SUPREME COURT NO. _____

NO. 74862-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CHAD SULLIVAN,

Petitioner.

---

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

The Honorable Bruce E. Heller, Judge

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# PETITION FOR REVIEW

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## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Chad Daniel Sullivan, the appellant below, seeks review of the Court of Appeals decision in State v. Sullivan, noted at ___ Wn. App. ___, 2017 WL 5127887, No. 74862-9-I (2017), following the denial of his motion for reconsideration on December 12, 2017.

B. ISSUES PRESENTED FOR REVIEW

1. The King County Department of Public Defense denied Sullivan's repeated requests to present a highly qualified expert who would render an opinion that pepper spray is not a "noxious or destructive substance," one of the elements of the second degree assault provision under which Sullivan was charged. The denials demonstrated a misunderstanding of the issues in the case, were based on budgetary concerns, or were rooted in an incorrect belief that pepper spray qualifies as a "noxious or destructive substance" as a matter of law. The Department of Public Defense eventually relented somewhat and allowed Sullivan to present the substantively inferior testimony of a much less qualified expert. Did the Department of Public Defense's actions violate equal protection, applicable court rules, and ultimately deprive Sullivan of a full and fair opportunity to present his only defense?

2. Does the Court of Appeals decision, which effectively endorses a race to the bottom with respect to the funding and retention of indigent defense experts, merit review under all RAP 13.4(b) criteria?

C. STATEMENT OF THE CASE

The State charged Sullivan with three counts of second degree assault. CP 8-9. According to trial evidence, a loss prevention office at Sportsman's Warehouse in Federal Way observed Sullivan conceal one of two pepper spray canisters he took off the shelf. RP 233. Sullivan was approached by the loss prevention officer and followed him to the loss prevention room of the store. RP 236. Sullivan attempted to escape by spraying pepper spray at loss prevention officers and store employees. RP 238-40, 259-60, 288-92. The State's second degree assault charges proceeded on the theory that Sullivan intended to inflict bodily harm by administering a poison or other destructive or noxious substance under RCW 9A.36.021(1)(d).

Sullivan sought funding for the expert services of Kamran Loghman, an "extremely qualified expert in . . . all aspects of tear gas, pepper sprays, and mace." CP 102. Defense counsel "was unable to locate any other experts as uniquely qualified to provide services in this case." CP 103. Loghman held five patents for pepper spray formula and was a trusted law enforcement and military consultant regarding chemical agents. CP 102,

105-06. Because of his unique qualifications, Loghman was expensive, charging a rate of $495 per hour. CP 103. Loghman would testify pepper spray was not noxious or harmful and that it was specially formulated not to be noxious or harmful. CP 102-03. The King County Department of Public Defense denied the request for expert services, stating that no expert was necessary: "Expert's proposed testimony . . . is not reasonable for a defense as it does not bear on whether pepper spray causes bodily harm." CP 100.

Sullivan resubmitted his request for Loghman's services on the following day. CP 112-31. According to the offer of proof in counsel's declaration, Loghman would testify pepper spray was not a noxious substance. CP 114-15. He would also testify that

> pepper spray is not harmful, that it is deliberately formulated not to be harmful, and that he is aware of no incident in which any person has suffered lasting harm of any sort from a single exposure to pepper spray, and that even multiple exposures to pepper spray are unlikely to result in any harm to the person exposed.

CP 115. Counsel's declaration correctly stated the prosecution was required to prove pepper spray "was noxious and harmful to the alleged victims. Mr. Loghman's expert testimony will directly contradict any evidence offered on that . . . element of proof, and will establish and best, and perhaps the only viable defense available to this defendant." CP 115.

The Department of Public Defense denied the services again. This time, it stated, "Before this amount of money can be authorized, counsel needs to contact other experts or medical professionals who would be able to state an opinion as to whether O.C. pepper spray is a 'noxious substance,' similar to poison. The proposed fees from other experts should be included in discussion." CP 133.

Sullivan resubmitted his request a third time, highlighting particular portions supporting the request. CP 136-38, 152. Counsel then submitted a revised version of this request (which was appended to counsel's later request for clarification but not originally filed in the superior court file). CP 189-94. In the revised version, counsel indicated she had located other law enforcement and military experts familiar with pepper spray but asserted they "would lack the qualifications necessary to testify regarding the chemical formula of this particular pepper spray and the nature of chemical compounds in the pepper spray." CP 191. Defense counsel had also managed to reduce Loghman's fees from $425 per hour to $375 per hour, requesting authorization for $7,500 instead of $9,900 for 20 hours of work. CP 190-91.

The Department of Public Defense denied Sullivan's request again:

> I have reviewed your resubmitted request but am not willing to approve it. The Information alleged an intent to inflict bodily har[m] and did cause to be taken . . . "a poison and a

> destructive and noxious substance". The Information does not allege that "noxious" is similar to poison nor does it say it must be harmful to the alleged victims. It says "or noxious substance". Because "noxious" can be defined very broadly I do not believe the request is justified under CrR 3.1(f).

CP 197.

Sullivan was later permitted the expert services of Rick Walker in an unexplained reversal in the Department's position. CP 199-200. In contrast to Loghman, Walker charged $25 per hour and was authorized for 20 hours of work for a total of $500. CP 200. Walker did not have Loghman's expertise or experience of consulting, developing, or researching pepper spray; instead, he owned a self-defense company, Black Dog Training, and was certified to demonstrate, train, and sell the products of a particular pepper spray brand. RP 351-52.

Walker also conceded points at trial that Loghman would not have. Walker testified pepper spray causes no harm to the body but conceded there could be long-term effects from a single exposure to pepper spray. RP 360. He also stated that pepper spray was "designed" to hurt. RP 369. Loghman, by contrast, would have stated "he is aware of no incident in which any person has suffered lasting harm of any sort from a single exposure to pepper spray, and that even multiple exposures to pepper spray are unlikely to result in any harm to the person exposed." CP 115. Loghman would have also

testified pepper spray was "deliberately formulated not to be harmful." CP 115.

The jury convicted Sullivan on all three counts of second degree assault. CP 36-38; RP 491-93. The trial court imposed low end standard range sentences of 63 months. CP 79; RP 519.

Sullivan appealed. CP 98. He argued that it violated equal protection of the laws and CrR 3.1(f) to deny expert services based solely on funding. Br. of Appellant at 5-14. He also argued that for the equal protection clause to have any meaning in this context, the competing experts in question must have comparable qualifications and Loghman's and Walker's qualifications were far from comparable. Br. of Appellant at 14-17.

The Court of Appeals rejected Sullivan's claims because nothing in CrR 3.1(f) explicitly precludes a trial court or a public defense office from considering cost in making its funding determination. Appendix at 6. Albeit somewhat tacitly, the Court of Appeals acknowledged Loghman was the more qualified expert, calling him "well qualified" compared to Walker, who was merely "qualified."[1] Appendix at 7. Yet the Court of Appeals failed to ascertain that this acknowledgment makes it completely acceptable that

[1] Despite Sullivan's contentions regarding the stark differences in qualifications between Loghman and Walker, the Court of Appeals failed to analyze or discuss these differences.

Sullivan's indigency alone relegates access only to a concededly less qualified expert. The Court of Appeals decision permits cost to become the driving consideration in expert funding, thereby endorsing an approach that allows the indigent funding of defense experts to become a race to the bottom.

D. ARGUMENT IN SUPPORT OF REVIEW

THIS COURT SHOULD GRANT REVIEW TO ENSURE THAT EXPERT FUNDING FOR INDIGENT DEFENDANTS IS NOT JUST A RACE TO THE BOTTOM

"[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." Ake v. Oklahoma, 470 U.S. 68, 77, 405 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). "[I]t is difficult to identify interest of the State, other than in its economy, that weighs against recognition of this right." Id. at 79.

"As part of an indigent defendant's constitutional right to effective assistance of counsel, the State must pay for the expert services, but only when such services are necessary to an adequate defense." State v. Melos, 42 Wn. App. 638, 640, 713 P.2d 138 (1986). "[T]he State may not condition the exercise of a constitutional right upon financial ability or deny a basic legal right because of one's poverty." Id. at 641-42 (citing State v. Lewis, 55 Wn.2d 665, 670, 349 P.2d 438 (1960)). "This constitutional right is no

broader than the defendant's right to petition for State-paid services under CrR 3.1(f)." Id. at 640.

CrR 3.1(f)(2) provides, "Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall authorize the services." King County has an applicable local rule, which states, in part,

> all requests and approval for expert services expenditures are hereby delegated to the King County Office of the Public Defender. Upon finding that investigative, expert or other services are necessary to an adequate defense and that defendant is financial unable to obtain them, the King County Office of the Public Defender (OPD) shall authorize the services.

King County Local Criminal Rule (KCLCrR) 3.1(f).

Although the Department of Public Defense initially and erroneously determined Sullivan was not entitled to a defense expert at all, it changed its position and permitted Sullivan to retain Walker as a substitute expert to Loghman. Thus, there is no dispute in this case that an expert was necessary for an adequate defense, that defense being that pepper spray was, as a factual matter, not a noxious or destructive substance.

The only dispute in this case is about money. Indeed, the Department of Public Defense opted to authorize the services of Walker but denied the services of Loghman because Walker came with the right price

tag. Sullivan was forced to proceed to trial with a much less qualified expert simply because the Department did not wish to authorize a more qualified—and therefore more expensive—expert witness. Sullivan's access to the most qualified expert available to him was conditioned on the amount of money he had, and his rights were therefore diminished because of his poverty.

The Court of Appeals decision expressly endorses this result. The Court of Appeals posits that it is entirely appropriate to provide Sullivan with a substantively less qualified expert because of cost. Appendix at 6 ("Nothing in CrR 3.1(f) . . . precludes the trial court from considering cost in making its decision."). This conflicts with Ake, Lewis, Melos, which expressly state that money cannot be the driving consideration in indigent expert funding, and also conflicts with the constitutional promise of the equal protection of the laws. The Court of Appeals' determination that it is perfectly acceptable for poor people to receive a less robust adversarial process in criminal cases merits review under RAP 13.4(b)(1), (2), and (3).

The Court of Appeals also dodged the main issue Sullivan presented—how to deal with alternative experts with quite disparate qualifications. Although the Court of Appeals declined to meaningfully discuss the stark differences between Loghman and Walker in terms of their experience, education, and overall expertise, the Court of Appeals acknowledged that Loghman was more "well qualified" than Walker.

Appendix at 7; see also Br. of Appellant at 14-16 (discussing clear differences in experts' qualifications and nature of their testimony). Yet the Court of Appeals mysteriously claimed Sullivan's argument would "require a viable alternative expert to have the exact same qualifications as the one originally requested." Appendix at 8.

Sullivan's argument was nothing of the sort. As the Court of Appeals pointed out, "Sullivan concedes, 'a defendant is not denied equal protection when he receives a viable alternative expert, and that there is no right to have an expert of one's choosing.'" Appendix at 7 (quoting Br. of Appellant at 16). This concession, however, was in the context of Sullivan's argument that Walker was not a viable alternative to Loghman. See Br. of Appellant at 14-17. Contrary to the Court of Appeals decision, Sullivan's argument would not require an alternative expert to have the exact same qualifications as the one originally requested, but only that alternative expert have *comparable* qualifications. Br. of Appellant at 16 ("For these [equal protection] principles to mean anything, the competing experts in question must have similar qualifications." (emphasis added)); Reply Br. at 3 (asserting "experts in question must have comparable qualifications to pass constitutional muster" (emphasis added)).

As far as Sullivan can tell, the issue of viable alternative experts has never been considered or decided in Washington. The Court of Appeals

decision allows the cost of the competing experts to become the driving consideration without regard to the experts' actual qualifications. The Court of Appeals posited that whether an expert is a viable alternative is within the discretion of the trial court, but made no attempt to address the limits of that discretion when money appears to be the sole factor in its exercise. Appendix at 8. Indeed, the Court of Appeals appears to mandate that indigent defendants must always receive the less expensive expert, regardless of the expert's disparate qualifications, the nature of the case, and the importance of the needed expertise in presenting a particular defense. The Court of Appeals' endorsement of a defense expert funding system that is a race to the bottom raises significant constitutional concerns, meriting RAP 13.4(b)(3) review.

Finally, in a time of fiscal austerity, it seems that funding for indigent defense is always among the first things to be cut. The Court of Appeals certainly seems at ease with this reality, eager to embrace a system where market forces become the primary if not exclusive consideration in funding defense services for the indigent. But such a system cannot be called a justice system. Such a system denies meaningful adversarial testing of the State's power to deprive citizens of their physical liberty to those without the means to pay for it. The Court of Appeals' nonchalant endorsement of such

a system presents an issue of substantial public interest that should be determined by Washington's highest court. RAP 13.4(b)(4).

E. CONCLUSION

Because he meets every RAP 13.4(b) criterion, Sullivan requests that this petition be granted.

DATED this 11th day of January, 2018.

Respectfully submitted,

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Attorneys for Petitioner

# APPENDIX

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| THE STATE OF WASHINGTON, Respondent, v. CHAD DANIEL SULLIVAN, Appellant. | ) | No. 74862-9-I<br>DIVISION ONE<br>UNPUBLISHED OPINION<br>FILED: November 6, 2017 |

MANN, J. — Chad Sullivan appeals from his conviction on three counts of assault in the second degree. Sullivan argues that he was deprived of the opportunity to present a defense because the King County Department of Public Defense (DPD) and trial court refused public funding for Sullivan's chosen expert witness. Because the trial court has discretion to provide a "competent" expert for indigent defendants, and nothing prohibits financial considerations in carrying out that discretion, we affirm.

FACTS

On October 22, 2014, store security at Sportsman's Warehouse in Federal Way observed Sullivan take two canisters of pepper spray from a store shelf and

conceal one of the canisters in his jacket. Sullivan then paid for the second can and left the store. After Sullivan exited the store, he was stopped by the store security officer Martin Roper, and another employee John Silas. Roper and Silas identified themselves and asked Sullivan to return to the store. Sullivan compliantly returned to the store and was escorted to a small room located near the front of the store. Roper took Sullivan's identification and left the room.

Silas remained in the room with Sullivan. While they waited, Silas heard Sullivan say "I can't go back to jail," at which point Sullivan pulled a small folding knife out and used the knife to open the package holding the pepper spray. Silas left the room and closed the door. Roper and a third store employee, Chris McMurray, joined Silas in trying to keep the door closed as Sullivan sprayed pepper spray under the door. Sullivan eventually succeeded in opening the door and during the ensuing struggle pepper sprayed Silas, Roper, and McMurray. After the security officers managed to subdue Sullivan, the police arrived and took him into custody.

The State charged Sullivan with three counts of second degree assault under RCW 9A.36.021(d), for administering a poison or other destructive or noxious substance.

Sullivan's primary defense was that pepper spray was not a noxious substance. Sullivan, who is indigent, applied pretrial for public funding from DPD to hire an expert to testify regarding the nature and effects of pepper spray. Sullivan requested funding to hire Kamran Loghman, an expert located in Washington, D.C., at the rate of $495 an hour for a total of $9,900. Loghman

was an expert in "all aspects of tear gas, pepper sprays and mace." Loghman held five patents for pepper spray formulas, and had years of experience as the chief executive officer of a pepper spray manufacturer that provided pepper spray to law enforcement agencies and the military. He also authored international law enforcement training manuals and published articles on pepper spray and other chemical agents. Sullivan's counsel stated that she had discussed the case with Loghman and that Loghman indicated "he has heard of no other state or federal case in which a serious felony comparable to Assault in the Second Degree has ever been charged based solely on the discharge of [over the counter] pepper spray." Counsel stated she "was unable to locate any other experts as uniquely qualified to provide services in this case."

DPD denied the request explaining that "expert's proposed testimony that there is no other case similarly charged as [defendant]'s case is not reasonable for a defense as it does not bear on whether pepper spray causes bodily harm." Sullivan filed a second request with DPD asserting that Loghman "indicated that, as a holder of 5 patents for pepper spray formulas, he is able to testify that the pepper spray in question in this case was not a noxious substance, similar to a poison . . . [and] that pepper spray does not cause bodily harm." DPD again denied the request explaining that "[b]efore this amount of money can be authorized counsel needs to contact other witnesses or medical professionals who would be able to state an opinion as to whether [over the counter] pepper spray is a 'noxious substance' similar to poison."

Sullivan then resubmitted a third request to for funds to hire Loghman. DPD again denied the request adding that

> The Information does not allege that "noxious" is similar to poison nor does it say it must be harmful to the alleged victims. It says "or noxious substance." Because "noxious" can be defined very broadly I do not believe the request is justified under CrR3.1(f).

Sullivan appealed to the superior court, which also denied the request. The court held, "the contents of commercial pepper spray is readily available," thus "[e]xpertise at the cost suggested by defendant is not reasonably necessary to the presentation of defendant's case." DPD ultimately approved funding to retain a different expert, Rick Walker. Walker charged $25 per hour and was authorized for 20 hours of work for a total of $500.

Walker testified at trial. Walker owns the personal safety training company, Black Dog Training, and is certified by a private pepper spray corporation to perform demonstrations, trainings, and sales. Walker testified he was familiar with the components and the concentration of the pepper spray used in this case. Walker characterized the pepper spray as a "nontoxic temporary incapacitater." He testified to the common reactions to pepper spray, and emphasized the spray can be washed off and has no long-term effects and causes no lasting physical harm to the body. Walker acknowledged there could be long-term effects from pepper spray in cases where an individual had a preexisting condition, though he had not seen that occur. Walker also acknowledged that pepper spray was "designed to hurt."

The three employees Sullivan pepper sprayed also testified. Roper testified the pepper spray hit the side of his face causing him to experience an intense burning sensation for half an hour, as well as difficulty breathing. McMurray testified that after being pepper sprayed he had difficulty keeping his eyes open, that the pain from the burning sensation on his skin was a six on a scale from one to ten, and that he had trouble sleeping that night due to the pain. Silas testified that the pepper spray had caused him to be unable to see, to have difficulty breathing, and that he felt a strong burning sensation on his skin, in his throat, and in his nostrils. All three of the victims testified they had no lasting effects from the pepper spray.

## ANALYSIS

### *Expert Opinions*

Sullivan argues that he was deprived of the right to present a defense because he was denied funding to retain Loghman. Sullivan argues the trial court improperly considered the cost of his expert, denying Sullivan his right to due process. We disagree.

As part of an indigent defendant's constitutional right to effective assistance of counsel, the State must pay for expert services when such services are necessary to an adequate defense. State v. Mines, 35 Wn. App. 932, 935, 671 P.2d 273 (1983). Whether expert services are necessary for an adequate defense lies within the sound discretion of the trial court. State v. Young, 125 Wn.2d 688, 691, 888 P.2d 142 (1995) (citing Mines, 35 Wn. App. at 935). A discretionary decision of the trial court "'will not be disturbed on review except on

a clear showing of abuse of discretion," meaning the discretion was "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" City of Mount Vernon v. Cochran, 70 Wn. App. 517, 523, 855 P.2d 1180 (1993) (quoting Mines, Wn. App. at 936).

In Washington, CrR 3.1(f) governs the appointment of experts at public expense. Young, 125 Wn.2d at 691. "CrR 3.1(f) incorporates the constitutional right of an indigent defendant to the assistance of expert witnesses." State v. Poulsen, 45 Wn. App. 706, 709, 726 P.2d 1036 (1986) (footnote omitted). CrR 3.1(f) provides, in relevant part:

> (1) A lawyer for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in the case may request them by a motion to the court.
> (2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court . . . shall authorize the services.

Nothing in CrR 3.1(f) requires the trial court to authorize payment for the witness of the defendant's choosing or precludes a trial court from considering cost in making its decision.

To the contrary, all that is required is that the defendant have access to expertise where necessary to support their defense. For example, in Ake v. Oklahoma, 470 U.S. 68, 83, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), the Supreme Court addressed whether an indigent criminal defendant attempting to present an insanity defense to a charge of murder had the right to expert opinion at the public's expense. The Court held that, in cases where the defendant can demonstrate to the trial court that his sanity at the time of the offense would be a

significant factor at trial, the "State must, at a minimum, assure the defendant access to a competent psychiatrist" to examine and assist in the presentation of the defense. Ake, 470 U.S. at 83. The Court continued:

> This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.

Ake, 470 U.S. at 83.

Similarly, in State v. Cuthbert, 154 Wn. App. 318, 225 P.3d 407 (2010), a theft case, the trial court denied the defendants request to hire a forensic accountant, instead offering "to authorize funds for the defense to hire someone to check all the records," an offer the defendant declined. Cuthbert, 154 Wn. App. at 335. The appellate court upheld the trial court's ruling, holding that the trial court properly exercised its discretion in concluding that a forensic accountant was not necessary to prepare a defense, and that an investigator would have sufficed. Cuthbert, 154 Wn. App. at 334-36. Indeed, Sullivan concedes, "a defendant is not denied equal protection when he receives a viable alternative expert, and that there is no right to have an expert of one's choosing."

Sullivan's defense was that pepper spray was not a "destructive or noxious substance" under RCW 9A.36.021(d). In order to present this defense, Sullivan wanted to retain a specialist familiar with the components and effects of pepper spray. Although we agree Loghman was well qualified to testify to the chemical composition and effects of pepper spray, Walker was also qualified.

Sullivan argues Loghman would have testified pepper spray was specifically manufactured not to cause permanent or long-term harm and that Walker was not a viable alternative because he was less qualified to testify to pepper spray manufacturing. Sullivan's argument would require a viable alternative expert to have the exact same qualifications as the one originally requested. Sullivan offers no support for this high standard.

The determination of whether an expert is competent or a viable alternative is within the discretion of the trial court, and will not be overturned absent a clear showing of abuse of discretion. Walker was familiar with the components and effects of pepper spray and was fully qualified to testify to the effects of pepper spray. Walker testified that pepper spray is a "nontoxic temporary incapacitater," emphasizing that the spray can be washed off, has no long-term effects, and causes no lasting physical harm to the body. Sullivan's argument—that the pepper spray was not "destructive or noxious" because it did not cause long-term harm—was addressed by Walker's testimony. Moreover, Walker's testimony was supported by all three victims who testified that they had no lasting harmful effects.

The trial court did not abuse its discretion in authorizing payment for Walker, but not Loghman.

*Statement of Additional Grounds*

In his statement of additional grounds, Sullivan claims that RCW 9A.36.021 is unconstitutional because "the word noxious is so vague that it is unfair to take the one word alone and constitute it an Assault II." The

constitutionality of a statute is an issue of law, which we review de novo. State v. Watson, 160 Wn.2d 1, 5, 154 P.3d 909 (2007). Appellate courts approach a vagueness challenge with a strong presumption in favor of the statute's validity. Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). "If the statute does not involve First Amendment rights, then the vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case." Watson, 160 Wn.2d at 6 (quoting State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)). The party challenging a statute's constitutionality on vagueness grounds has the burden of proving its vagueness beyond a reasonable doubt. City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988).

Under the due process clause of the Fourteenth Amendment, "a statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement." Watson, 160 Wn.2d at 6 (internal quotations omitted). "A statute meets constitutional requirements if persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement." Watson, 160 Wn.2d at 7. Impossible standards of specificity are not required as some measure of vagueness is inherent in the use of language. Eze, 111 Wn.2d at 26.

Sullivan fails to prove beyond a reasonable doubt that the statute as applied under the particular facts of the case is unconstitutionally vague. RCW

9A.36.021 prohibits "administer[ing] to or caus[ing] to be taken by another, poison or any other destructive or noxious substance" with the "intent to inflict bodily harm." Bodily harm is defined by RCW 9A.04.110(4)(a) as "physical pain or injury, illness, or an impairment of physical condition." The rest of the terms, though not specifically defined, are all commonly known and used. Persons of ordinary intelligence, viewing the facts in this case, could understand that pepper spray being sprayed in the face of another person would constitute a "poison" or "destructive or noxious substance" causing "injury" or an "impairment of physical condition." While there may be some disagreement, such disagreement is for the finder of fact, and does not rise to the level of constitutional vagueness.

Finally, Sullivan argues he had ineffective assistance of counsel. As Sullivan's allegations rest on facts and matters outside the record, it cannot be considered on direct appeal. State v. Kinzle, 181 Wn. App. 774, 786, 326 P.3d 870 (2014).

*Appellate Costs*

Sullivan also asks that no costs be awarded on appeal. Appellate costs are generally awarded to the substantially prevailing party on review. However, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. Here, Sullivan was found indigent by the trial court. If the State has evidence indicating that Sullivan's

financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner.

We affirm.

Mann, J.

WE CONCUR:

Becker, J.

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**January 11, 2018 - 2:15 PM**

## Transmittal Information

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| **Appellate Court Case Title:** | State of Washington, Respondent v. Chad Daniel Sullivan, Appellant |
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