attempted quantification.[3] To the extent that the first portion of the remark

[3] Nonetheless, we strongly discourage arguments that apply numerical concepts to the burden of proof beyond a reasonable doubt. Mathematical expressions imply a level of precision and certainty that our courts have not attempted to apply to this standard and can too easily be misconstrued.

("more than 50 percent") might have been capable, in isolation, of being misconstrued, it was not such an egregious error that a curative instruction would have been unavailing.[4]

Because the prosecutor was not trying to quantify the level of certainty she needed to establish, this remark was not such an irremediably egregious misstatement of the law that relief is available to Mr. Lopez. Appellant has not established that the prosecutor committed misconduct in closing argument.

Trial Testimony

Mr. Lopez raises numerous claims of error related to testimony admitted at trial. After initially noting the standards that govern review of these contentions, we will turn to consideration of his claims seriatim.

As with the previous topic, the standards of review governing these issues are very well settled. Trial court judges have great discretion with respect to the admission of evidence and will be overturned only for manifest abuse of that discretion. *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Furthermore, the failure to raise an evidentiary objection to the trial court waives the objection. *State v. Guloy*, 104 Wn.2d 412, 422, 705

---

[4] The failure of the defense to object also is evidence that correction is unnecessary. *Swan*, 114 Wn.2d at 661 (noting that the absence of an objection or motion for mistrial "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial").

P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986); *State v. Boast*, 87 Wn.2d 447, 451-452, 553 P.2d 1322 (1976). As explained in *Guloy*:

> A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review.

104 Wn.2d at 422 (citation omitted).

Another general rule that also is at issue in this case is that appellate courts will not consider an issue on appeal that was not first presented to the trial court. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). However, RAP 2.5(a)(3) permits a party to raise initially on appeal a claim of "manifest error affecting a constitutional right." This authority is permissive; an appellate court will refuse to consider such issues if the record is not sufficient to permit review of the claim. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

With these principles in mind, it is time to address Mr. Lopez's specific evidentiary arguments.

Use of the word "victim." In conjunction with his previous prosecutorial misconduct argument, Mr. Lopez argues that it was error for the prosecutor and witnesses to use the word "victim" during questioning and testimony. There was no effort made pretrial to prohibit use of the term and no objection was ever raised during testimony.

Accordingly, this claim is waived unless Mr. Lopez can establish that use of the word constituted manifest constitutional error. He cannot.

Mr. Lopez correctly acknowledges that no Washington case has found use of this term constitutes manifest constitutional error, and he notes a previous unpublished case from this division where we indicated there *may* be some circumstances where it would constitute a comment on the evidence to use the term, but declined to find error in that circumstance. *State v. McFarland*, No. 32873-2-III (Wash. Ct. App. Mar. 8, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/328732.unp.pdf. He, therefore, has no basis for his argument that use of the word constituted manifest constitutional error.[5]

This argument is unpreserved.

Photo of I.G. at age 8. Mr. Lopez next challenges the display to the jury of a picture of I.G. at the time of the alleged offenses when she was age 8. The defense objected to the relevance of this evidence, so the issue has been preserved for our review.

[5] We also note that this is exactly the type of argument that RAP 2.5(a) is intended to foreclose. An objection at trial could easily have cured any potential problem and have avoided putting the parties through a flawed trial. Parties should not allow alleged evidentiary errors to go forward without challenge and then complain about them on appeal following an adverse verdict. We also think the *Swan* observation noted earlier has force here. The failure to object is significant evidence that the defense perceived no error at trial. 114 Wn.2d at 661.

Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401. Relevant evidence is generally admissible at trial, but can be excluded where its value is outweighed by other considerations such as misleading the jury or wasting time. ER 402; ER 403.

The trial court deemed the evidence relevant due to the passage of time between the events at issue and the trial. Nearly four and one-half years had passed from the summer 2011 incidents and the December 2015 trial. I.G. was no longer 8 years old and apparently had gained weight after these events. These are tenable reasons for displaying the picture of the child to the jury. Her physical ability to resist advances in 2011 may have been significantly different than it appeared in 2015.

While there appears to be little value to the photograph, we cannot say that there was none. The trial court did not err in allowing demonstrative use of a photograph.

Investigation of father. Mr. Lopez next argues that he was deprived of his ability to put forth a defense when the court prevented him from asking the detective whether others in the house had been investigated. Since he admitted he was not alleging that his father sexually assaulted I.G., there was no relevance to his question.

The federal and state constitutions guarantee a defendant the opportunity to present a defense to the crime charged. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct.

1920, 18 L. Ed. 2d 1019 (1967); *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). There is, however, no right to present irrelevant or inadmissible evidence. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Prior to the second trial, the prosecutor moved in limine to prohibit testimony about N.L. allegedly molesting A.L. in the past. Defense counsel agreed that he would not be presenting third party perpetrator evidence, but did desire to cross examine the police about their investigation of the case and whether anyone in the house had been investigated. RP at 21, 25. The court indicated it would permit the inquiry, but also ruled that it did not want "any intimating, insinuating, or anything like that." RP at 25. Defense counsel cross examined a police sergeant extensively about the police investigation. RP at 85-94. However, when counsel asked whether police had "investigated anyone else in the case," the prosecutor objected. RP at 94. The court sustained the objection, ruling the question inappropriate and reversing itself "[i]f I said that." RP at 94.

Mr. Lopez now contends that the court denied his right to present a defense (1) by reversing itself concerning the question about investigating others in the household, and (2) by prohibiting "other suspects" evidence. The second argument is contrary to the facts of this case and will not be entertained here other than to note that defense counsel expressly and repeatedly told the court at two separate hearings that he was not

presenting other suspects evidence. RP at 21-22, 24. The court did not exclude the evidence because the defense never sought to offer it.[6]

The court did not err by sustaining the objection to the question. The defense had previously agreed that it was not presenting an "other suspects" defense in light of its general denial defense, and the trial court ruled that there would be no "intimating [or] insinuating" that N.L. had committed the crime. Yet, the defense still sought to inquire about whether N.L. (the only adult male in the household) had been investigated in violation of the court's ruling on the topic. Whether N.L. specifically had been investigated was information that only would have supported the rejected "other suspects" defense. If the true interest of the inquiry concerned the quality of the police investigation, then a properly phrased question would have been something along the lines of "did the police investigate only my client?" or other, neutrally phrased questions that did not seek to point out a specific other individual. Not only would that phrasing have satisfied the court's earlier rulings, it still would have supplied the answer sought—N.L. had not been investigated because no one else had been investigated.

---

[6] Contrary to the appellant's assertion that it had strong "other suspects" evidence, it actually had next to nothing on point. There must be significantly more evidence than motive and opportunity to commit the crime before the defendant can accuse another of the crime. *See generally State v. Starbuck*, 189 Wn. App. 740, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016) and the authorities cited therein.

The question asked was not relevant in light of the defense decision not to pursue an "other suspects" defense. The relevant question was not asked. The court did not err in excluding the irrelevant question.

Vouching for I.G. Mr. Lopez also argues that the court erred in permitting the prosecutor to ask if I.G. was the type of child to make up stories to gain attention. The defense opened the door for this limited question.

It is improper for one witness to testify about the credibility of another witness. *State v. Korum*, 157 Wn.2d 614, 651, 141 P.3d 13 (2006). A defendant claiming error in this regard must show that there was improper and prejudicial conduct that had a substantial likelihood of affecting the jury's verdict. *Id.* at 650. Testimony does not amount to error unless it is "a nearly explicit statement by the witness that the witness believed the accusing victim." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).

The prosecution contends there was no vouching at all because the question and answer did not rise to the level of a nearly explicit statement. We need not answer that argument, however, because the defense clearly opened the door to the topic. The trial court has discretion to admit evidence that otherwise might be inadmissible if the defendant opens the door to the evidence. *State v. Bennett*, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985) (citing *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); *State v. Olson*, 30 Wn. App. 298, 633 P.2d 927 (1981)).

The defense claimed this was a "he said, she said" case where I.G. made up the accusation. To that end, the defense pointed out the inconsistent statements the child gave over the course of the investigation. Her character for truthfulness was clearly put in issue. The topic was thus relevant. ER 404(a)(2). Having opened the door to this topic, Mr. Lopez cannot claim there was error in responding to his invitation.

Mr. Lopez has not established any evidentiary error that deprived him of a fair trial.

Financial Matters

Finally, Mr. Lopez argues that the trial court did not adequately inquire into his ability to pay the LFOs imposed at sentencing and that this court should waive recoupment of appellate expenses. A majority of this court concludes that the trial court did not err in imposing LFOs at sentencing. We defer the issue of appellate costs to our commissioner.

The trial court determined that Mr. Lopez, who was represented by retained counsel at trial, had the ability to pay LFOs. We review the trial court's decision to impose LFOs for abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015) (citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991)).

Mr. Lopez argues that the trial court's inquiry was inadequate.[7] We disagree. The court received a thorough PSI that included information about Mr. Lopez's work history and finances. He had worked full time for several years and was supporting himself and voluntarily supporting others. At the hearing, he was able to argue any information he thought relevant to the LFO inquiry. Mr. Lopez did not claim indigency until *after* sentencing when he sought appointment of counsel at public expense to pursue this appeal. Presented with no indication that Mr. Lopez could not pay the LFOs, and plenty of information suggesting he could do so, the trial court had a tenable basis for ordering them.

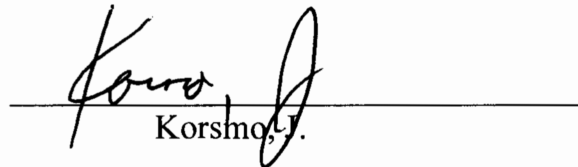
Mr. Lopez also requests that we waive appellate costs; he has complied with our General Order on that topic. His updated financial form shows that he has several years of full time employment prior to his incarceration for these convictions. Under the circumstances, we deem this matter best presented to our commissioner for consideration under recently amended RAP 14.2 in the event that the State seeks costs as the prevailing party.

---

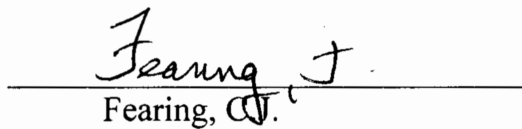
[7] This case does not present the issue of a court's failure to make an inquiry, the problem at issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) and its progeny.

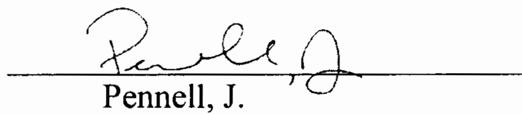
Affirmed.

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


Korsmo, J.

WE CONCUR:


Fearing, C.J.


Pennell, J.

NICHOLS AND REUTER PLLC / EASTERN WASHINGTON APPELLATE LAW

August 28, 2017 - 2:48 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34059-7
Appellate Court Case Title:	State of Washington v. Adrian Ray Lopez
Superior Court Case Number:	13-1-50512-5

The following documents have been uploaded:

- 340597_Petition_for_Review_20170828144735D3589804_1099.pdf
  This File Contains:
  Petition for Review
  The Original File Name was State v. Adrian Lopez 340597 Petition to Supreme Court for Discretionary Review.pdf

A copy of the uploaded files will be sent to:

- appeals@co.franklin.wa.us
- jill@ewalaw.com
- ssant@co.franklin.wa.us
- tchen@co.franklin.wa.us

Comments:

Sender Name: Kristina Nichols - Email: admin@ewalaw.com
Address:
PO BOX 19203
EASTERN WASHINGTON APPELLATE LAW
SPOKANE, WA, 99219-9203
Phone: 509-731-3279

Note: The Filing Id is 20170828144735D3589804