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NO. 74220-5-1

Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON

Respondent

v.

GERMAN LOPEZ-CASTRO,

Appellant

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 1

 A. TESTIMONY REGARDING ER 404(B) EVIDENCE. 4

III. ARGUMENT..... 11

 A. THE COURT PROPERLY EXERCISED ITS DISCRETION
 WHEN IT DECLINED TO ISSUE A MISTRIAL UNDER THE
 FACTS OF THIS CASE..... 11

 1. The Court Was Within Its Discretion When It Initially Admitted ER
 404(B) Evidence Regarding Witness Larue Pretrial And Any Error
 Was Cured By The Testimony Being Stricken And The Jury
 Instructed To Disregard..... 13

 2. It Was Not Prosecutorial Misconduct To Expect Witness Larue
 Would Testify At Trial Consistently With Her Testimony At The ER
 404(B) Hearing? 16

 3. The Court Properly Overruled The Defendant's Objection As To
 The Relevance Of Ms. Larue's Testimony Based On Her Testimony
 In The ER 404(B) Hearing..... 18

 B. THE DEFENDANT SHOULD BE REQUIRED TO PAY THE
 COSTS OF HIS UNSUCCESSFUL APPEAL..... 19

IV. CONCLUSION..... 25

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Glass v. Stahl Specialty Co.</u> , 97 Wn.2d 880, 652 P.2d 948 (1982)	20
<u>In re Sehome Park Care Ctr., Inc.</u> , 127 Wn.2d 774, 903 P.2d 443 (1995).....	23
<u>National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1</u> , 66 Wn.2d 14, 400 P.2d 778 (1965).....	21
<u>Pilch v. Hendrix</u> , 22 Wn. App. 531, 534 P.2d 824 (1979).....	21
<u>State v. Barry</u> , 183 Wn.2d 297, 352 P.3d 161 (2015).....	12
<u>State v. Blank</u> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	22, 23
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	18
<u>State v. Braun</u> , 82 Wn.2d 157, 509 P.2d 742 (1973).....	12
<u>State v. Costello</u> , 59 Wn.2d 325, 367 P.2d 816 (1962).....	12
<u>State v. Cunningham</u> , 51 Wn.2d 502, 319 P.2d 847 (1958).....	12
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2008).....	16, 17
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	13
<u>State v. Gresham</u> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	14
<u>State v. Hager</u> , 171 Wn.2d 151, 248 P.3d 512, 514 (2011).....	11
<u>State v. Imhoff</u> , 78 Wn. App. 349, 898 P.2d 852 (1995).....	12
<u>State v. Keeney</u> , 112 Wn.2d 140, 112 P.2d 140, 769 P.2d 295 (1989).....	21
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	12, 13
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	18
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008) ..	12, 13
<u>State v. Nelson</u> , 131 Wn. App. 108, 125 P.3d 1008 (2006).....	14
<u>State v. Nolan</u> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	20
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 178 (1984).....	18
<u>State v. Post</u> , 118 Wn.2d 596, 826 P.2d 172 (1992).....	11
<u>State v. Sinclair</u> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	19, 20
<u>State v. Southerland</u> , 109 Wn.2d 389, 745 P.2d 33 (1987).....	12
<u>State v. Wade</u> , 138 Wn.2d 460, 979 P.2d 850 (1999).....	13
<u>Water Dist. No. 111 v. Moore</u> , 65 Wn.392, 397 P.2d 845 (1964) .	21,

22

WASHINGTON STATUTES

Laws of 1995, ch. 275	20
Laws of 2015, ch. 265, § 22	24
RCW 10.73.150.....	20
RCW 10.73.160.....	20, 23
RCW 10.73.160(1)	19
RCW 10.73.160(3)	20

COURT RULES

ER 404(b)..... 4, 8, 9, 14, 16, 17, 18
RAP 15.2(f) 20

I. ISSUES

1. The trial court initially allowed evidence of the defendant's prior assaults on a witness, for the purpose of explaining the witness's delay in reporting the crime. Later, the trial court reconsidered, excluded the evidence, and instructed the jury to disregard it. Did the court abuse its discretion in determining that this incident did not warrant a mistrial?

2. Should the defendant be required to pay the costs of his unsuccessful appeal?

II. STATEMENT OF THE CASE

The defendant was charged by the first amended information with count 1: second degree assault – domestic violence with a deadly weapon (knife) enhancement and the aggravating factor that the crime was committed in front of the victim's minor children and count 2: harassment – domestic violence with a deadly weapon (knife) enhancement and the aggravating factor that the crime was committed in front of the victims minor children. After a 5 day jury trial, the defendant was convicted of count 1 second degree assault - domestic violence with a finding that the defendant and victim were members of the same family or household; that the defendant was armed with a deadly weapon and the aggravating factor that

the crime was committed in front of the victim's minor children. Witness Larue's testified regarding the harassment charge. The jury acquitted the defendant of count 2: harassment. CP 16-20, 88-9, 2 RP 173-97.

At the time of trial, the defendant and Stephanie Lopez-Castro had been married for nine years and had three children together. Their eldest child, A.L.-C., was 12 years old and testified at trial. A.L.-C. testified that the defendant is her father and that she loves him. On July 26, 2015, her mother and the defendant were fighting and the defendant grabbed a big knife. He put the knife up to a television in the kitchen. The defendant then locked the front door. He then pushed her mother up against a wall and put the knife to her mother's neck. A.L.-C. clarified that the knife was not on her mother's neck, but was by her neck. A.L.-C. identified state's trial exhibit 8 as the knife the defendant grabbed. A.L.-C. testified that prior to grabbing the knife, the defendant said he would end it. When the defendant put the knife to her mother's neck, A.L.-C. was standing right by them. She said everyone in the apartment started screaming and the defendant dropped the knife. A.L.-C. picked up the knife to get it away from the defendant because she thought he was going to hurt her mom. The

defendant grabbed the knife from A.L.-C. and left the apartment. A.L.-C. testified that she wrote her statement for the police in her mother's bedroom. Her mother was in the kitchen, out of her line of sight, while she wrote her statement. No one told her what to write in her statement. 2 RP 211; 3 RP 298, 301-6, 310.

The tape of Ms. Lopez-Castro's July 26, 2015, 9-1-1 call was played for the jury. In the call, Ms. Lopez-Castro denies that the defendant has a weapon and minimized the assault. She was on the phone with 9-1-1 up to the point when the police arrive and separated everyone to obtain statements. 2 RP 160, 3 RP 285-7. The prosecutor argued to the jury after they heard the 9-1-1 tape in the defendant's closing that it showed the difference between Ms. Lopez-Castro's statements to the operator and A.L.-C.'s statement and testimony. She also pointed out that the jury could tell from the recording that there was no opportunity for A.L.-C. to hear or receive direction from Ms. Lopez-Castro to make up the story about the knife. 4 RP 399, 413-14.

Ms. Lopez-Castro testified consistently with A.L.-C. with regard to the major events of July 26, 2015. She added that she was in fear for her life when the defendant said he was going to end it. Ms. Lopez-Castro testified regarding the prior abuse from the

defendant over the past two years as being the reason she believed he was going to kill her. Tara Larue also testified regarding her past history of abuse from the defendant to explain why she did not report the July 20th threats to the police or anyone at the time they were being made. The jury acquitted the defendant of the charge of harassment.

A. TESTIMONY REGARDING ER 404(B) EVIDENCE.

At the pre-trial 404(b) hearing, the court heard testimony from both Ms. Lopez-Castro and Ms. Larue. The defendant does not challenge the admission of the 404(b) evidence offered through Ms. Lopez-Castro.

Ms. Larue testified that on July 20, 215, the defendant said to her, "We're going to go to Stephy's house. Nobody calls the cops on me. I'm going to kill that bitch." She said she and the defendant then went to Ms. Lopez-Castro's house and waited for her. The defendant said he wanted to wait for Ms. Lopez-Castro to come outside so that he could hurt or kill her or her kids and see how that made her feel. Ms. Larue said she did not tell anyone about the threats the defendant voiced that day because she did not have a means of communication and she was afraid of the repercussions from the defendant if she didn't do the things he told her to do. Ms.

Larue further explained that she didn't have a means of communication because the defendant would not allow her to have a phone. The defendant had been physical with her numerous times in the past, including choking her, spitting in her face, pouring beer on her, breaking her things, cutting up her purses and clothing. Mr. Larue said the defendant never hit her, he would choke her and cracked her ribs. When asked how she felt about the defendant she replied that he scares her. When asked to elaborate, Ms. Larue testified about the defendant saying to her, "I wonder if your kids will come to your funeral after I kill you." She also said the defendant had pulled a knife on her before and had kidnapped her from a public place by forcing her into his car. On cross-examination she elaborated on the knife incident. She said she and the defendant were at a friend's apartment. They were arguing. She went to leave and the defendant chased her down the hallway into a stairwell. He pulled a pocket knife with a large blade and held the blade to her throat. The then dropped the knife and started crying. 2 RP 120, 121-3; 125, 132-3.

Although she said she did not have a means of communication, Ms. Larue did testify that she had texted Ms. Lopez-Castro the day before on a roommate's phone. She said as

soon as the defendant realized she had that phone, he took it away from her. Ms. Larue testified that the defendant made sure she did not have a means of communicating with anyone. 2 RP 128.

The defendant did not offer any testimony to contradict the testimony of Ms. Lopez-Castro or Ms. Larue. 2 RP 138.

The court ruled that Ms. Larue's testimony was relevant for two purposes. The first was the testimony regarding the July 20th incident was relevant to show the defendant had a plan to threaten Ms. Lopez-Castro and an actual intent to do so. The court found this testimony was highly relevant for that purpose.

The court also found that her testimony tended to explain why Ms. Larue did not notify the police of the July 20th incident. The court ruled that since both sides had indicated they wanted to get into Ms. Larue's failure to notify the police, then her fear of the defendant and her reasons for fearing the defendant are all relevant as the reasons why she didn't telephone the police.

Ms. Larue testified at trial. The prosecutor began by asking questions about her relationship with the defendant. Ms. Larue testified that at first it was great but that it changed. The prosecutor asked her how it changed and Ms. Larue said they started arguing a lot and that the defendant would get physical with her. The

defendant's attorney then objected saying "Your Honor, I'm going to object at this point as the relevance of the testimony had not yet been established." The court overruled the objection and allowed Ms. Larue to continue. 2 RP 175.

Ms. Larue then testified that the defendant had pushed her in a room, strangled her, spit on her, and belittled her. Ms. Larue testified that she never reported any of these incidents to the police because she was afraid of the repercussions; what would happen to her after she had called the police. Ms. Larue explained that the defendant had threatened her many times, wanting to know if her children would come to her funeral or showing her videos of how she would die. The prosecutor then asked Ms. Larue if there was a reason she did not report the July 20th incident to law enforcement. Ms. Larue responded that she just did what the defendant told her and that she hadn't had a phone forever, that the defendant made sure she had no connection to anyone. 2 RP 176.

Later in her testimony, Ms. Larue testified that the defendant had threatened her in the past with a knife. She described the incident as, "He just ran after me into a stairwell of my friend's apartment and put the knife on me there." The prosecutor did not elicit any further details about that situation. 2 RP 184. On cross-

examination, the defendant's attorney brought out that the defendant had held the knife to Ms. Larue's throat and dropped it and started crying. The defense attorney also brought out that another reason for Ms. Larue not calling the police could be the warrants she had for her arrest. 2 RP 196.

The next morning, the trial court held a hearing outside the presence of the jury to discuss the defendant's proposed limiting instruction as to the 404(b) testimony. The court said it did not recall Ms. Larue testifying to being afraid of the defendant as she had done in the 404(b) hearing earlier. The court stated it therefore regretted allowing the testimony about the prior acts of abuse. Although Ms. Larue had testified regarding her fear of reporting any of the acts of abuse to the police because of the defendant's threats to kill her, and he was threatening to kill Ms. Lopez-Castro, because "No one calls the cops on me." Ms. Larue did not specifically state that her reason for not calling anyone about the threats was because of fear. She did say, it was because she did not have a phone because the defendant would not allow her to have one. The court in its discretion reversed its earlier ruling. 3 RP 237-9.

The defendant moved for a mistrial. The state opposed the mistrial and agreed to strike all of Ms. Larue's testimony about prior abuse. In ruling, the court articulated that it saw three solutions to the problem, one would be to grant the mistrial, another would be to allow the state to recall Ms. Larue to illicit additional testimony that would perhaps be consistent with her testimony at the 404(b) hearing or the third would be to strike Ms. Larue's testimony regarding the prior abuse and instruct the jury to disregard it. The court articulated that it felt in some cases, striking the testimony would be pointless because the testimony is so powerful that it would be too much to ask that a jury set aside what they know the testimony was. The court went on to say that might have been the case with Ms. Larue's testimony had she not already been impeached in cross-examination. The court opined that Ms. Larue's testimony might be disregarded even without a jury instruction to do so. The court pointed to the inconsistencies in Ms. Larue's testimony and the other areas of impeachment. The court concluded it felt the jury could follow an instruction to disregard Ms. Larue's testimony about prior abuse and the defendant would be able to get a fair trial. 3 RP 245, 248-53.

The court then read the following to the jury:

THE COURT: You have heard evidence of unreported and uncorroborated allegations of prior physical contact between the defendant German Lopez-Castro and both Stephanie Lopez-Castro and Tara Larue. You are to disregard all the evidence presented by Ms. Larue concerning allegations of prior physical contact between her and the defendant.

I repeat, you are to disregard utterly all the evidence presented by Ms. Larue concerning allegations of prior physical contact between her and the defendant.

The court continued with the remainder of the instruction regarding Ms. Lopez-Castro testimony which is not at issue here. 3 RP 260-1.

Ms. Larue's was not present at the incident on July 26, 2015. She was only present for the defendant's threats to kill Ms. Lopez-Castro on July 20, 2016. During the prosecutor's closing argument, she referenced Ms. Larue's testimony about the July 20, 2015, harassment threats to Ms. Lopez-Castro. One of the jurors interrupted, exclaiming, "Wasn't Tara Larue's testimony wiped from the record?" At the request of the attorneys, the court re-advised the juror of the limiting instruction it had previously given regarding Ms. Larue's testimony. The jury acquitted the defendant of the harassment charge. 4 RP 390, CP 16.

III. ARGUMENT

A. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DECLINED TO ISSUE A MISTRIAL UNDER THE FACTS OF THIS CASE.

In a criminal trial proceeding, a new trial is necessary only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly. State v. Hager, 171 Wn.2d 151, 156, 248 P.3d 512, 514 (2011). The court must decide whether the remark, when viewed against the backdrop of all the evidence, so prejudiced the jury that there is a substantial likelihood the defendant did not receive a fair trial. The trial court has wide discretion to cure trial irregularities, and an appellate court reviews the trial court's decision whether or not to grant a mistrial for an abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). An abuse of discretion occurs only 'when no reasonable judge would have reached the same conclusion. Hager, 171 Wn.2d at 156.

Here, the trial court clearly considered the stricken testimony of Ms. Larue against the backdrop of all the evidence and found that the statements would not so prejudice the jury that a curative instruction could not be followed. The court specifically found the defendant could still receive a fair trial. The court corrected any

potential errors or irregularities resulting from the stricken testimony by issuing the curative instruction.

Appellate courts have long presumed that jurors follow the trial court's instructions. State v. Cunningham, 51 Wn.2d 502, 505, 319 P.2d 847 (1958), State v. Costello, 59 Wn.2d 325, 332, 367 P.2d 816 (1962), State v. Braun, 82 Wn.2d 157, 169, 509 P.2d 742 (1973), State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987), State v. Imhoff, 78 Wn. App. 349, 351-352, 898 P.2d 852 (1995), State v. Montgomery, 163 Wn.2d 577, 595-596, 183 P.3d 267 (2008), State v. Barry, 183 Wn.2d 297, 306, 352 P.3d 161 (2015). This presumption applies in the context of an instruction to disregard erroneously introduced evidence. Cunningham (improper propensity evidence), Costello (same), Montgomery (improper opinion testimony).

Evidence that the jury did not follow the court's instructions may overcome the presumption that those instructions were followed. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007), Montgomery, 163 Wn.2d at 596. In the absence of such evidence the presumption prevails.

The defense points to no evidence in the record that suggests that the jurors did not follow this instruction. To the

contrary, the evidence in the record shows the jury did follow the instruction of the court given to the jury three times, “to disregard utterly all the evidence presented by Ms. Larue concerning allegations of prior physical contact between her and the defendant.” At least one juror announced during the prosecutor’s closing the intent to follow the curative instruction and that the jury acquitted the defendant on the charge for which Ms. Larue testimony was relevant. It is clear the trial court was correct in its determination that a mistrial was not warranted. Like Kirkman and Montgomery, this court should conclude that these instructions cured any prejudice resulting from the witnesses’ testimony that was stricken.

1. The Court Was Within Its Discretion When It Initially Admitted ER 404(B) Evidence Regarding Witness Larue Pretrial And Any Error Was Cured By The Testimony Being Stricken And The Jury Instructed To Disregard.

The interpretation of an evidentiary rule is a question of law that is reviewed de novo. A trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The appellant bears the burden of proving an abuse of discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

In Washington, the admissibility of ER 404(b) evidence is determined by a four-part test. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). The trial court in this case conducted the appropriate four-part analysis on the record in the pre-trial ER 404(b) hearing. 2 RP

The defendant does not contest that the trial court engaged in the proper four-part analysis. He challenges the court's determination at that hearing that the prior abuse of Ms. Larue was admissible. The defendant does not challenge the admissibility of Ms. Lopez-Castro's allegations of prior abuse or the statements of Ms. Larue regarding the defendant's intent or plan to threaten Ms. Lopez-Castro. BOA at 6.

The state sought to introduce evidence of the defendant's prior acts of domestic violence against Ms. Larue for the purpose of explaining her delay in reporting the threat to Ms. Lopez-Castro's life. 2 RP 139 (See, State v. Nelson, 131 Wn. App. 108, 125 P.3d 1008 (2006).

At the ER 404(b) hearing, Ms. Larue testified that on July 20, 2015, the defendant told her, "We're going to go to Stephey's [Ms. Lopez-Castro's] house. Nobody calls the cops on me. I'm going to kill that bitch." Ms. Larue described the history of abuse by the

defendant towards her involved him choking her, spitting on her, and cracking her ribs. She also said the defendant would say things like, "I wonder if your kids will come to your funeral after I kill you." And that he had pulled a knife on her before. Ms. Larue also testified that part of the abuse was the defendant not allowing her to have a "means of communication" or phone. When asked why she didn't tell anyone about the threats on July 20, 2015, Ms. Larue said it was because she didn't have a means of communication. When asked why she accompanied the defendant to Ms. Lopez-Castro's house, Ms. Larue stated it was because the defendant scares her. The defendant did not present any contradictory testimony to the testimony of Ms. Larue. 2 RP 120-1,125, 128, 131.

The defendant acknowledged that he intended to get into the fact that Ms. Larue did not contact anyone, particularly the police for 5 days after hearing the threats to Ms. Lopez-Castro's life. The court reasoned that the incidents of prior abuse were prejudicial, but given the issue of the delay, the probative value of the reasons for that delay, in particular Ms. Larue's fear of the defendant outweighed the prejudice. The court allowed the evidence to come in. 2 RP 150. The court properly engaged in the proper four-part analysis and was clearly within its discretion to allow the testimony.

After Ms. Larue's testimony to the jury, the court in its discretion determined the evidence of prior abuse to Ms. Larue should not be admissible and struck that testimony. It is the state's position that the court would have been within its discretion to have allowed the testimony as it noted, "And the things she did say, at least, were in keeping with being afraid of the defendant." But the court stated because she did not actually articulate that, it reversed its earlier ruling. 3 RP 249. However, even if the court had abused its discretion, this was cured by the court's reversing its decision and striking the testimony.

2. It Was Not Prosecutorial Misconduct To Expect Witness Larue Would Testify At Trial Consistently With Her Testimony At The ER 404(B) Hearing?

The defendant asserts the circumstances in this case are the same as those in State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2008). BOA 32. However, in Fisher, the trial court found the ER 404(b) evidence was only relevant if the issue of delayed reporting was made an issue. Id. At 734. In Fisher, the court noted that the prosecutor began referencing the ER 404(b) evidence in opening statements but the defendant did not raise the issue of delayed

reporting in his opening statement¹. Throughout the trial in Fisher, the prosecutor repeatedly focused on the ER 404(b) evidence despite the defendant never raising the delayed reporting. In closing argument argued that it showed a propensity to commit the offense in direct conflict with the court's ruling. Also, in Fisher, the defendant did not propose a curative instruction

In this case, it is clear the court did not feel the prosecutor had violated his pretrial ruling. "It's not as though the evidence was unfairly obtained in any way. It's just that, having fairly obtained the evidence, the State was unable to see it recreated when the State needed it." 3 RP 252. It appears from the record the court, like the prosecutor anticipated Ms. Larue would testify consistently with her testimony at the ER 404(b) hearing. Unlike Fisher, there is no indication the prosecutor was intentionally disregarding the court's ruling at the ER 404(b) hearing.

Here, during the pretrial ER 404(b) hearing, the defendant was clear that he intended to get into the fact that Ms. Larue did not tell the police about the threats. The court had ruled therefore the

¹ To the extent Fisher relies on opening statement, it should be noted the opening statements in this case have not be transcribed.

reasons for not reporting to the police were admissible. The prosecutor preemptively elicited testimony from Ms. Larue that she did not report the matter to the police. When a party reasonably anticipates an attack on the witnesses' credibility, evidence rehabilitating the witness may be introduced even before she has been attacked. State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997). A party may reasonably anticipate an attack on the witnesses' credibility when it is an inevitable, central issue in the case. State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 178 (1984), overruled on other grounds, State v. Kitchen, 110 Wn.2d 403, 405, 756 P.2d 105 (1988). The defendant's attorney cross-examined Ms. Larue at length about her failure to notify anyone, including the police of the threats until at least 5 days later, and presented argument in closing to question her credibility based on her failure to notify anyone. 4 RP 410. However, even if the admission of the evidence was error, it was cured by the court striking the testimony and instructing the jury to disregard it.

3. The Court Properly Overruled The Defendant's Objection As To The Relevance Of Ms. Larue's Testimony Based On Her Testimony In The ER 404(B) Hearing.

Ms. Larue's anticipated testimony was relevant to rebut the attack on her credibility reasonably anticipated by the state based

on the defendant's remarks during the pretrial hearings and motions in limine.² The defendant makes it clear in his argument for mistrial that, "The reason that I had made the objection was that I felt that the relevance hadn't yet been established at the time when she started talking about the prior incidents in that it was the explanation for the – why all those prior incidents were coming in was her reason for not calling the police." 3 RP 246. The prosecutor had no reason to believe her witness would not testify consistently with testimony she had given earlier the same day. It was not prosecutorial misconduct for her to anticipate the inevitable attack on Ms. Larue's credibility and present the evidence that would potentially rehabilitate her in chronological order. However, even if the court should have granted the objection, any error was cured by the striking of the testimony and the curative instruction.

B. THE DEFENDANT SHOULD BE REQUIRED TO PAY THE COSTS OF HIS UNSUCCESSFUL APPEAL.

Under RCW 10.73.160(1), this court "may require an adult offender convicted of an offense to pay appellate costs." As this court has recognized, the statute gives this court discretion concerning as to the award of costs. State v. Sinclair, 192 Wn. App.

² It may also have been relevant to address comments by defense counsel in the untranscribed opening statements.

380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The defendant claims that because the trial court found him to be indigent, costs should presumptively be denied. This argument ignores both the language and the history of RCW 10.73.160. It also ignores the defendant's and appellate counsel's affirmative duty to notify this Court of any significant improvement in his financial condition. RAP 15.2(f).

To begin with, RCW 10.73.160 expressly applies to indigent persons. The title of the enacting law is "An Act Relating to indigent persons." Laws of 1995, ch. 275. RCW 10.73.160(3) expressly provides for "recoupment of fees for court-appointed counsel."

Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

Second, the statute adopts existing procedures. "Costs ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." "In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160

should therefore be construed as incorporating existing procedures relating to appellate costs.

Prior to 1995, the rules governing appellate costs in criminal cases were the same as those applied in civil cases. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, the rule was that “[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs.” Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979). The appellate court nonetheless had discretion to deny costs.

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1, 66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn.392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case. It refused to award costs because “this appeal was retained and decided, not for any benefit which either of the parties would receive in consequence of the decision, but for the public interest involved.” NECA, 66 Wn.2d at 23.

In Moore, the plaintiffs brought suit to resolve issues arising from the anticipated dissolution of a water district. The trial court

rendered judgment for the defendants. On appeal, the Supreme Court reversed that judgment because the action was brought prematurely. The court nonetheless refused to award costs: "While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of the premature action and will not be permitted to recover costs on this appeal." Moore, 65 Wn.2d at 393.

As these cases illustrate, appellate courts have discretion to deny costs if some unusual circumstance renders an award inequitable. The circumstances that the court considers are those connected with the issues raised in the appeal. They have nothing to do with the parties' financial circumstances.

This analysis makes practical sense. The appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. Gaining such information requires factual inquiries which the court is poorly positioned to conduct. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Litigating such issues is likely to increase the length and expense of

the appeal. This court should therefore decide the issue of costs based on the appellate record rather than on suppositions.

This analysis is also consistent with long-standing practice under RCW 10.73.160. That statute was enacted in 1995. In 1997, the Supreme Court held that costs could be awarded under the statute without a prior determination of the defendant's ability to pay. Blank, 131 Wn.2d at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal. The Legislature has made no changes to the statute with regard to adult offenders.

"In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period." In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 780, 903 P.2d 443 (1995). For almost 20 years, this court and the Supreme Court construed RCW 10.73.160 as providing for the routine imposition of costs against indigent defendants. The Legislature has acquiesced in that decision. There is no reason for applying different standards now. If the Legislature believes that this results in an undue burden on adult defendants, it can amend the statute – just as it has done for

juvenile offenders. See Laws of 2015, ch. 265, § 22 (eliminating statutory authority for imposition of appellate costs against juvenile offenders).

At sentencing the defendant's attorney told the court that she had advised her client not to make any statements with regard to the factual allegations that were at issue at trial. She also told the court she had brought a notice of appeal with her and that she was asking the court to grant an order authorizing Mr. Lopez-Castro to seek an appeal at public expense. She requested the court find the defendant indigent on the basis that he had been in-custody and had alluded to the possibility that her client would be deported. These statements obviously chilled the trial court's ability to ascertain the defendant's future ability to pay. As the court noted, "I'm going to make a finding of indigency, because I don't have any reason to believe you are going to be earning significant amounts of money when you get out. Maybe you will be, but nevertheless, I'm going to make this finding, and that will be something of a break..." 6 RP 442-4, 447. The defendant provided no documentation or official testimony to establish his immigration status. There was no indication of his assets, income or any limitations on his ability to work. The finding of indigency appears

to be based on the assertion by the defendant that he won't be able to earn money while incarcerated and might be deported.

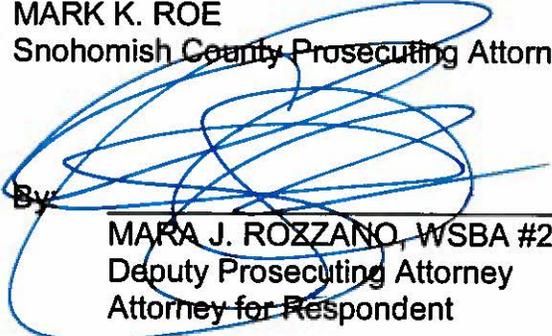
IV. CONCLUSION

For the foregoing reasons the judgment and sentence should be affirmed. Should the defendant not prevail, he should be required to pay appellate costs.

Respectfully submitted on August 15, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By



MARA J. ROZZANO, WSBA #22248
Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

GERMAN LOPEZ-CASTRO,

Appellant.

No. 74220-5-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

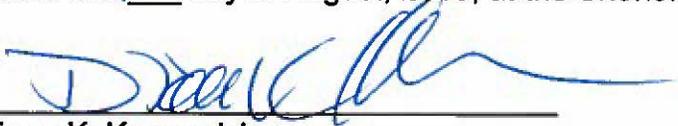
The undersigned certifies that on the 15th day of August, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Dana Nelson, Nielsen, Broman & Koch, nelsond@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 15th day of August, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office