

NO. 47422-1-II; 47869-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CARLOS AVALOS,

Appellant.

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**BRIEF OF RESPONDENT**

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ROBERT W. FERGUSON  
Attorney General

Michael Pellicciotti  
Assistant Attorney General  
WSBA #35554  
Office of the Attorney General  
Criminal Justice Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 464-6430

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## I. INTRODUCTION

Appellant, Carlos Avalos, was charged with First Degree Assault, based on the intent to produce great bodily harm or death to a Corrections Officer that Avalos stabbed while Avalos was in prison. The jury did not find that he acted with the requisite intent to kill, and instead found Avalos guilty of the lesser offense of Second Degree Assault for intentionally assaulting the officer and thereby recklessly inflicting substantial bodily harm. RCW 9A.36.021(a); CP 107.

Avalos appeals his conviction, claiming prosecutorial misconduct when the prosecutor remarked on the truthfulness of Avalos's testimony. Avalos also claims the trial court improperly limited the time of his closing argument. This Court should reject these claims and affirm the conviction because there was neither prosecutorial misconduct nor trial court error, and Avalos has failed to show any prejudice as a result.

Avalos also appeals his sentence and the restitution order. The State concedes that the matter should be remanded to the trial court for resentencing, but the restitution in this case was appropriately ordered by the trial court and should be affirmed.

## II. ISSUES PRESENTED

1. **Did the prosecutor commit misconduct by challenging the truthfulness of Avalos's testimony where the court instructed to disregard the statement?**
2. **Did the trial court abuse its discretion by limiting the parties' closing arguments to 30 minutes?**
3. **Did the trial court independently determine whether two prior juvenile convictions were the "same criminal conduct" before counting them both in the offender score? The State concedes that resentencing is appropriate in this matter.**
4. **Did the trial court erroneously impose restitution to the victims of this case?**

## III. STATEMENT OF THE CASE

Appellant, Carlos Avalos, was charged by amended information with First Degree Assault. CP 439. Avalos was alleged to have used a deadly weapon likely to produce great bodily harm or death, with intent to inflict great bodily harm or death. *Id.*

Avalos testified that he brought a metal shank to an education lab at prison. Report of Proceedings<sup>1</sup> [02-02-2015] at 480-83, 501. When Avalos returned from a bathroom break, he snuck up behind a corrections officer and repeatedly stabbed the officer around the officer's head, neck and near his eye. *Id.* at 484-88, 509-10, 513-14. Avalos chased after the

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<sup>1</sup> Unless otherwise indicated, references to the Report of Proceedings are listed as RP and dated.

officer with the weapon until Avalos was restrained by other officers.

*Id.* at 490-94.

Avalos testified that he stabbed the officer because he wanted to send a message to everyone in the prison not to disrespect him. *Id.* at 487, 505. Avalos testified that his intent was to cause “minor injuries” and that he did not intend to kill or seriously injure the officer. *Id.* at 508-09, 515. The officer required stitches to close the wounds. RP [02-11-2015] at 230. Due to the injuries, the officer was on medical leave for ten months. RP [03-10-2015] at 9.

During closing argument, the State said the following about Avalos’s testimony:

He gave us a lot of detail. A lot of detail that actually having it come at the end of everything you’d already heard makes quite a bit of sense, except for one thing, one thing that he kept repeating. One thing that he kept repeating that is absolute nonsense, that is absolutely 100 percent not true and you know what that thing was? I bet you can guess what that thing was, I didn’t intend to kill, I only intended to inflict minor injuries.

RP [02-12-15] at 564.

Defense counsel immediately objected and the court sustained the objection. *Id.* at 564-65. The jury was excused from the courtroom. *Id.* at 565. After defense requested a curative instruction and proposed the language, the court instructed the jury:

As I indicated in one of the earlier instructions the argument and comments of attorneys are not evidence for you to consider in terms of determining what the evidence shows. You folks are the sole determiner of what's true and not true, so I want to impress upon the jury that that's exclusively your province.

*Id.* at 567.

Upon further request from defense counsel, the court continued:

[S]hould an attorney express an opinion as to that attorney's belief in what the evidence is, [it] is to be disregarded. You are to look at the evidence independently in the jury room and your own conclusions of the value of that evidence, if any.

*Id.* 567-68.

Near the end of the closing argument, the court interrupted the prosecutor to tell him that his closing argument would be limited to only five more minutes. *Id.* at 582. The prosecutor concluded, and his total argument including the break to remove the jury and address the defense objection, lasted 33 minutes. *Id.* at 563, 585.

Defense counsel then gave his closing argument focused on how Avalos had no intent to kill or cause great bodily harm to the officer. *Id.* at 585-605. Near the end of the defense argument, the court similarly advised counsel that he had five more minutes. The defense argument lasted 28 minutes. *Id.* at 602-05. Over the next six minutes, the prosecutor gave his rebuttal, and the court selected the alternate juror and

instructed the jury on other related matters, before excusing them for the day. *Id.* at 605-09.

At 4:44pm, defense counsel asked for a mistrial, claiming that he had insufficient time to make his closing argument. *Id.* at 610. The trial court disagreed. *Id.* at 610-11. Finding that he needed to send court staff home, that 30 minutes was enough for closing argument, and that defense “did a nice job with it,” he denied the motion for mistrial. *Id.* at 661. The next day during deliberations, the jury was unable to reach a verdict on the charge of First Degree Assault and instead found the defendant guilty of Second Degree Assault, the lesser offense that did not require proof of intent to kill. RCW 9A.36.021(a); CP 107, 358-59.

At sentencing, the court sentenced Avalos to a standard range sentence. The court determined the offender score to be 8, instead of 7, after counting a prior juvenile burglary and theft as two separate felonies. RP [03-10-2015] at 14-15. The trial court interpreted the 2004 juvenile court’s failure to check off the “same course of conduct” box as a positive finding that the two crimes “were not the same course of conduct.” *Id.* at 14. Over Avalos’s objection, the court interpreted RCW 9.94A.525.5(a)(i) to not require an independent determination of whether the prior juvenile felonies were based on the “same criminal conduct.” *Id.*

At a restitution hearing, the court ordered restitution to the victim officer in the amount of \$3,391.54 for various expenses while on leave from work. CP 450-51. Avalos argued at the hearing that the officer should have this restitution reduced to zero, because the officer saved \$16,623.48 in mileage costs based on the officer's regular work commute. RP [07-28-15] at 6. The court rejected that argument. CP 45-51; RP [07-28-15] at 26. The court also ordered restitution to the State Department of Labor and Industries in the amount of \$45,984.81 for the various medical and salary insurance expenses it paid out. *Id.*; CP 450-51, 453-69.; RP [07-28-15] at 26.

Avalos now appeals his conviction, sentence, and restitution. CP 14.

#### IV. ARGUMENT

##### A. **The Prosecutor Did Not Commit Misconduct In Challenging The Truthfulness Of Avalos's Testimony, And No Prejudice Resulted.**

At closing, the parties focused their arguments on whether Avalos stabbed the officer with the intent to kill, or, as Avalos claimed, with the intent to cause minor injuries. Such would be the difference between the jury convicting the defendant of First Degree Assault or a lesser assault offense, respectively. Avalos claims the prosecutor committed

prosecutorial misconduct when he began his closing argument by remarking about Avalos's testimony that:

He gave us a lot of detail. A lot of detail that actually having it come at the end of everything you'd already heard makes quite a bit of sense, except for one thing, one thing that he kept repeating. One thing that he kept repeating that is absolute nonsense, that is absolutely 100 percent not true and you know what that thing was? I bet you can guess what that thing was, I didn't intend to kill, I only intended to inflict minor injuries.

RP [02-12-15] at 564.

Avalos immediately objected and on appeal now bears the burden of showing that (1) the State committed misconduct, and (2) the misconduct had prejudicial effect. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002, 245 P.3d 226 (2010).<sup>2</sup>

The first question is whether Avalos can show the argument was improper. Avalos claims that “[t]he prosecutor argued that Avalos was a

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<sup>2</sup> On appeal, Avalos argues that “[e]ven when defense counsel’s objection is sustained and the trial court gives a curative instruction, reversal is required if the prosecutor’s remarks were so flagrant and ill-intentioned that they produced an enduring prejudice which could not have been neutralized by a corrective instruction to the jury.” Appellant’s Brief at 15. Respectfully, Avalos confuses the law here. When there is an objection to misconduct, the only questions for the court are whether it was misconduct, and whether it was prejudicial. *State v. Anderson*, 153 Wn. App. at 427. The cases Avalos cites make clear that only when there is *not* an objection and curative instruction, the Court then considers whether the prosecutor’s remarks were so flagrant and ill-intentioned as to conclude that a corrective instruction was incapable of correcting the misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)(“undisputed fact that no objection was made”); *State v. Russell*, 125 Wn.2d 24, 85-89, 882 P.2d 747 (1994)(“Russell made no objection to these comments”).

liar and that he was guilty.” Appellant’s Brief at 15. But the trial prosecutor never said that Avalos was “a liar.” RP [02-12-15] at 564. Instead, the prosecutor urged the jury to “guess what that thing was” in the testimony that was not true. RP [02-12-15] at 564. There is a difference between testimony being “untrue” and a witness being called “a liar.” Our Supreme Court has distinguished a prosecutor’s closing remarks that challenge the “truthfulness” of a defendant’s testimony from a prosecutor’s express use of the disparaging term “liar.” See *State v. McKenzie*, 157 Wn.2d 44, 59-60, 134 P.3d 221 (2006).

Had the prosecutor called Avalos “a liar,” in certain contexts, such a statement could have been improper. A prosecutor is not allowed to offer his or her personal opinion as to credibility of a witness when it is “divorced from the evidence.” *Id.* However, use of a term other than the “epithet ‘liar,’” and even using the term “liar,” so long as it is related to the evidence, can be proper argument. *Id.*; *State v. Copeland*, 130 Wn.2d 244, 291–92, 922 P.2d 1304 (1996). “Where a prosecutor shows that other evidence contradicts a defendant’s testimony, the prosecutor may argue that the defendant is lying.” *McKenzie*, 157 Wn.2d at 59 (citing *Copeland*, 130 Wn.2d at 291–92; see also *State v. Jefferson*, 11 Wn. App. 566, 524 P.2d 248 (1974) (finding no impropriety in prosecutor’s use of word “liar” where evidence showed defendant was

untruthful); *State v. Luoma*, 88 Wn.2d 28, 40, 558 P.2d 756. (1977) (finding that evidence supported prosecutor's comments in closing argument that defendant was a "liar"))).

Avalos offers no authority to show that it is improper for a prosecutor to suggest that testimony was "not true." And in the context of the case, the truthfulness of Avalos's testimony that he did not intend to kill the officer was part of the evidence of this case. Indeed, during cross examination, Avalos was specifically questioned, "Isn't it true that when [the officer] turned and faced you, you still tried to kill or seriously injure him?" Avalos responded, "No, that's not true." RP [02-12-15] at 564. Arguing that this part of Avalos's testimony was "100 percent not true" was proper argument challenging this *mens rea* evidence of the case, because the prosecutor later supported this argument with specific references to the evidence. *Id.* at 568-584.

The prosecutor's remark came at the start of his closing. Avalos immediately objected, and the court sustained the objection before the prosecutor was able to more fully support this remark with evidence. *Id.* at 564-65. The prosecutor even responded to the objection, "I'm allowed to argue the evidence..." before the trial court removed the jury. *Id.* at 565. The court held that "I don't have any trouble I guess to a certain extent arguing the strength of the evidence as long as you don't get to the

ultimate conclusion of true and not true.” *Id.* The prematurely sustained objection deprived the prosecutor of the opportunity to link this remark more fully to the evidence. The remark by the prosecutor was not misconduct. Indeed, immediately after the objection, the prosecutor continued: “I did not intend to kill, I only intended to inflict minor wounds, minor injuries, robotically repeated several times during the testimony. Well, it’s your job to determine whether or not that makes any sense in light of the rest of the evidence that you heard.” *Id.* at 568. The prosecutor then continued referencing throughout the rest of his closing argument how the evidence showed that Avalos intended to kill the officer. *Id.* at 568-584.

Here, the prosecutor did not disparage the defendant by identifying him as “a liar;” the prosecutor used the evidence in the case to properly challenge Avalos’s testimony that he did not intend to kill the officer. Such argument is proper. *See McKenzie*, 157 Wn.2d at 59-60; *Copeland*, 130 Wn.2d at 291–92; *Jefferson*, 11 Wn. App. at 566; *Luoma*, 88 Wn.2d at 40. Accordingly, Avalos has failed to meet his burden on appeal of showing that the State committed misconduct, and his claim fails.

Even if the prosecutorial remark were misconduct, Avalos cannot show any resulting prejudice. If Avalos establishes that the State committed misconduct, Avalos must then show that he was prejudiced.

*State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). To determine whether there is prejudice, this Court reviews whether there was a substantial likelihood that the improper comments prejudiced the defendant by affecting the jury. *Emery*, 174 Wn.2d at 760; *Anderson*, 153 Wn. App. at 427. The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *McKenzie*, 157 Wn.2d at 52-53 (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). A curative instruction by the court can remedy prosecutorial misconduct even if a prosecutor improperly attempts to influence the jury's perception of a witness, which is not the case here. *See Copeland*, 130 Wn.2d at 284-84.

In this case, the jury received the following curative instruction proposed by Avalos:

As I indicated in one of the earlier instructions the argument and comments of attorneys are not evidence for you to consider in terms of determining what the evidence shows. You folks are the sole determiner of what's true and not true, so I want to impress upon the jury that that's exclusively your province.

RP [02-12-15] at 567. And Upon further request from defense counsel, the court continued:

[S]hould an attorney express an opinion as to that attorney's belief in what the evidence is, [it] is to be disregarded. You are to look at the evidence independently in the jury room and your own conclusions of the value of that evidence, if any.

Id. 567-68.

“Juries are presumed to follow instructions absent evidence to the contrary.” *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Avalos's proposed instructions were clearly articulated to the jury. And the resulting verdict shows that the jury fully understood them. The jury rejected the State's argument that Avalos was untruthful when he testified that he did not intend to kill the officer, because it did not convict Avalos of First Degree Assault. The underlying facts of what happened in the prison were largely undisputed. Avalos admitted to assaulting the officer intentionally with a weapon. The jury's finding that Avalos committed only the lesser included offense of Second Degree Assault, which only required the intent to assault and reckless infliction of substantial bodily harm, demonstrated that the jury was not swayed by the prosecutor's “intend to kill” remarks. Not only does this establish that the jury was properly cured by the trial court's instruction as to the law, it shows there could be no resulting prejudice, because Avalos was not convicted of a crime requiring the intent to kill. Accordingly, even if prosecutorial

misconduct occurred, Avalos fails to meet his burden on appeal to prove prejudice in this case, and his claim also should be denied for this reason.

**B. The Court Exercised Its Discretion In Limiting Closing Arguments, And No Prejudice Resulted.**

Avalos argues the court erred when it limited the parties' closing arguments to 30 minutes. Because the trial court properly exercised its discretion in limiting the duration of closing, and there was no resulting prejudice, this claim should be denied.

The trial court has broad discretion over the scope of closing argument. *State v. Osman*, 2016 WL 298802, \*6-7, \_\_\_ P.3d \_\_\_ (January 26, 2016); *State v. Perez-Cervantes*, 141 Wn.2d 468, 474-75, 6 P.3d 1160 (2000); *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975).

The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations . . . . He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion.

*Perez-Cervantes*, 141 Wn.2d at 474-75 (quoting *Herring*, 422 U.S. at 862).

Accordingly, this Court reviews the limiting of closing argument for an abuse of discretion. *City of Seattle v. Erickson*, 55 Wash. 675, 677, 104 P. 1128 (1909). In *Erickson*, the defendant claimed on appeal that the

court improperly limited his closing argument to 15 minutes. In finding that the trial court properly limited the time of this argument to 15 minutes, our Supreme Court held, “it rests in the sound discretion of the [trial] court to put proper limit to the time to be consumed by counsel in argument, a discretion with which an appellate court will not interfere unless the time was made so short as to be manifestly prejudicial to the rights of the party complaining.” *Id.* Our Supreme Court cited the importance of maintaining court proceedings and the orderly administration of justice in allowing trial courts to exercise this discretion.

The time to be used for such a purpose must therefore be a matter to be regulated by the presiding judge upon the trial, the same as any other proceeding during the progress of the case. It is to be presumed that the court will properly guard and protect the rights of parties so that justice can be administered to all, and the judge is certainly a competent and proper person to determine as to the time which would be required for a proper discussion and presentation of the case on trial.

*Id.*

The trial court properly protected Avalos’s rights. *See State v. Cecotti*, 31 Wn. App. 179, 183, 639 P.2d 243 (1982)(finding that a closing can be properly limited to 30 minutes, with a five minute warning before the end of argument, to ensure orderly conduct of the trial when rights are protected). The record shows that the court considered Avalos’s rights when the court noted that Avalos had done “a nice job” with closing

argument, and found after the closing that “30 minutes to present your argument to the jury” was enough. RP [02-12-15] at 661. This trial lasted less than a week and had fewer than a dozen witnesses. RP [02-09-15] at 1-3. Accordingly, the trial court did not abuse its broad discretion in limiting the time of closing. Since Avalos cannot show the trial court was manifestly unreasonable in limiting his argument to 30 minutes, his claim should be rejected.

Even if the court abused its discretion, Avalos cannot show that he was prejudiced by the error. This Court does not reverse unless the trial court’s decision was both manifestly unreasonable *and* prejudicial. *Erickson*, 55 Wash. at 677. There is no prejudice here. Avalos conceded in his closing argument that he intentionally assaulted the officer with a weapon. RP [02-12-15] at 664-65. Avalos focused his closing argument instead on how the evidence showed that he was not trying to kill the officer. Avalos was successful in that the jury was not convinced that Avalos intended to kill the officer, and accordingly he was not convicted of First Degree Assault, but was only convicted of Second Degree Assault. RP [02-12-15] at 585-608. Avalos cannot show prejudice from this verdict. *See Supra* § IV.A. There is no substantial likelihood the result would have been different with a longer closing. Accordingly, his claim should be denied.

**C. The State Agrees That Resentencing Is Necessary So The Trial Court Can Independently Determine Whether The Prior Offenses Were The Same Criminal Conduct.**

At sentencing, the trial court found an offender score of 8, which included the counting of two juvenile offenses as two separate felonies. Because the court failed to independently determine that these two juvenile felonies were not the same criminal conduct, this case should be returned to the trial court for resentencing to make this determination.

A sentencing court exceeds its authority under the Sentencing Reform Act when it imposes a sentence based upon a miscalculated offender score. *In re Personal Restraint Petition of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). This Court reviews an offender score calculation de novo but reviews a “determination of what constitutes the same criminal conduct [for] abuse of discretion or misapplication of the law.” *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

RCW 9.94A.525(5)(a)(i) requires that a sentencing court review all “prior juvenile offenses for which sentences were served consecutively” to determine whether those “offenses shall be counted as one offense or as separate offenses.” The court must do so by using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a). RCW 9.94A.589(1)(a) defines “same criminal conduct” as “two or more crimes that require the

same criminal intent, are committed at the same time and place, and involve the same victim.”

In the present case, the 2004 theft and burglary felony convictions were sentenced in the same juvenile disposition order. CP 199. However, the trial court did not do an independent inquiry of these three “same criminal conduct” factors other than noting that the 2004 disposition order did not check the offenses as being the “same course of conduct.” CP 199. This led the trial court to find that “in 2004 the trial court found that the burglary and the theft were not the same course of conduct.” RP [03-10-15] at 14. But the “same course of conduct” is not necessarily the same as “same criminal conduct.” “Same course of conduct” is a juvenile determination made under RCW 13.40.020(8)(a) to determine whether a juvenile should be sentenced on only the higher offense. The definition of “same course of conduct” is defined as there being “no substantial change in the nature of the criminal objective.” *State v. Calloway*, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985).

Even assuming that the juvenile court’s failure to check the “same course of conduct” box constituted a determination that the burglary and theft convictions were the same “course of conduct,” all this does is establish there was substantial change in the nature of criminal objective. Such a finding alone is insufficient to satisfy an independent finding that

the two felonies are not of “the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Accordingly, the case should be remanded for resentencing so the trial court can make an independent determination of whether the burglary and theft felony convictions the “same criminal conduct” as defined in RCW 9.94A.589(1)(a).

**D. The Trial Court Properly Awarded Restitution In This Case.**

Avalos claims on appeal that the amount of restitution ordered to the Department of Labor and Industries should be reduced by \$16,623.48. Avalos’s argument is based on a misunderstanding of the record. This \$16,623.48 amount that Avalos references was never ordered by the trial court, and thus this claim should be rejected.

A trial court’s authority to order restitution is statutory. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). RCW 9.94A.753 states that restitution “shall be based on easily ascertainable damages for injury to or loss of property.” “Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property . . . unless extraordinary circumstances exist which make restitution inappropriate in the court’s judgment and the court sets forth such circumstances in the record.” *Id.* A trial court’s order of

restitution will not be disturbed on appeal absent an abuse of discretion.

*State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999).

In our case, the trial court ordered restitution to two victims: (1) the officer, and (2) the State Department of Labor and Industries, which was the insurance victim. The trial court ordered restitution to the officer in the amount of \$3,391.54 for various income losses. CP 451. Avalos does not contest this \$3,391.54 restitution amount on appeal, and since the trial court found these damages to be resulting from Avalos's crime, it was properly ordered. *Id.*; RP [07-28-15] at 26; RCW 9.94A.753(3).

The court also ordered \$45,984.81 to the State Department of Labor and Industries for various medical and salary reimbursements for the injured state employee. This order does *not*, contrary to Avalos's appellate claim, include payments for travel reimbursement to the officer. CP 453-69. The trial court found the \$45,984.81 to be damages resulting from Avalos's crime. CP 450-51; RP [07-28-15] at 26; RCW 9.94A.753(3). Accordingly, this restitution is properly ordered. RCW 9.94A.753(3).

On appeal, Avalos argues that the amount of restitution ordered to Labor and Industries should be reduced by \$16,623.48. But Avalos's argument confuses the record, where defense counsel below was

attempting to persuade the trial court to reduce the amount of restitution provided to *the officer* by \$16,623.48. Contrary to Avalos's claim on appeal, Labor and Industries never reimbursed \$16,623.48 to the officer for travel expenses. CP 453-69. There were never any mileage reimbursements paid by Labor and Industries. *Id.* The \$16,623.48 represents the amount that trial counsel alleged was *saved* in mileage costs by the officer not having to work. RP [07-28-15] at 6-7.

Defense counsel had calculated the travel costs (in the amount of \$16,623.48) that the officer would have personally incurred had the officer been able to work. In other words, defense counsel argued that the officer was receiving a windfall as the victim of the crime, because while injured he was not incurring his daily *non-reimbursable* travel costs. *Id.* Counsel calculated \$16,623.48 as the car depreciation and gas mileage the officer would have personally spent traveling to work during the 10 months he was injured at home. Counsel argued to the trial court that the officer was actually saving money by not having to go to work. Counsel claimed these savings "would basically offset the amount of restitution owed [to the officer,] and I guess if there's any room for error, that figure's higher than the [\$3,391.54] restitution he's being requested by a significant enough amount that I think it's pretty clear that he did not suffer any non-compensated injuries from this." *Id.* at 6. The trial court considered

this argument on whether the officer should “receive any kind of set off of . . . \$16,623.48 that he didn’t have to pay for fuel going to and from work?” The court determined that “[i]t’s an intriguing argument, but I’m not going to accept it.” *Id.* at 6. The court did not reduce the \$3,391.54 due to the officer.

Avalos’s argument on appeal that this \$16,623.48 was improperly awarded by the trial court confuses the record. No restitution of \$16,623.48 for travel expenses was ever awarded either individually or as part of the larger Labor and Industries restitution. Accordingly, because all restitution was properly awarded, Avalos’s claim should be rejected.

#### V. CLOSING

For the foregoing reasons, Avalos’s conviction and restitution order should be affirmed. The matter should be remanded for sentencing so that the trial court can independently determine whether Avalos’s two prior juvenile convictions were the “same criminal conduct.”

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of March, 2016.

ROBERT W. FERGUSON  
Attorney General



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MICHAEL PELLICCIOTTI,  
WSBA #35554  
Assistant Attorney General

NO. 47422-1-II; 47869-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

CARLOS AVALOS,

Appellant.

DECLARATION OF  
SERVICE

I, Kelly Hadsell, declare as follows:

On this 1<sup>st</sup> day of March, 2016, I served via electronic mail and United States mail, true and correct cop(ies) of the Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

LISE ELLNER  
LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070

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

DATED this 1<sup>st</sup> day of March, 2016, at Seattle, Washington.

  
\_\_\_\_\_  
KELLY HADSELL

**WASHINGTON STATE ATTORNEY GENERAL**

**March 01, 2016 - 2:43 PM**

**Transmittal Letter**

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