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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

No. 39508-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH NICKOLS

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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RESPONSE BRIEF

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STATEMENT OF THE CASE

Nickols' recitation of the facts is adequate for purposes of responding to this appeal.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED NICKOLS' MOTION FOR A MISTRIAL.

Nichols claims the trial court erred when it denied his motion for a mistrial. This argument is not persuasive.

A trial court's denial of a defendant's motion for mistrial is reviewed for an abuse of discretion. State v. Hopson, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989). An abuse of discretion will be found only when no reasonable judge could have reached the same conclusion. Id. A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that he will be tried fairly; only errors affecting the trial's outcome are deemed prejudicial. Id. In determining the effect of an irregularity, a reviewing court will examine its seriousness, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. Id.. at 284 (*citing* State v. Mak, 105 Wash.2d 692, 701, 718 P.2d 407, *cert. denied,* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

Under the facts presented in the present case, the trial court did not abuse its discretion when it denied Nickols' motion for a mistrial.

The factual circumstances here are as follows. In a motion in limine, Nickols requested that the Court direct the State to tell its witnesses not to mention anything regarding any prior criminal conduct or "bad acts" by Nickols. In response to this request the trial court ruled:

> COURT: I'm ordering that the prosecutor is to advise the prosecutor's lay witnesses that they are not to volunteer information about prior criminal history, they're not to volunteer information about prior bad acts; but, on the other hand, if they're specifically asked a question, either on direct or cross examination, I think the witnesses are allowed to answer the question, and *whether the answer is responsive to the question that's asked is something that will have to come up and be dealt with during the trial.*

RP 31, 32 (emphasis added). Nickols also asked that the Court direct the State to tell its witnesses "not to mention [Nickols'] custody status. . . . I just don't want them to come and say, 'Yeah, he's in jail now,' or something along those lines." RP 32. The Court granted that request. Id. The prosecutor advised defense counsel that he had indeed admonished the witnesses "not to come out with anything like that." RP 38.

Despite everyone's best efforts to impress upon the witnesses that they were not to mention such topics, however, Samantha Tanori did just that. Still, there is absolutely no evidence that the prosecutor asked a question to provoke Tanori into venturing into the forbidden territory, nor is Respondent aware of any method that the prosecutor here could have used to rein in this witness. She quite simply blurted out a reference to Nickols having been in jail in 2007.

This occurred when the prosecutor asked a perfectly proper question on direct. The exchange went like this:

PROSECUTOR:	How long have you known Mr. Nickols?
TANORI:	Over a year.
PROSECUTOR:	Did you guys ever have a dating relationship?
TANORI:	Yes, we did.
PROSECUTOR:	When did that start and when did that end?
TANORI:	That started -- well, I don't remember exactly when it started actually, but it ended *when he went to jail back in November of '07*.

RP 37 (emphasis added). Upon hearing this answer, Nickols immediately requested a mistrial. RP 37. As can be seen by the

content of the prosecutor's question, there is no way the prosecutor could have predicted that Tanori would give such an answer.

Furthermore, the trial court found no problem with Tanori's response. The trial court explained:

> COURT: . . . the question was, '[w]hen did the dating relationship end?
>
> * * *
>
> COURT: You assert that the answer, '[w]hen he went to jail,' was nonresponsive, and I don't know that it was nonresponsive at all. It's entirely conceivable that this witness, as opposed to having a specific date and month and year in mind, might look at it in terms of, 'Well, when he went to jail, that's when I was no longer his girlfriend.' So I can't say that it was nonresponsive. [RP 39]
>
> DEFENSE COUNSEL: Can we have the court reporter read back exactly what her answer was? (last answer was read.)
>
> * * *
>
> COURT: Well, the problem with it is, the way the question was asked and the answer that was given was in fact responsive to the question that was asked.
>
> The concern that you expressed previously was that there would be gratuitous volunteering of information about bad acts committed by the defendant. I don't find that this was a gratuitous volunteering of information. She was asked when the relationship ended. She said it ended in November of '07 when he went to jail. End of story. [RP 41].
>
> DEFENSE COUNSEL: . . . The 'when he went to jail' is exactly what I've been trying to avoid,

> and that's exactly what I anticipated this witness. . . to come out with. They were specifically told, 'don't say that.'
>
> COURT: . . . They were told not to volunteer anything. I don't find what she said to be volunteering. . . .Motion for dismissal is denied. Motion for mistrial is denied. *I will instruct the jury to disregard the response.* [RP 41]

RP 39-41 (emphasis added). The trial court's denial of the mistrial was correct.

The seriousness of this "irregularity" was minor --the time period referred to by Tanori in the remark was nearly two years in the past. RP 37, 41. Furthermore, all this remark did was show the time period in which Tanori had ended her relationship with Nickols.

Finally, the trial court *did* instruct the jury to disregard the remark (assuming the jury even remembered the brief reference in the first place, considering their removal from the courtroom for the court to consider the motion). In sum, these types of irregularities, unfortunately, are quite simply going to happen--despite a prosecutor's best efforts (as here) to impress upon the witness not to mention that a defendant at some point was in jail. If our courts declared a mistrial every time a State's witness goes "sideways" via an unprovoked, unintentional, minor slip of the tongue--there would be quite a drain on our court system indeed.

In short, the witness's one fleeting remark should not a mistrial make. The trial court did not abuse its discretion when it denied Nickols' motion for a mistrial, and this Court should so find.

B. ATTORNEY FEES WERE PROPERLY IMPOSED.

Nickols argues that it was error for the trial court to order $1,200 in attorney fees for his court-appointed counsel. This argument is without merit because-- so far at least-- Washington law allows a court to impose costs for court-appointed counsel against a convicted defendant.

CrR3.1(d)(2) states, in pertinent part, "[the assignment of a lawyer may be conditioned upon part payment pursuant to an established method of collection." RCW 10.01.160 also permits the court to order a convicted defendant to repay the costs of a lawyer as part of the judgment and sentence. Additionally, RCW 9.94A.030(28) explains that the definition of "legal financial obligation" includes attorney fees:

> "Legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, <u>court-appointed attorneys' fees,</u> and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.

West's RCWA 9.94A.030 (emphasis added). Our Appellate Courts have also agreed that attorney fees may be assessed against a convicted, indigent defendant. See e.g, State v. Wimbs 68 Wash.App. 673, 681, 847 P.2d 8 (1993)(emphasis added), *review granted* (other grounds), 123 Wn.2d 1026, 872 P.2d 1080(1994), *affirmed on remand* 74 Wn.App. 511, 874 P.2d 193(1994); State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976). The Washington Supreme Court has also rejected the argument that attorney fees cannot be assessed against a convicted defendant simply because he is indigent. State v. Curry, 118 Wn.2d 911, 915, 829 P.2d 166 (1992). On of the reasons our courts have upheld the assessment of attorney fees against a convicted, indigent defendant is that our statutes provide certain safeguards--one of which is that a defendant may petition the court to vacate such costs if it appears there is no likelihood the defendant's indigency will end. Barklind, supra.

In the present case, Nickols argues that attorney fees could not be assessed against him because those fees fall within the exception "for costs inherent in providing a jury trial." Brief of Appellant at 8, citing RCW 10.01.160(2). But Nickols cites no

authority supporting this interpretation of our current statutes--which expressly allow imposition of such costs--nor has Respondent found any.

A reviewing court is not required to consider arguments for which the party has cited no authority. State v. Bello 142 Wash.App. 930, 932, 176 P.3d 554 (2008), citing State v. Kroll, 87 Wash.2d 829, 838, 558 P.2d 173 (1976); and State v. Dennison 115 Wash.2d 609, 629, 801 P.2d 193 (1990). This Court should agree that Nickols' argument regarding the imposition of attorney fees against convicted, indigent defendants is not persuasive. Absent current authority disallowing such costs, the court's order imposing attorney fees should be upheld.

Nickols does, however, cite State v. Hess, 86 Wn.2d 51, 541 P.2d 51 (1975), in support of his argument that the Washington Constitution prohibits a court from requiring an indigent defendant to repay attorney fees as a condition of sentence. This reliance is misplaced, because, as the Hess Court notes, "[t]he issue of whether a statute which authorizes recoupment and which provides those safeguards noted in Fuller[1] . . .. is not before us here." Hess

[1] Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)(discussing the safeguards in Oregon statutes that guard against "oppressive application" of imposing costs against indigent defendants for court appointed counsel).

at 54. In other words, the Hess case--decided in 1975--did not discuss any of the procedural safeguards for imposing costs against indigent defendants that now exist under Washington law. See e.g., CrR3.1(d)(2); RCW 10.01.160; RCW 9.94A.030(28). In particular, the Hess Court did not have before it the Washington statute which "provides the guide to imposition of recoupment of attorney fees as well as costs." State v. Baldwin, 63 Wn.App. 303, 310-312, 818 P.2d 1116 (1991). Indeed, Washington cases decided after Hess clearly allow the imposition of costs for court appointed counsel against a convicted, indigent defendant. And, unlike in Hess, these newer cases do discuss the statutory safeguards now in place in Washington which help guard against oppressive assessment of costs against indigent defendants. Id.; Barklind, supra; Curry, supra; State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997); State v. Mahone, 98 Wn.App. 342, 989 P.2d 583 (1999); State v. Johnson, 59 Wn.App. 867, 802 P.2d 137, *review granted*, 117 Wn.2d 1007, 816 P.2d 1223, *reversed on other grounds*, 119 Wn.2d 143, 829 P.2d 1078(1990)(and statutes cited therein).

In sum, Respondent is not aware of any current Washington law which holds that the costs of court appointed counsel cannot be

assessed against an indigent defendant because such costs are part of the "expenses inherent in providing a constitutional jury trial." Brief of Appellant at 7,8. The authority cited by Nickols does not support this argument for the reasons just stated. Therefore, the imposition of attorney fees against Nickols was proper, and the judgment and sentence should be affirmed in all respects.

Amount of Attorney Fees

Nickols also argues--as he did below--that because he offered to plead guilty to the lesser offense of assault in the fourth degree but the State rejected that offer--and because the jury convicted him only on that lesser offense-- that he therefore should not have to pay the higher costs imposed for taking the case to trial. Brief of Appellant at 9. There is absolutely no authority for this creative line of reasoning, and Nickols cites none.

While Nickols certainly has a right to a jury trial--and he got one--there is no such right to a plea bargain. State v. Moen, 110 Wn.App. 125, 132-133, 38 P.3d 1049 (2002), *citing*, State v. Wheeler, 95 Wash.2d 799, 804, 631 P.2d 376 (1981) (no constitutional right to a plea bargain). The amount of attorney fees based upon the units charged for a jury trial was properly imposed,

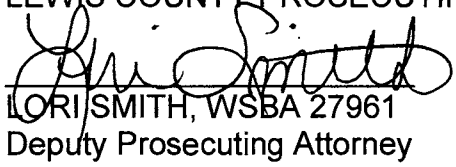
and Nickols' argument to the contrary has no basis in Washington law.

CONCLUSION

For the reasons discussed above, the trial court did not abuse its discretion when it denied Nickols' motion for a mistrial. Nor did the trial court err when it imposed attorney fees. Accordingly, Nickols' conviction should be affirmed.

RESPECTFULLY SUBMITTED THIS 5th day of January, 2010.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by: 
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a copy of this response brief was served upon the Appellant by placing said document in the United States mail, postage prepaid, addressed to Appellant's attorney as follows:

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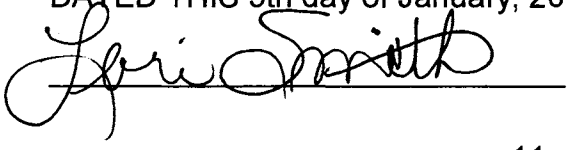
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