

NO. 46965-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

STACY THORNTON,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Trial counsel's failure to object when the state called upon a police officer to testify that in his opinion the defendant was guilty and when the state argued to the jury that it should find the defendant guilty of trafficking in stolen property because he was a homeless drug addict who had the propensity to commit that crime violated the defendant's constitutional right to effective assistance of counsel.

2. The trial court erred when it imposed legal financial obligations upon an indigent defendant without making an individualized inquiry into the defendant's ability to pay.

3. This court should not impose appellate costs on appeal.

Issues Pertaining to Assignment of Error

1. Does a trial counsel's failure to object when the state calls upon a police officer to testify that in his opinion the defendant is guilty and when the state argues to the jury that it should find the defendant guilty of trafficking in stolen property because he is a homeless drug addict who has the propensity to commit that crime violate that defendant's constitutional right to effective assistance of counsel?

2. Does a trial court err if it imposes discretionary legal financial obligations upon an indigent defendant without first making an individualized inquiry into the defendant's ability to pay?

3. Should an appellate court impose costs on appeal if an indigent client has no present or future ability to pay those costs?

STATEMENT OF THE CASE

Factual History

Sometime during 2013 the defendant Stacy Thornton spent time in the Thurston County Work Release facility following his conviction for possession of a controlled substance. CP 156; 194-197. During this time the defendant became acquainted with another inmate in work release by the name of Marcus Hodnett. RP 194-197. Following his release from custody later in the year the defendant, who was homeless, found himself living on the streets of Olympia. *Id.* While living on the streets of Olympia he would occasionally go to the Union Gospel Mission where he could get a hot meal for free. *Id.* On one of these evenings the defendant saw Mr. Hodnett and started a conversation with him. *Id.* Mr. Hodnett was also homeless. *Id.* During their conversation Mr. Hodnett told the defendant that he had found a heated, empty government building in town where they could sneak in and sleep. RP 52-54. The defendant went with Mr. Hodnett and slept on the carpeted floors in one of the rooms of that building. RP 210.

After a few days of staying in the empty building Mr. Hodnett approached the defendant, asked if he had any identification, and then asked if he would help Mr. Hodnett sell or pawn a platinum ring with a large diamond in it he said he got from his deceased grandfather. RP 67-68, 204, 247. In fact, Mr. Hodnett had recently burglarized a residence at 3130 Sunset

Way SE in Tumwater and stolen the ring, along with a number of other items. RP 61-63. The defendant stated that he did have identification and that he would help Mr. Hodnett sell the ring. RP 204. Mr. Hodnett told the defendant that he would give him some of the proceeds from the sale. RP 67-68. In fact, Mr. Hodnett had previously taken the ring to a local Fred Meyers Jewelry store, where they told them that it had an approximate retail value of \$5,000.00, and that a pawn broker in Yelm would give him a fair price for it. RP 67-68, 205.

Later that day both Mr. Hodnett and the defendant obtained a ride from a male acquaintance of Mr. Hodnett (according to the defendant) or a male acquaintance of the defendant, (according to Mr. Hodnett). RP 73-74, 208-209. This person and his female passenger first took them to a pawn broker in Yelm. *Id.* Although the owner of that store was interested in the ring he couldn't buy it that day because he did not have the cash on hand. RP 73-74. Mr Hodnett and the defendant then tried another pawn shop, but the owner was not interested in jewelry. *Id.* The group then returned to a pawn shop in Olympia by the name of Cash Northwest. RP 73-74, 100-104, 211-212. Once at that store the defendant went in alone and was able to pawn the ring for \$1,000.00. *Id.* When he came out of the store he gave the money to Mr. Hodnett, who gave him back \$200.00 (Mr. Hodnett's version) or \$50.00 (the defendant's version). RP 74, 211.

A few days after the defendant pawned the ring Detective Chris Johnstone of the Olympia Police Department had occasion to check a website pawn brokers use to list property that might be stolen. RP 40. Upon reviewing this site Detective Johnstone found a platinum ring with a large diamond listed by Cash Northwest. *Id.* Upon further investigation he determined that it was one of the rings stolen in the burglary at 3130 Sunset Way SE in Tumwater. RP 37-38, 42. He then went to the pawn store, retrieved the ring, and obtained a copy of the slip the defendant had signed when he pawned the item. RP 37-42. A couple of patrol officers in Olympia later found the defendant on the streets and took him to the police department where Detective Johnstone interviewed him. RP 43-45. During that interview the defendant admitted pawning the ring but denied that he had known that it was stolen. RP 246. Rather, he claimed that Mr. Hodnett had told him that it had previously belonged to his deceased grandfather. RP 247.

Procedural History

By information filed February 10, 2014, the Thurston county Prosecutor charged the defendant Stacy Thornton with one count of trafficking in stolen property in the first degree. CP 4. The prosecutor later amended this information to add a count of bail jumping upon an allegation that the defendant failed to appear at a scheduled pretrial on April 17, 2014. CP 10.

The case eventually went to trial before a jury, with the state calling the following six witnesses: (1) Detective Johnstone, (2) Marcus Hodnett, (3) the owner of the burglarized house, (4) the clerk from the shop where the defendant pawned the ring, (5) a deputy prosecutor who testified that she was in court on the day the defendant failed to appear for pretrial, and (6) a woman by the name of Kelly Olsen, who claimed that she was privy to conversations about the ring between Mr. Hodnett and the defendant. RP 35, 51, 94, 114, 118, 166. These witnesses testified to the facts contained in the preceding factual history. *See Factual History supra*. Once the state closed its case, the defendant took the stand and testified that while he had pawned the ring he did not learn it was stolen until later. RP 194-241. The state then called Detective Johnstone for brief rebuttal, after which the defendant took the stand for even briefer sur-rebuttal. RP 243, 251.

During his testimony on direct Detective Thornton told the jury that in his opinion the defendant had knowledge that the ring was stolen at the time he pawned it. RP 46. This exchange went as follows:

Q. Detective, without referring to the information that you gathered during your interviews with either individual, what was your opinion as to the role that the defendant had regarding the pawning of the ring, if any?

A. I believe that he had knowledge that it was stolen and that he pawned the item at Cash Northwest knowing that the item was stolen.

RP 46.

The defense made no objection that this evidence constituted an improper opinion generally or an improper opinion of guilt in particular. *Id.*

In addition, during his testimony Marcus Hodnett testified that he and the defendant were both drug addicts, that they smoked marijuana and injected methamphetamine together, that they didn't have jobs, and that he did what all jobless drug addicts do, which was to continually commit thefts and burglaries and pawn or sell the stolen items to get drugs. RP 54-55, 67,

88. A portion of this testimony went as follows:

Q. And when you have indicated using drugs now and then with the defendant, well, Mr. Thornton, what drugs were you referring to?

A. Primarily methamphetamine and marijuana.

Q. And you have indicated you were homeless. Were you employed? Did you have any jobs going at the time?

A. No.

Q. So how did you pay for your addiction then, sir?

A. I was doing, you know – let's see. I was doing deals downtown with people, for lack of a better term, hustling, I guess you could say. I would do petty thefts, and I had recently did a burglary, residential burglary.

Q. And is that a common or uncommon practice among users to commit thefts at various stages?

A. Well, I'm not a professional at what common practices are for users, but as for me, I would speak for myself, it was a regular, daily thing for me.

Q. And so did you socialize with each other than just the nights you were staying the same time at the Housing Authority?

A. Yeah, I mean there was times when I needed some drugs and he knew where to get it, and we met at another location and hung out there for a while.

Q. And you have described – I think Mr. Taylor asked you about each time you hung out about an hour or two, and you described smoking marijuana. Did you only smoke marijuana together?

A. No, no, we used meth together intravenously.

RP 54-55, 88.

The defense did not object that this evidence was more prejudicial than probative, that it was not relevant, or that it violated ER 404(b) as improper character evidence “offered for the purpose of proving action in conformity therewith on a particular occasion.” RP 54-55, 88.

During its case-in-chief the state also called upon Kelly Olson to given her opinion that homeless, drug addicted person’s routinely support their drug habits by committing thefts and then either selling the stolen items or pawning them. RP 168-169. This testimony went as follows:

Q. Sure. As an individual who is homeless and has a drug addiction, is that an expensive habit?

A. It is.

Q. And how would you pay for that habit?

A. By committing various crimes, usually those related to theft.

Q. You say “theft.” What would happen with those items after

they were stolen generally?

A. Sometimes traded directly to drug dealers or pawned, and then the money was used to get drugs.

Q. Is that a common or uncommon experience?

A. Extremely common.

Q. Amongst whom?

A. Among drug users, especially homeless, but all in my experience.

Q. You have described those thefts being part of that lifestyle. Were you ever convicted of any of those thefts?

A. Yes.

RP 168-169.

As with Mr. Hodnett's testimony, in this case the defense again did not object that this evidence was more prejudicial than probative, that it was not relevant, or that it violated ER 404(b) as improper character evidence "offered for the purpose of proving action in conformity therewith on a particular occasion." RP 168-169.

Following the reception of evidence in this case the court instructed the jury without objection from either party. RP 268. The state then presented closing argument, during which it invited the jury on five separate occasions to conclude that (1) since homeless drug addicts all commit thefts to support their habits and then either sell or pawn the stolen items, and (2)

that since the defendant was a homeless drug addict who pawned a stolen ring, and (3) that since other persons believed the ring to be stolen, then (4) the defendant had to have known the ring was stolen when he pawned it. RP 300, 302, 304, 313. In the first instance the state argued:

You heard from almost all of the witnesses, to include Ms. Northrup [the pawn store clerk], that stolen property, drugs, and pawn stores are regularly linked, because a lot of use requires money, and a lot of people in the drug trade don't have money. Why? Because it's expensive and they use it up. It's a perishable product. There is a supply-demand issue. So what happens? A lot of that only stolen property ends up getting pawned. That is common knowledge. That is the common culture, and you have heard that from every single witness that came up and testified. It's not some kind of kept secret that folks don't know about.

RP 300.

The second instance of the state's argument on this point went as follows:

And the last one, and this is important, and we will come back to it at the end, but Ms. Northrup [the pawn store clerk], a reasonable person, believed that ring was stolen, and she had literally a fraction of the information that the defendant had. So sitting in your position, had she been sitting there, she didn't have any of that, and she knew looking at it that it was stolen, but she can't tell you that, or she can't tell the person that, because they have a store policy that says, unless you know you are seeing them steal it, you are not allowed to not take it. Instead their responsibility is minimize that risk, if that property is going to come back and be taken from them, and that's exactly what happened.

So the police came back, put a hold on it. The store is out the money they put out for that ring, but what's significant is that Ms. Northrup, a reasonable person, knew without any of this information simply by the interaction and the ring being pawned by Mr. Thornton

that that ring was probably stolen.

RP 302-303.

The following gives the third instance in which the state argued that the defendant's drug addiction proved his knowledge that the ring was stolen:

He said he'd been homeless for three weeks or so but had been using methamphetamine and marijuana off and on since 1990. This is interesting to me. This is, I think, interesting to you, is that he makes all of these statements about how he doesn't know that this item is stolen and you know he has been using methamphetamine and he has been using drugs off and on since 1990, but he tries to distance himself, and I submit to you that is what was happening in his testimony. He is trying to distance himself with both these people and this culture. It's a new world for me. I don't know anything about this. I'm not involved in this process. This is what these people do, but I don't do that. I don't have to buy my drugs. I have always gotten my drugs without purchasing them. I have maybe had to trade clothes, but I have never had to purchase drugs – your Honor, can we take a break for a moment?

RP 304.

The state's closing then went on and for a fourth time and picked up the following argument:

Further, you don't just pick up meth at the grocery store. You're engaged with people that are using those drugs. You have a prior drug conviction. It is a problem. You have a problem. If you don't recognize that is a problem, then I submit to you that colors your testimony about how you talk about and what the reasonableness of other actions and other events as they occurred.

It also indicates that you have clear knowledge of how this trade and how this culture works. You know how to get it. You know where to get it, and you know how other people get it, and that includes, as is common knowledge, stealing and trading and pawning items to get those drugs.

RP 312-313.

Finally, in rebuttal, the state made the following argument:

Why would anyone do that ? Why would anyone pawn an item for very little money a stolen item? Why would anybody in their right mind do that? People that don't make good choices. People who have demonstrated they have a history of not making good choices, that are using substances. Those are people who do that. People who need money now, they don't have money, don't have a way to get money, those are the people that do that, people like the defendant who are involved in a culture and are doing exactly what people like Mr. Hodnett, Ms. Olsen, and Det. Johnstone talked about doing. These actions are complete consistent with that. And when you talk about, why would a person do that, honest people don't do that, those are not the people we are talking about right here.

You know we would like to go down to the central casting or the State would like to go down to central casting and pick out people who don't have those kinds of thefts, but that's not who does that. The types of people who do these types of actions are people who are involved in the culture, who are involved in the drug trade, who are doing these illegal actions together. So we are not talking about the honest.

RP 340-341.

Following argument and deliberation, the jury returned guilty verdicts on both counts. CP 141. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. 141-151, 153-164.

ARGUMENT

I. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN (1) THE STATE CALLED A POLICE OFFICER TO TELL THE JURY THAT IN HIS OPINION THE DEFENDANT WAS GUILTY, AND (2) THE STATE PRESENTED EVIDENCE OF AND ARGUED THAT THE DEFENDANT MUST BE GUILTY BECAUSE HE WAS A HOMELESS DRUG ADDICT AND COMMITTING CRIMES IS WHAT HOMELESS DRUG ADDICTS DO VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, petitioner claims ineffective assistance based upon trial counsel’s failure to object when the state (1) called upon a police officer to tell the jury that in his opinion the defendant was guilty, and (2) when the state presented evidence that the defendant was a homeless drug addict and that he must have committed the crime charged because committing crimes is what homeless drug addicts do. The following sets out these arguments.

(I) Trial Counsel’s Failure to Object When the State Had Officer Johnstone Tell the Jury That in His Opinion the Defendant Was Guilty Fell Below the Standard of a Reasonably Prudent Attorney.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result no witness

whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701.

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to

have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that “[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wn.2d 312, at page 315, 427 P.2d 1012, at page 1014 (1967), said:

Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. The proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. To the question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).

So the testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

State v. Haga, 8 Wn.App. At 491-492.

In the case at bar the state charged the defendant in Count I with trafficking in stolen property upon an allegation that he pawned a ring that he knew to be stolen. At trial the defendant took the witness stand and admitted that he had pawned the stolen ring. His defense was simply that he did not know that the ring was stolen when he pawned it. This was the only issue before the jury. In light of these facts, the state specifically invited Officer Johnstone to render an opinion on whether or not the defendant knew the ring was stolen. This occurred in the following exchange:

Q. Detective, without referring to the information that you gathered during your interviews with either individual, what was your opinion as to the role that the defendant had regarding the pawning of the ring, if any?

A. I believe that he had knowledge that it was stolen and that he pawned the item at Cash Northwest knowing that the item was stolen.

RP 46.

The decision whether or not the defendant knew the ring was stolen when he pawned it and was thus guilty of the crime charged was a decision that the jury was called upon to make as the trier of fact in the case. By rendering this opinion that he believed that the defendant knew the ring was stolen when he pawned the ring Officer Johnstone invaded the province of

the jury. There is no possible tactical reason for a defense attorney to knowingly fail to object to this type of evidence. As the court noted in *Carlin*, this type of evidence is particularly egregious when presented by a police officer. *State v. Carlin*, 40 Wn.App. at 703. Thus, in this case trial counsel's failure to object to this evidence fell below the standard of a reasonably prudent attorney.

(2) Trial Counsel's Failure to Object When the State Presented Evidence of and Argued That the Defendant must Be Guilty Because He Was a Homeless Drug Addict and Committing Crimes Is What Homeless Drug Addicts Do Fell Below the Standard of a Reasonably Prudent Attorney.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). Consequently, it is fundamental under our adversarial system of criminal justice that "propensity" evidence, many times offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b)

wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court’s permission to elicit evidence from

the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted

him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a “reasonable probability” that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In the case at bar the state repeatedly called upon witnesses to testify that the defendant was a homeless drug addict whose status predisposed him to commit the crime with which he was charged. Put another way, the state presented evidence that (1) the defendant was a homeless drug addict, and (2) that homeless drug addicts routinely commit crimes such as theft and trafficking in stolen property with that trafficking many times occurs at pawn shops. Thus, the state argued that the defendant must be guilty of trafficking in stolen property because he was a homeless drug addict and trafficking in stolen property is what homeless drug addicts do.

This evidence was first presented during the following exchange between the prosecutor and Mr. Hodnett:

Q. And when you have indicated using drugs now and then with the defendant, well, Mr. Thornton, what drugs were you referring to?

A. Primarily methamphetamine and marijuana.

Q. And you have indicated you were homeless. Were you employed? Did you have any jobs going at the time?

A. No.

Q. So how did you pay for your addiction then, sir?

A. I was doing, you know – let's see. I was doing deals downtown with people, for lack of a better term, hustling. I guess you could say. I would do petty thefts, and I had recently did a burglary, residential burglary.

Q. And is that a common or uncommon practice among users to commit thefts at various stages?

A. Well, I'm not a professional at what common practices are for users, but as for me, I would speak for myself, it was a regular, daily thing for me.

Q. And so did you socialize with each other than just the nights you were staying the same time at the Housing Authority?

A. Yeah, I mean there was times when I needed some drugs and he knew where to get it, and we met at another location and hung out there for a while.

Q. And you have described – I think Mr. Taylor asked you about each time you hung out about an hour or two, and you described smoking marijuana. Did you only smoke marijuana together?

A. No, no, we used meth together intravenously.

RP 54-55, 88.

The state repeated the presentation of this propensity evidence during the direct evidence of Kelly Olson. This exchange between the prosecutor and Ms Olson went as follows:

Q. Sure. As an individual who is homeless and has a drug addiction, is that an expensive habit?

A. It is.

Q. And how would you pay for that habit?

A. By committing various crimes, usually those related to theft.

Q. You say “theft.” What would happen with those items after they were stolen generally?

A. Sometimes traded directly to drug dealers or pawned, and then the money was used to get drugs.

Q. Is that a common or uncommon experience?

A. Extremely common.

Q. Amongst whom?

A. Among drug users, especially homeless, but all in my experience.

Q. You have described those thefts being part of that lifestyle. Were you ever convicted of any of those thefts?

A. Yes.

RP 168-169.

At no point did the defense make any objection to this improper testimony. Neither did the defense make an objection when on five separate occasions the state argued to the jury that the defendant must be guilty based upon his status as a homeless drug addict. The first instance of this argument went as follows:

You heard from almost all of the witnesses, to include Ms. Northrup [the pawn store clerk], that stolen property, drugs, and pawn stores are regularly linked, because a lot of use requires money, and a lot of people in the drug trade don't have money. Why? Because it's expensive and they use it up. It's a perishable product. There is a supply-demand issue. So what happens? A lot of that only stolen property ends up getting pawned. That is common knowledge. That

is the common culture, and you have heard that from every single witness that came up and testified. It's not some kind of kept secret that folks don't know about.

RP 300.

The second instance of the state's argument on this point went as follows:

And the last one, and this is important, and we will come back to it at the end, but Ms. Northrup [the pawn store clerk], a reasonable person, believed that ring was stolen, and she had literally a fraction of the information that the defendant had. So sitting in your position, had she been sitting there, she didn't have any of that, and she knew looking at it that it was stolen, but she can't tell you that, or she can't tell the person that, because they have a store policy that says, unless you know you are seeing them steal it, you are not allowed to not take it. Instead their responsibility is minimize that risk, if that property is going to come back and be taken from them, and that's exactly what happened.

So the police came back, put a hold on it. The store is out the money they put out for that ring, but what's significant is that Ms. Northrup, a reasonable person, knew without any of this information simply by the interaction and the ring being pawned by Mr. Thornton that that ring was probably stolen.

RP 302-303.

The following gives the third instance in which the state argued that the defendant's status as a drug addiction proved his knowledge that the ring was stolen:

He said he been homeless for three weeks or so but had been using methamphetamine and marijuana off and on since 1990. This is interesting to me. This is, I think, interesting to you, is that he makes all of these statements about how he doesn't know that this item is stolen and you know he has been using methamphetamine and

he has been using drugs off and on since 1990, but he tries to distance himself, and I submit to you that is what was happening in his testimony. He is trying to distance himself with both these people and this culture. It's a new world for me. I don't know anything about this. I'm not involved in this process. This is what these people do, but I don't do that. I don't have to buy my drugs. I have always gotten my drugs without purchasing them. I have maybe had to trade clothes, but I have never had to purchase drugs -- your Honor, can we take a break for a moment?

RP 304.

The state's closing then went on and for a fourth time as follows:

Further, you don't just pick up meth at the grocery store. You're engaged with people that are using those drugs. You have a prior drug conviction. It is a problem. You have a problem. If you don't recognize that is a problem, then I submit to you that colors your testimony about how you talk about and what the reasonableness of other actions and other events as they occurred.

It also indicates that you have clear knowledge of how this trade and how this culture works. You know how to get it. You know where to get it, and you know how other people get it, and that includes, as is common knowledge, stealing and trading and pawning items to get those drugs.

RP 312-313.

Finally, in rebuttal, the state made the following argument:

Why would anyone do that? Why would anyone pawn an item for very little money a stolen item? Why would anybody in their right mind do that? People that don't make good choices. People who have demonstrated they have a history of not making good choices, that are using substances. Those are people who do that. People who need money now, they don't have money, don't have a way to get money, those are the people that do that, people like the defendant who are involved in a culture and are doing exactly what people like Mr. Hodnett, Ms. Olsen, and Det. Johnstone talked about doing. These actions are complete consistent with that. And when you talk about,

why would a person do that, honest people don't do that, those are not the people we are talking about right here.

You know we would like to go down to the central casting or the State would like to go down to central casting and pick out people who don't have those kinds of thefts, but that's not who does that. The types of people who do these types of actions are people who are involved in the culture, who are involved in the drug trade, who are doing these illegal actions together. So we are not talking about the honest.

RP 340-341.

In *Pogue* the court held that in a case claiming that the defendant possessed cocaine, the fact that he had previously possessed cocaine only showed that he had a propensity to commit the crime charged. As such, admission of that evidence was improper. Similarly, in the case at bar, the admission of the evidence that the defendant was homeless and the claim that he was a drug addict and that homeless drug addicts routinely steal property and sell it to pawn shops was also presented solely to allow the prosecutor to argue that the jury should convict based upon that propensity. Indeed, this is what the state argued to the jury on five separate occasions.

As with the evidence of opinion of guilt, there is no possible tactical reason for a defense attorney to knowingly fail to object to this type of evidence and fail to object to the argument the state repeatedly made from it. The evidence was inadmissible, the argument was improper, and trial counsel's failure to object fell below the standard of a reasonably prudent

attorney.

(3) Trial Counsel's Errors Caused Prejudice and Denied the Defendant Effective Assistance of Counsel.

As was stated previously, in order to prevail upon a claim of ineffective assistance the defense has the burden of proving prejudice. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A review of the evidence in this case indicates that there is a reasonable probability sufficient to undermine confidence in the guilty verdict in this case.

This evidence includes the following facts. First, in order to obtain a conviction the state had to rely upon the testimony of two drug addicts with numerous theft convictions who were highly motivated to provide the evidence the state sought regardless of its truth. Both were currently being prosecuted for their crimes and were looking at prison were they to be taken out of their drug court programs. Second, the defendant knowingly used his own identification to pawn the ring. This fact militates against the conclusion that he knew the ring was stolen when he pawned it. Third, the defendant voluntarily spoke with the police when asked. Fourth, by all accounts the defendant received little compensation for using his identification to pawn the

ring. Finally, the defendant pawned the ring at a pawn shop where he was a known customer. All of these facts militate to support a conclusion that the defendant did not know the ring was stolen when he pawned it. In light of these exculpatory facts, the state's use of and argument from improper propensity evidence undermines confidence in the jury's verdict in this case. Thus, trial counsel's failure to object caused prejudice and denied the defendant effective assistance of counsel.

II. THE TRIAL COURT ERRED WHEN IT IMPOSED DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS UPON AN INDIGENT DEFENDANT WITHOUT MAKING AN INDIVIDUALIZED INQUIRY INTO THE DEFENDANT'S ABILITY TO PAY.

A trial court's authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

(3) The court shall not sentence 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).

Although the court need not enter written findings and conclusions in regards to a defendant's current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55,

817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations and any punishment for willful failure to pay must meet the following requirements:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayments may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar the trial court imposed discretionary legal financial obligations in the form of court costs without any consideration of the defendant's ability to pay those obligations. Thus, the trial court violated RCW 10.01.160(3), as well as the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the imposition of legal-financial obligations and remand for consideration of the defendant's ability to pay.

In this case the state may argue that this court should not address this issue because the defendant did not sufficiently preserve this statutory error at the trial level and the argument does not constitute a manifest error of constitutional magnitude as is defined under RAP 2.5(a). However, in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court took the opportunity to review the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair penalties that indigent defendant's experience based upon this failure. The court then decided to deviate from this general rule precluding review. The court held:

At sentencing, judges ordered *Blazina* and *Paige-Colter* to pay LFOs under RCW 10.01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although

appellate courts will normally decline to hear unpreserved claims of error, we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

State v. Blazina, at 11-12.

In the case at bar the record reveals that the trial court did not make "an individualized inquiry in to the defendant's current and future ability to pay" before it imposed legal financial obligations. As a result, this court should reverse the imposition of all discretionary legal financial obligations.

III. THIS COURT SHOULD NOT IMPOSE APPELLATE COSTS ON APPEAL.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra*. In the case at bar the trial court found Mr. Thornton

indigent and entitled to the appointment of counsel at both the trial and appellate level. CP 3, 165-166. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: “[t]he court of appeals,

supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly requested to do so.” *Supra*.

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” *State v. Sinclair*, 192 Wn. App. at 388. Thus, “it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay.

Sinclair, supra. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, “[i]t is entirely appropriate for an appellate court to be mindful of these concerns.” *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was “unable by reason of poverty to pay for any of the expenses of appellate review” and that the defendant “cannot contribute anything toward the costs of appellate review.” *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant’s, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

Similarly in the case at bar, the defendant Stacy Thornton is indigent and lacks an ability to pay. During sentencing, the trial court refused to impose the majority of discretionary legal financial obligations. CP 156-157. The court also entered an order authorizing the defendant to appeal *in forma pauperis*, finding that he “lacks sufficient funds to prosecute an appeal”

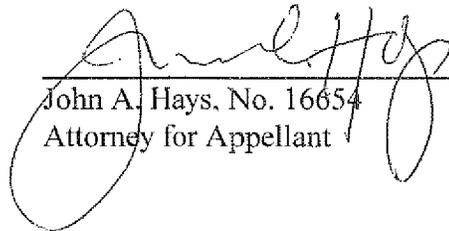
CP 165. This finding is supported by the record. In his declaration, the defendant asserted that he was homeless, that he had no income, no assets, no employment, and that he lived on welfare and food stamps. CP 172. He is 53-years-old, he is a drug addict, and he lives on the streets. CP 4; RP 194-241. Given these factors, it is unrealistic to think the Mr. Thornton will be able to pay appellate costs. Thus, this court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail on appeal.

CONCLUSION

Trial counsel's failure to object to the admission of improper, prejudice evidence and failure to object to the state's argument from that evidence denied the defendant effective assistance of counsel. In the alternative, the trial court erred when it imposed discretionary legal financial obligations. Finally, even if the state prevails, this court should not impose costs on appeal.

DATED this 5th day of May, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RCW 10.01.160

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed two hundred fifty dollars. Costs for administering a pretrial supervision other than a pretrial electronic alcohol monitoring program, drug monitoring program, or 24/7 sobriety program may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

(3) 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.

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

(5) Except for direct costs relating to evaluating and reporting to the court, prosecutor, or defense counsel regarding a defendant's competency to stand trial as provided in RCW 10.77.060, this section shall not apply to costs related to medical or mental health treatment or services a defendant receives while in custody of the secretary of the department of social and health services or other governmental units. This section shall not prevent the secretary of the department of social and health services or other governmental units from imposing liability and seeking reimbursement from a defendant committed to an appropriate facility as provided in RCW 10.77.084 while criminal proceedings are stayed. This section shall also not prevent governmental units from imposing liability on defendants for costs related to providing medical or mental health treatment while the defendant is in the governmental unit's custody. Medical or mental health treatment and services a defendant receives at a state hospital or other facility are not a cost of prosecution and shall be recoverable under RCW 10.77.250 and 70.48.130, chapter 43.20B RCW, and any other applicable statute.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

vs.

**STACY THORNTON,
Appellant.**

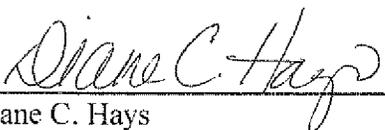
NO. 46965-1-II

**AFFIRMATION
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Carol Laverne
Thurston County Prosecutor's Office
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502
lavernc@co.thurston.wa.us
2. Mr. Stacy Thornton
1702 Dickinson Ave. NW
Olympia, WA 98512

Dated this 5th day of May, 2016, at Longview, WA.



Diane C. Hays

HAYS LAW OFFICE

May 05, 2016 - 3:31 PM

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COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,
vs.
STACY THORNTON,
Appellant.

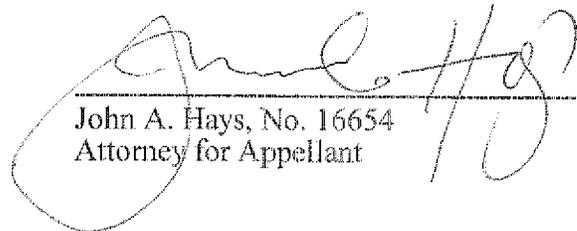
No. 46965-1-II

**NOTICE OF WITHDRAWAL
OF SECOND ARGUMENT IN
BRIEF OF APPELLANT**

Comes now Appellant Stacy Thornton and gives notice to Respondent and to the Court that he is withdrawing his second argument in the Brief of Appellant. After further review it appears that the trial court did not impose any discretionary legal-financial obligations. As a result the argument that the trial court erred when it imposed discretionary legal-financial obligations is not well taken.

DATED this 27th of May, 2016.

Respectfully submitted,


John A. Hays, No. 16654
Attorney for Appellant

HAYS LAW OFFICE

May 27, 2016 - 11:46 AM

Transmittal Letter

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Other: Notice of Withdrawal of Second Argument in Brief of Appellant

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