No. 48060-3-II

#14-1-01277-0

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON NEWLEN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
COWLITZ COUNTY

The Honorable Michael H. Evans, Trial Judge

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, #176
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Appellant Clifton Newlen was deprived of his due process rights to a fair trial when the prosecutor committed repeated misconduct which was so flagrant, prejudicial and ill-intentioned that it could not have been cured by instruction.

2. Mr. Newlen was also deprived of his Article 1, § 22, and Sixth Amendment rights to effective assistance of appointed counsel by counsel's unprofessional failures, which prejudiced his client's rights.

3. This Court should not depart from its prior procedure and adopt the new pleading requirements crafted by Division One in State v. Sinclair, __ Wn. App. __, __ P.3d __ (2016 WL 393719).

4. RCW 10. 73.160 is unconstitutional under Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), as indicated by State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and State v. Blank, 131 Wn.2d 230, 244-45, 930 P.2d 1213 (1997), to the contrary, is no longer good law.

5. This Court should not exercise its considerable discretion regarding costs on appeal on an indigent appellant who has exercised his constitutional right to appeal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is reversal required despite counsel's unprofessional failure to object to misconduct below where the misconduct included a) telling the jury they had not heard all the evidence while suggesting it would favor the state, b) eliciting improper testimony conveying the investigating officer's opinion that Mr. Newlen was guilty and that his defense was not credible but the state's witnesses were and c) suggested to the jury that they had to decide who was telling the truth and effectively had to solve the case, even implying jurors had to figure out who was committing perjury in order to decide the case?

2. Even if the misconduct could possibly have been cured with objection and instruction, should reversal be granted based on counsel's unprofessional failure to attempt to minimize the prejudice to his client?

3. In Sinclair, supra, Division One adopted a new pleading requirement for appellants in criminal appeals.

Should this Court decline to change its procedures to follow Division One where the new procedures set forth in Sinclair run afoul of decisions of our highest court, are unclear and potentially onerous, encourage waste of scarce judicial and criminal justice resources and will result in an improper presumption of imposition of costs against indigents, in violation of constitutional prohibitions?

4. Is RCW 10.73.160 unconstitutional under Fuller, supra, in light of Blazina, supra, and is Blank, supra, to the contrary no longer good law because Blazina has revealed that the theoretical assumptions underlying the decision in Blank were false in practice?

5. Should the court decline to impose costs of appeal on an impoverished defendant in a criminal case who chooses to exercise his state constitutional right to appeal when the presumption of indigency has not been rebutted?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Clifton Newlen was charged by information with second-degree assault and a deadly weapon enhancement. CP 1-2; RCW 9.94A.825; RCW 9.94A.533(4); RCW 9A.36.021(1)(a). After pretrial hearings before the Honorable Judges Marilyn Haan, Gary Bashor, Michael Evans, James Stonier and Stephen Warning on December 8, 2014, January 12 and 20, February 12, March 16, April 6, May 11 and June 4, 2015, trial was held before Judge Evans on June 11 and 12, 2015.[1] Judge Evans dismissed the deadly weapon enhancement at the close of the state's case but Mr. Newlen was convicted by the jury of the second-degree assault. 3RP 28-29; CP 86.

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[1]The verbatim report of proceedings consists of three volumes, which will be referred to herein as follows: the volume containing the dates of December 8, 2014, January 12 and 20, February 12, March 16, April 6, July 7 and 21, August 18, September 8 and 10, 2015, as "1RP;"
the volume containing the trial date of June 11, 2015, as" 2RP;"
June 12, 2015, as "3RP."

Sentencing was continued on July 7 and 21 and August 18, and ultimately held on September 8, 2015, after which the judge ordered Mr. Newlen to serve a standard-range sentence. See CP 93-102.

Mr. Newlen appealed and this pleading follows. See CP 105.

2. Testimony at trial

Jeanie Brissett and her husband were buying some property from a man named Tom Hug. 2RP 4-5. Brissett, who was 46, said they had given Hug $10,000 as a down payment and were going to make payments to him every month. 2RP 77. On the property was a "single wide," a small manufactured portable home, which had no working toilet. 2RP 78. Hug was supposed to meet Brissett on the property on August 6, 2014, in order to fix the issue. 2RP 78-79.

On that day, Brissett did not yet have keys to the mobile home, so while she waited for Hug, she went "out back" of the property, "looking at what we had just bought, pretty much." 2RP 79. The back yard was fully enclosed with a fence, which also had a gate in a corner of the yard. 2RP 80, 88. The fence was not tall, maybe about three or four feet high. 2RP 113.

Brissett's version of what happened next was inconsistent. At the later trial, she would testify that, while she stood there, a man was suddenly on the property and next to her, having gotten there presumably through the gate. 2RP 80-81. Brissett admitted at trial she did not see him approach, nor did she see him actually come through or over the fence. 2RP 80-82.

When she spoke to police just after the incident, however, Brissett

gave a different description. The officer who spoke to her was clear that Brissett had never said the man was inside the fence or next to her at all. 2RP 94, 147-48. Instead, she reported that the man talked to her over the fence, staying on his side. 2RP 94, 147-48. Despite this, Brissett denied making that statement and maintained the man had approached. 2RP 80-81, 91-92. The man, later identified as Clifton Newlen, was older and walking with a cane. 2RP 18.

Brissett said that Newlen asked if Brissett was renting or buying the property. 2RP 81. When she said they were in the process of buying it, Brissett claimed, Newlen then said he needed to let her know that part of the property was actually his and he was taking it back. 2RP 81. Newlen told Brissett that part of the fence was inside his property line. 2RP 94.

Brissett admitted this was not the first time she had heard about a property line dispute. 2RP 94-95. Hug, however, had told them it had been resolved. 2RP 95. More specifically, Hug told them about the dispute but said he had not heard anything from Newlen recently and "felt that we shouldn't have any problems with it[.]" 2RP 95, 106.

After Newlen told her about the issue with the fence, Brissett responded, "okay," looking to where Newlen pointed at the back part of the property. 2RP 81-82. From where she stood, Brissett said, she could see that some of the fence had been cut. 2RP 81.

Brissett said she put her hands up at that point. 2RP 81. Although she knew about the land dispute, she did not really know what was going on and had decided she just wanted to "get back around to the front" of the

property. 2RP 81. Brissett testified that was sort of startled because she "didn't even know where he came from,"so he was "a little intimidating" as a result. 2RP 81.

On direct examination, Brissett testified that when she said, "[o]kay," she meant not "[o]kay," but rather that she figured Hug would work things out when he showed up. 2RP 81. Brissett repeated, "okay," and Newlen walked away, going through the gate. 2RP 82-83.

Brissett did not argue or debate and instead made "[a]bsolutely" no effort to dispute Newlen. 2RP 81-82. She maintained that, as she thought he had already started cutting down the fence, she did not feel she needed to talk to him about it. 2RP 82. And when asked by the prosecutor if Newlen had tried to "clarify that you were okay with this," she said, "[n]o." 2RP 82-83.

A few minutes later, when Hug arrived, Brissett told Hug that "some man came up to me and was out back cutting the fence down, said he was going to be taking back some property of his[.]" 2RP 83. Hug went and looked but no one was there, so Hug started working on the toilet. 2RP 83, 96. But at some point while Hug and Brissett were inside, talking, Brissett's 3-year old grandson had to go to the bathroom, so Brissett took him into the backyard to let him urinate there. 2RP 83.

Brissett said Newlen was then on the other side of the fence and appeared to be cutting it with a pair of bolt cutters. 2RP 83-84. She had her son go get Hug, who then came outside. 2RP 84.

At first, Brissett testified at trial that Hug then went "just walkin' up" to Newlen, as if Hug was not upset. 2RP 98. When confronted with

prior statements, however, Brissett conceded that Hug was obviously frustrated as he walked over to where Newlen was on the other side of the fence. 2RP 98. Brissett thought the frustration was on her behalf, because it was her first time at the property and she was having to "deal with this." 2RP 98.

Newlen was holding the bolt cutters by the handles, as you would if you were using them. 2RP 100. Hug walked right up to him. 2RP 84. Brissett admitted that she could not hear what either man said. 2RP 84, 105. From her vantage point about 75 feet away, she said, she saw them talk for "just a second," then saw Newlen appear to move to cut the fence with the cutters. 2RP 84, 86.

At that point, Hug shoved the cutters back. 2RP 84-85. Newlen ended up hitting Hug on the side with the cutters. 2RP 84-85. Brissett said Hug "kind of curled over and grabbed his back" and Brissett then screamed, "[h]ey, stop that," which caused both men to jump. 2RP 85.

Bissett saw that, when Hug grabbed to shove the cutters, he used both hands. 2RP 100. She also throught that Newlen had raised the cutters up and swung them and that Newlen pulled back first. 2RP 100-101.

Thomas Hug testified that he had owned the property in Kelso for about 14 years and had bought it as an investment, renting it out with a mobile home he put on it. 2RP 111-13. According to Hug, the property had the fence on it when he bought it and it had been there a long time. 2RP 113. Hug thought that Newlen had only owned the property next door for "maybe five years." 2RP 113-14.

Hug, who never lived on the property himself, admitted that Hug had a dispute with Newlen about whether the fence was in the wrong place. 2RP 114. Indeed, Hug conceded, there had been "some issues regarding this in the past," that they were "ongoing" and that they "came and went." 2RP 114.

Previously, when Hug spoke with Newlen about the dispute, Hug would just say that the property was his by "adverse possession" because the fence had been in place for so long. 2RP 129. Indeed, the first time they had met, Hug had told Newlen that Newlen's property was Hug's by adverse possession. 2RP 129. Hug thought that it meant he had to just "maintain" something for more than seven years and "if the border turned out to be in a different place, it still stays where it was." 2RP 135.

Hug admitted he never asked a court or outside entity declare the boundary or property lines had actually changed, however. 2RP 129. In fact, no lawsuits had been filed by either party. 2RP 129-31.

Although he had his cell phone in his pocket at the time, Hug did not call police when he learned Newlen was cutting a fence that Hug believed was on Hug's property, despite the longstanding property line dispute 2RP 130-31.

Instead, Hug approached Newlen himself. 2RP 131. At trial, Hug would later describe his confrontation with Newlen. 2RP 117-20. According to Hug, he walked up to Newlen and asked what Newlen was doing and Newlen said that, because there were new owners, "adverse possession was no longer in effect[.]" 2RP 118. Hug said he told Newlen that the other man was wrong, and "like usual," Newlen started "callin'

names and cussin'," then moved to put the bolt cutters off the fence to cut it. 2RP 119.

Hug admitted that, at that point, Hug "pushed" Newlen's bolt cutters off the fence. 2RP 119. Hug also conceded he also told Newlen to "get his tools off my fence," and that Hug then physically pushed the cutters in Newlen's hands. 2RP 119.

Unlike Brissett, Hug did not think he used both hands when he made that shove. 2RP 132. But Hug could not then say which hand he had used. Nor could he recall which way he had pushed the cutters. 2RP 132. Hug maintained, however, "[i]t's not like I pushed 'em very hard," although he conceded the cutters were "pretty heavy" and it had taken some effort to move them. 2RP 132.

Hug admitted he did not really see what happened to the bolt cutters after he shoved them off the fence. 2RP 132. He knew that they were still in Newlen's hands. 2RP 120. But he was repeatedly asked the same questions at trial and his testimony was inconsistent.

At first, Hug testified that Newlen had "reared back" before swinging. 2RP 120. When asked specifically if he saw Newlen "pull it back first, and then swing it," however, Hug admitted that, in fact, he did not actually see. 2RP 120. Thus, he admitted, he could not say. 2RP 120. But he did state his belief it was not an accident and was "definitely intentional," because he thought Newlen had "been aggravated with [him] for years . . .ever since he moved out there, because [Hug] wouldn't give in to him." 2RP 120.

A few minutes later, Hug reaffirmed that he had not seen Newlen

"rear back." 2RP 132-34.

But ultimately, after repeated questions, the prosecutor was able to elicit from Hug that Newlen "reared back and swung 'em at me." 2RP 136.

Hug was also unclear at exactly how Newlen had made the swing. First, he said he thought Newlen had "swung 'em right-handed." 2RP 134. But he also thought Newlen had both hands on the bolt cutters. 2RP 134. Hug also said he did not grab at the cutters and that there was no struggle. 2RP 136.

And Hug did not think that by pushing on the tool Newlen had in both his hands that it might cause the other man to lose his balance. 2RP 136.

Hug finished up work with his son's help, in pain. 2RP 125. He eventually got medical help. 2RP 125. A doctor confirmed that Hug had called a regional nurse phone line and described his symptoms. 3RP 8-12, 20. He had then been seen at a clinic, where he told the doctor he had been struck by bolt cutters "in an altercation with a neighbor." When x-rays were ultimately done, they showed fractures on several ribs which, several months later, had not yet healed. 3RP 17-19.

The doctor said that the injuries Hug received did not require going to an emergency room or put him at risk of death. 3RP 20-21. The doctor also did not think it would be expected that such an injury would have such a result or that the incident would have been likely to cause death. 3RP 21.

Cory Huffine, a sergeant with an unnamed police agency, was

called to the reported assault and spoke to Hug. 2RP 138-40. Hug reported being in pain and told Huffine that Newlen had hit him with a pair of bolt cutters. 2RP 140. The officer took pictures and said Hug seemed to hurt when he moved. 2RP 140. Huffine also spoke to Brissett about "her observations," taking statements ultimately from both Brissett and Hug. 2RP 142-43.

After that, Sergeant Huffine went to contact Newlen on his property. 2RP 144. The officer asked about the bolt cutters and Newlen showed them to him. 2RP 144-45. The officer took a picture of Newlen holding up the bolt cutters. 2RP 145.

Clifton Newlen was 74 years old at the time of trial. 3RP 33. He had been retired for almost 30 years due to his medical disabilities, which included acute arthritis, diabetes and other ailments. 3RP 34. He could still walk "to a degree" on the day of the incident but frankly admitted he had to use a cane or he would not get far without taking a fall. 3RP 34-35.

Newlen owned three separate properties, two of whom adjoin the property that had belonged to Hug. 3RP 36. Newlen agreed there had been a long-term dispute over the boundary lines between them. 3RP 36.

On the day of the incident, Newlen was clear that he had stayed on his side of the fence but had talked with Brissett. 3RP 37. Brissett seemed very friendly and introduced herself as "Jeanie with the light brown hair[.]" 3RP 37. She was "real excited" because she and her husband had not purchased property before. 3RP 37.

When Newlen asked if Hug had ever mentioned the property line dispute, Brissett said Hug had never mentioned it. 3RP 37.

At that point, Newlen told Brissett where the property line "actually existed." 3RP 38. She affirmed that she had noticed that the property she was looking at that day as belonging to Hug and being bought by Brissett and her family "looked like a whole lot bigger than what the property description was that she had." 3RP 38. Newlen told her he had hopped for years to have the opportunity to remove the fence surrounding that part of his property. 3RP 39.

Brissett suggested that, if he showed them where the property lines were and took down the fence surrounding his part, she and her husband would bring over a wooden fence "from where they used to live" and they would put that "on the property line." 3RP 39.

Newlen was excited by this offer. 3RP 39. He talked about it with a man named Larry who lives in a trailer on Newlen's property just after it was made. 3RP 39. Larry then cautioned Newlen that he should act on it quickly. 3RP 39. Newlen would later testify that Larry said, "[w]ell, you better take my bolt cutters and go down there and take it down before somebody changes their mind." 3RP 39.

Newlen testified that he believed that, because she had purchased the property, Brissett had the ability to give him consent. 3RP 39.

Newlen took the borrowed bolt cutters to right where the property line was and started to nip the upper wire around the pipe holding up the fence. 3RP 40. The cutters were pretty heavy so the only way he could get them up to cut where he wanted was to bring them up to the middle, rest the head on something, go back to the handles and then squeeze. 3RP 40.

Newlen was working his way up the fence when Hug came over. 3RP 40. Hug said, "[d]o you feel like going to jail today?" 3RP 40. Newlen said, "[s]ure, why not?" 3RP 41.

At that point, Newlen said, Hug charged, raising his arm, swinging and hitting the bolt cutters, which were resting on the top of the fence. 3RP 41. The push was very violent, making the cutters swing around so that Newlen almost fell into the brush. 3RP 42.

The entire incident lasted about two or three seconds. 3RP 52.

Newlen did not deny that he had hit Hug with the bolt cutters but said it was not his intent. 3RP 43. He said he had not meant to "clip" Hug, but Hug was hit. 3RP 37, 42.

At trial, Newlen did not recall telling the officer that he thought Hug had grabbed the bolt cutters at some point, or that they were both pulling on them and that resulted in Hug's injuries. 3RP 56. The officer testified that Newlen had made those statements and that Newlen had also said Hug had hit himself in the side with the bolt cutters during the struggle. 3RP 56-57. The officer admitted the cutters were a heavy, unwieldy tool, and that most of the weight was up at the top, in the "jaw." 3RP 56-57.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED REPEATED FLAGRANT MISCONDUCT WHICH COMPELS REVERSAL AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Unlike defense attorneys, prosecutors enjoy a special status as "quasi-judicial" officers. See State v. Charlton, 90 Wn.2d 657, 664-65,

585 P.2d 142 (1978); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). As a result, the words of the prosecutor carry great weight with the jury. See State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). With this special status, however, comes added responsibility. Id. Included is the duty to seek justice instead of acting as a "heated partisan" by trying to gain conviction at all costs. See Charlton, 90 Wn.2d at 664-65; State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969).

Because of their special role, the acts of the prosecutor may not only amount to misconduct but also may have a significant impact on the defendant's due process right to a fair trial. See State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2001); see Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Only a fair trial is a constitutionally proper trial, as only with a fair trial can we be confident that our system has worked and guilt properly decided. See State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). When a prosecutor fails his duties and commits misconduct, he thus not only denigrates the integrity of the prosecutor's office but also deprives the defendant's of the due process right to a fair trial. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In this case, the prosecutor committed multiple acts of misconduct which, taken separately or together, compel reversal. Further, counsel's

unprofessional failures regarding the repeated misconduct prejudiced Mr. Newlen, so that he was deprived of not only his due process rights to a fair trial but also his constitutional rights to effective assistance of appointed counsel.

To understand the gravity of the misconduct and why it compels reversal, it is crucial to look at the issues at trial. Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18.

Here, there was no dispute that Mr. Newlen was holding the cutters when they hit Mr. Hug. Nor was there any dispute that Mr. Hug was injured. Instead, as the prosecutor repeatedly declaimed below, the only issue in the case was whether the state had presented sufficient evidence to prove, beyond a reasonable doubt, that Mr. Newlen had the required intent for second-degree assault. See 3RP 114-15 (the only issue in the case is "when the Defendant hit Mr. Hug with these bolt cutters, did he do it on purpose or was it an accident"); 3RP 122 ("[t]he only question was: Was it intentional").

All of the misconduct in this case went directly to the jury's ability to fairly and impartially decide that issue. Newlen was charged with second-degree assault under RCW 9A.36.021(1)(a), and the prosecution's case as submitted to the jury was that Newlen had committed the crime by actual battery. See CP 62-63. "Actual battery" occurs when the defendant engages in an intentional touching or striking of another which is harmful or offensive. See State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439

(2009). The statutory scheme then sets the "degree" of the assault based upon the type of harm caused by the actual battery. See RCW 9A.36.011(1)(c).

For second-degree assault as alleged here, the prosecution had to prove that the defendant had intentionally assaulted Hug and "thereby recklessly inflict[ed] substantial bodily harm." RCW 9A.36.021(1)(a). But regardless of the degree of harm inflicted, the prosecution bears the burden of proving in the first instance that the defendant intended the touching or striking of the other person. See, State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000), review denied, 143 Wn.2d 1023 (2001); see also, State v. Keend 140 Wn. App. 858, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041 (2008).

The misconduct in this case all went directly to this question of intent, the only issue at trial. That misconduct included 1) telling the jury that there was evidence they were not being allowed to hear because of "evidence rules" while at the same time implying the "missing" evidence would support the prosecution's case, 2) eliciting improper opinion testimony from an officer about the credibility of the state's witnesses and the defendant and the defendant's guilt and then invoking that testimony by inference in closing argument; and 3) implying that jurors had to decide which side was telling the truth and even which was lying in court in order to perform their appointed role.

First, the prosecutor committed serious, flagrant, ill-intentioned and prejudicial misconduct when he told the jury, in rebuttal closing argument, that there was evidence they were not being allowed to hear

because of "evidence rules," and in implying that evidence would have supported the state.

During rebuttal closing argument, the prosecutor told the jury regarding the statement Brissett had given to Sergeant Huffine:

> Defense says, well, she said to Huffine about the fence line, what exactly was meant by that, who knows, or her memory of it, who knows; but the one thing is: **You didn't hear the entirety of her conversation with Sergeant Huffine. Evidence rules don't allow you to hear all of that.** She testified to what happened and Defense got a chance to cross-examine her, and there was no - - you know, that she was intimidated by him, that's not inconsistent with what she told Sergeant Huffine, **that's just not evidence that was presented**.

3RP 139 (emphasis added).

This argument was flagrant misconduct. It is misconduct and vouching to suggest to the jury that evidence not presented at trial supports the testimony of a witness. See State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

That is especially true because of the prosecutor's fundamental role and the likelihood that such suggestions by a prosecutor will hold sway with the jury. See Berger, 295 U.S. at 88-89. Where the prosecutor refers to evidence the jury does not hear and suggests that the rules are keeping evidence from them, that is highly improper. And worse, the prosecutor effectively places the weight of his office behind the witness, suggesting that there are things the prosecutor knows about which would support a finding of guilt - but also, that Newlen was somehow scary and Brissett was more intimidated by him than the jury was going to hear. It is akin to

the prosecutor testifying about the "fact" the "missing" evidence would supposedly support - here, that Brissett's version of events and thus the state's theory of guilt should be believed. This is serious, flagrant misconduct. See State v. Boehning, 127 Wn. App. 511, 517, 111 P.3d 899 (2005); compare, Thorgerson, supra.

As if this misconduct were not enough to compel reversal on its own, the prosecutor also committed serious, flagrant and prejudicial misconduct in eliciting improper opinion testimony from the investigating officer at trial. After establishing that Huffine had been an officer for many years, the prosecutor then asked if the officer had specifically investigated cases including assaults. 2RP 140. A few moments later, the officer testified that he had spoken to and taken the statements of Hug and Brissett, then gone to speak to Newlen and seen the bolt cutters. 2RP 147. The following exchange occurred:

[PROSECUTOR]:	And did he - - did you get a statement from him?
[OFFICER]:	Yes, I did.
Q:	After this, what did you do?
A:	After I took his statement?
Q:	Yeah.
A:	**I arrested him for assault.**

2RP 147 (emphasis added).

Thus, the officer's opinion and belief in Newlen's guilt and disbelief in Newlen's defense was revealed to jurors.

Then, in closing argument, the prosecutor referred back to

Huffine's conclusion, albeit in a less direct way. He told jurors they had heard two versions of events and had to figure out how they could "know what happened." 3RP 115. He then referred back to Huffine, saying that, to figure out what happened, they had to "examine the evidence, **just like Sergeant Huffine did when he conducted his investigation.**" 3RP 115 (emphasis added).

Thus, the prosecutor first elicited direct or near direct opinion testimony from an officer of the law on Mr. Newlen's guilt and veracity and that of the state's main witnesses in this case where credibility was crucial. Then he invoked that opinion again, suggesting the jury should see the evidence just the same way the sergeant did and further bolstering that conclusion. And again, the investigation the prosecutor was bolstering and referring to was the one which had concluded with Newlen's arrest, thus bringing the jury full circle back to the officer's improper opinion testimony.

It is the exclusive province of the jury to decide guilt. See State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); Demery, supra. The state and federal rights to a fair trial before an impartial jury guarantee the right to have the jury serve as the "sole judge" of the credibility of a witness, the weight to give her testimony and the ultimate determination of guilt. See State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005). These Sixth Amendment and Article I, § 21, rights are violated when a witness gives improper opinion testimony on those points. Id.

In general, it is improper for an officer to give their opinion on

veracity, credibility or guilt, either by direct or "inferential" statement at trial. See State v. Jones, 71 Wn. App. 789, 813, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). Counsel's behavior can affect their client's rights on this issue, however, because counsel's failure to object below precludes review of the issue in this court unless there is "an explicit or almost explicit" statement as to the defendant's guilt, veracity or credibility, or the veracity or credibility of any witness. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

In this case, despite counsel's failures to object below, this Court can address the issue because the comments met the Kirkman standards. The Court looks at several factors in determining this question; 1) the type of witness involved, 2) the nature of the testimony, 3) the nature of the charges, 4) the nature of the defense and 5) the other evidence before the trier of fact. Demery, 144 Wn.2d at 759. Here, the testimony came from an officer, whose testimony is more likely to hold sway with jurors, because it carries a "special aura of reliability." See Kirkman, 159 Wn.2d at 928. Second, the nature of the testimony, coupled with the nature of the charges, defense and other evidence was to bolster the prosecution's case. First, the jury heard that, after talking with the state's witnesses and then with Mr. Newlen, the officer then decided to arrest Newlen for assault. That conveyed the officer's belief in Newlen's guilt and his lack of veracity while bolstering that of the state's witnesses. And then the prosecutor reminded the jurors of that testimony and, by inference, of the officer's conclusions on Newlen's guilt. The prosecutor elicited improper opinion testimony and committed further misconduct.

But again, that was not the sole misconduct in this case. The prosecutor committed yet further misconduct, misleading the jury as to the burden of proof and the jury's proper role by suggesting that jurors had to decide which side was lying in order to decide the case.

In closing argument, the prosecutor told the jury there were two versions of events - one from Hug and one from Newlen. 3RP 115. The prosecutor then indicated jurors had to figure out how to "know what happened." 3RP 115. The prosecutor also told jurors that the "truth" was that Newlen was angry so he hit his neighbor. 3RP 125.

In rebuttal closing argument, the prosecutor returned to the theme that the jury had to decide which side was telling the truth. 3RP 137. The prosecutor reminded the jury that they had heard from Hug and Brissett. 3RP 137. The prosecutor then told the jurors "**you can judge if they were up to something in the courtroom, or if the Defendant was, and that's - - that's for you to decide."** 3RP 137 (emphasis added).

The prosecutor then pointed out there was "no real evidence" that Newlen was right about his claims about the property line. 3RP 138. The prosecutor also stated, "we don't have some survey or anything presented to tell us what the property line actually is." 3RP 138.

But Mr. Newlen had no burden of proving that his claims about the property line were true. Nor did he have a burden of providing "some survey or anything" to tell where the property line "actually is." Indeed, Newlen had *no* burden of proof on anything. Both the state and federal due process clauses require the prosecution to prove "beyond a reasonable

doubt. . .every fact necessary to constitute the crime with which [a defendant] is charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); see State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Further, the defendant bears no burden of disproving the prosecution's case in any way and may only be assigned the burden of proof on an affirmative defense if that defense does not negate an element of the offense. See, State v. W.R., Jr., 181 Wn.2d 757, 762-63, 336 P.3d 1134 (2014).

In addition, the prosecutor's arguments minimized the state's burden of proof and misstated the jury's proper role. The jury did not need to decide which party was "up to something in the courtroom." It did not need to decide who was telling the "truth." The jury's proper role is to decide whether the prosecution has met its constitutional burden of proving every essential element of its case, beyond a reasonable doubt. See State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). And suggesting to the contrary that the jury must decide what had happened or who is telling the truth have been repeatedly condemned in this state as misstating the jurors' role and presenting them with a "false choice." See State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). The choice is "false" because jurors do not need to decide that *anyone* is lying or telling the truth in order to perform its duties. See Barrow, 60 Wn. App. at 876.

As one Court had explained:

[t]he testimony of a witness can be unconvincing or wholly or

> partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.

State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). And as this Court has declared:

> A jury's job is not to "solve" a case. It is not, as the State claims to "declare what happen on the day in question." . . .Rather, the jury's duty is to determine whether the State has proven its allegations against the defendant beyond a reasonable doubt.

State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010).

In the unlikely event the Court finds any of the misconduct could have been cured had counsel objected and requested a proper instruction below, reversal is still required, because counsel was ineffective in his failures on this issue below. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.3d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth. Amend.; Art. I, § 22. Counsel is ineffective despite a strong presumption to the contrary if his conduct falls below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Those standards are amply met here. As noted *infra*, the misconduct was flagrant and prejudicial and included shifting a constitutional burden of proof to the defendant. Yet counsel sat mute,

allowing the prosecutor's misconduct to go unchecked.

If the Court finds that the misconduct does not compel reversal under the standard applicable for misconduct to which counsel has objected below, it should nevertheless reverse based on counsel's unprofessional failure to request such cures below. There could be no legitimate tactical reason to fail to object to the serious, prejudicial misconduct in this case. Reversal and remand for a new trial is required.

2. THIS COURT SHOULD NOT ABANDON ITS CURRENT PRACTICES AND ADOPT THE INEFFICIENT, DUPLICATIVE NEW PLEADING REQUIREMENTS DIVISION ONE CRAFTED IN SINCLAIR

In Blazina, supra, the state Supreme Court held that a trial court is prohibited from imposing legal financial costs on any defendant in a criminal case unless the court makes a specific finding that the person has the present or future ability to pay those costs. 182 Wn.2d at 835. Further, the Court held, the finding must be based on a detailed look at such things as the length of incarceration, existing financial obligations and whether the defendant qualified for a public defender and thus was indigent. Id.

Blazina was a landmark decision the effects of which have not yet been completely seen. In this Court, as a result of Blazina, where an indigent appellant has been asked to pay costs on appeal and objects, the Court has been conditionally imposing the costs upon the finding on remand by the trial court of "ability to pay." See Sinclair, __ Wn. App. at __. In Sinclair, Division One rejected that procedure and crafted a new pleading requirement, imposing a new burden on an indigent appellant to preemptively object or be subjected to automatic imposition of costs on

appeal if the appeal is later lost. See id.

This Court should not change its procedure to adopt the new one crafted by Division One, for several reasons.

a. The state constitutional right to appeal is directly impacted by the imposition of costs on appeal and thus constitutional limits apply

In order to fully understand the fallacies of Sinclair, it is important to look at the rights involved. There is no federal constitutional right to appeal a criminal conviction. See McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894). Our state constitution, however, guarantees such a right. Blank, 131 Wn.2d at 244-45. As a result, anyone convicted of a crime in our state courts has a constitutional right to a full, fair and meaningful appeal - and further, to appointed counsel at public expense if the person is indigent. See State v. Giles, 148 Wn.2d 448, 450-51, 60 P.3d 1208 (2003); Blank, 131 Wn.2d 244.

The state constitutional right to appeal is not, however, the only right involved. Where, as here, a state creates a right, federal due process and equal protection mandates apply. See Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). For example, in Draper, the Court found that indigent appellants were entitled to a record of sufficient completeness to allow them to pursue their state constitutional right to appeal, even though there was no similar federal right. Id. And where the state has created a right to appeal, that appeal must be more than a "meaningless ritual," so that the indigent appellant in a criminal case must be given appointed counsel for that appeal. See Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

This intertwining of federal and state constitutional principles is at issue here, where an impoverished person chooses to exercise a state constitutional right and is required to pay to do so. In general, it is unconstitutional to require someone to pay to exercise a constitutional right. See Fuller, supra. In Fuller, the U.S. Supreme Court upheld a statute which required an indigent defendant who had been given appointed counsel to repay that cost if he later became able. 417 U.S. at 45. The statute did not make repayment mandatory. 417 U.S. at 45. It also required the appellate court to "take into account the defendant's financial resources and the burden that payment would impose." See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller).

In addition, the statute at issue in Fuller provided that no payment obligation could be imposed "if there was no likelihood the defendant's indigency would end." Fuller, 417 U.S. at 46. It also provided that no convicted person could be held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

Based upon these careful proscriptions on how the repayment obligation was imposed and enforced, the Fuller Court was convinced the relevant statute did not penalize those who exercised their rights but simply "provided that a convicted person who later becomes able to pay . . .may be required to do so." 417 U.S. at 53-54. Because the legislation was "tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to to meet it without hardship," the statute was constitutional. 417 U.S. at 53-54.

In Blank, supra, our Supreme Court examined Fuller and our state's own recoupment statute for appeals, RCW 10.73.160. That statute provides, in relevant part:

> (1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.
>
> (2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.
>
> (3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence.
>
> (4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The Blank Court examined the statute and the mandates of Fuller and upheld the statute, finding that it satisfied the requirements set forth in that case for ensuring that people were not being forced to pay to exercise a constitutional right. 131 Wn.2d at 238-45. Further, the Court looked at the constitutionality of the statute under state constitutional principles, including whether the statute improperly "chilled" the exercise of the

constitutional right to appeal. Id.

The Blank Court upheld the statute against all claims. Id. The Court was unconcerned about the prospect of indigent people being jailed or punished for being poor and unable to make payments. 131 Wn.2d at 239-40. Instead, the Court held, such a practice is not possible because RCW 10.73.160 allows a person unable to pay to ask for "remission" of costs. 131 Wn.2d at 238-45. The Supreme Court was convinced that any trial court facing the question of whether a defendant should be punished for failing to pay would comply with the mandates of Fuller. Blank, 131 Wn.2d at 241-42. The Blank Court was further convinced that "sufficient safeguards" existed to present a person from being punished simply for their poverty and inability to pay. Blank, 131 Wn.2d at 241-42.

As a result, the Court found that RCW 10.73.160 "contemplates the constitutionally required inquiry into ability to pay, the financial circumstances of the defendant, as well as the burden payment will place on defendant and his or her immediate family." Id. The Court was also confident that any future "additional penalty for failure to pay" could not be imposed by the state without the required inquiry, because "ability to pay must be considered at that point." Id.

Blank thus upheld as constitutional an order against an indigent defendant for payment of costs of his unsuccessful appeal under RCW 10.73.160 and Rules of Procedure Title 14. 131 Wn.2d at 244-27. That statute and those rules, however grant this Court considerable discretion over not only when but even whether to order the appellant in a criminal case to pay those costs. State v. Nolan 141 Wn.2d 620, 628, 8 P.3d 300

(2000).

In Nolan, our highest Court once again addressed the issue of imposition of costs on appeal in light of an indigent case. Mr. Nolan argued that, because of the constitutional rights involved, costs on appeal should not be ordered paid by an unsuccessful appellant in a criminal case who is indigent unless the appeal was wholly frivolous. 141 Wn.2d at 625-26. The Supreme Court rejected that theory but also dismissed the prosecution's claim that costs should be awarded virtually as an automatic step in the process. 141 Wn.2d at 627-28. Imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Indeed, the Court held, the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are technically entitled to costs under the rules. Nolan, 141 Wn.2d at 628.

Thus, the issues of whether and when to impose costs on an impoverished appellant after he exercises his constitutional right to appeal are complex. This is not simply an exercise in unfettered discretion. The constitutional rights at issue also present serious and difficult questions where, as here, the government seeks to impose a cost for exercise of a constitutional right.

b. The *Fuller* protections no longer exist in this state as *Blazina* made clear and *Blank* is no longer good law

There is now a serious question as to whether imposition of costs

on appeal continues to be constitutional and whether Blank remains good law. It has become abundantly clear that imposition of costs on indigents across our state is resulting not only in improper punishment for poverty but has resulted in extreme inequity. See Blazina, supra. Blazina laid bare the ugly realities of the system wrought in the wake of the assumptions of Blank; that no penalties would be imposed on indigent people until the moment of enforced collection, when a trial court would make the required inquiry. It also laid to rest any notion that there was no impact on impoverished people ordered to pay legal financial obligations or costs on appeal which become part of those obligations. See, e.g., RCW 10.82.090(1) (imposition of 12 percent interest to start the date the judgement and sentence is entered; collection and payments start immediately); RCW 10.73.160(4) (no provision for counsel to help a defendant who is indigent to seek redress or remission of the costs imposed as a result of their having exercised the constitutional right to appeal).

Blazina was a highly unusual, historic decision. In that case, the Court relied on an extremely rare method of reaching an issue, because it felt the urgency to do so in the interests of justice. 182 Wn.2d at 833-34.

More specifically, the Blazina Court recognized that "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." 182 Wn.2d at 834. The Court chronicled widespread "problems associated with LFO's imposed against indigent defendants," including inequities in administration, impact of criminal debt on the ability of the state to have

effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems." Id. One of the proposed reforms the Court mentioned was a requirement "that courts must determine a person's ability to pay before the court imposes LFOs." Id.

The Court then noted the flaws in our own state's LFO system and the system's "problematic consequences." Id. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. Id. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford $25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 182 Wn.2d at 836-37. This increased involvement "inhibits reentry," the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other "reentry difficulties increase the chances of recidivism." Id.

Finally, the Blazina court pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when

defendants go to trial, or when they are male or Latino. Id. The Court also noted that certain counties seem to have higher LFO penalties than others. Id. The fact that the LFO system effectively ensured that people in poverty would be supervised by courts far longer than those who could pay off their LFOs right away - and the resulting social costs of that continuing contact - were also of grave concern. Id.

Blazina represented historic recognition by our highest state court that the legal financial obligation system has become an impediment to the very principles of the system it seeks to serve. It applies disproportionately to people in poverty. It ensures those people will be under the jurisdiction of the courts for far longer than people with means. That is why the Blazina Court took such an extraordinary step of granting relief even absent objection. And Mr. Newlen will be subject to the very same collection and interest and procedure at issue in Blazina, because appellate costs become part of the judgment and sentence and are collected by the trial court and treated as such.

Blazina also casts serious doubt on the continuing validity of Blank. In Blank, the cornerstone of the finding that our state's scheme met the requirements of Fuller was that the procedures for remission would ensure no one was imprisoned for the inability to pay due to poverty. Blank, 131 Wn.2d at 242-43. But Blazina made it clear that remission procedures are *not* sufficient to prevent that result. As do numerous studies across the country and in this state. See Blazina, 182 Wn.2d at 834-35; see ACLU/Columbia Legal Services Report: Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for

Being Poor (February 2014), *available at*,https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf ; Washington State Minority and Justice Commission, *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008), available at http://www.courts.wa.gov/?fa=home.sub&org=mjc&page=publications&layout=2&showPubTab&tab=pubRes .

Our highest court has reaffirmed its commitment to Blazina, supra, even extending it to apply in cases where there was no objection below. See State v. Duncan, __ Wn. 2d ___, __ P.3d __ (No. 90188-1) (April 28, 2016). In Duncan, the Supreme Court remanded to the trial court for resentencing and proper consideration of ability to pay, even though the defendant had not raised the issue below. After first noting that the imposition and collection of LFOs impacts constitutional issues, the Court rejected the idea that the issue was somehow waived or should not be addressed, stating, "[h]ad Duncan objected at trial to the LFOs sought by the state, the trial court *would have been obligated to consider* his present and future ability to pay before imposing the LFOs." (Emphasis added). Further, the Court referred to making the required findings for even those portions of the LFOs declared "non-discretionary."

Just like the defendants in Blazina, Mr. Newlen is indigent. Just like those defendants, because appellate costs become part of the judgment and sentence and become enforceable just as other LFOs, they will immediately be subject to 12% interest. And just as in Blazina, here, there should be consideration of whether the indigent appellant has any present

or future likelihood of having any hope of paying appellate costs before they are imposed. The procedure used by this Court of holding that appellate costs may be imposed only if, on remand, a finding is made of specific "ability to pay" satisfies that concern.

In Sinclair, supra, Division One of the Court of Appeals recently looked at the issue of costs on appeal when a defendant whose conviction was affirmed objected to a cost bill filed post-decision by the state. 2016 WL 393719. In Sinclair, the prosecution urged the Court to automatically impose costs on appeal against indigent defendants in *every* case and wait to see if the defendant brings a remission hearing on his own in trial court to ask for relief from imposition of such costs. 2016 WL 393719 at 2-3.

Division One properly rejected that idea. But it then further rejected the procedure this Division has been using as a remedy - and ultimately imposed a rule which ends up amounting to a presumption of imposition of costs. 2016 WL 393719 at 4-5. In this Division, for some time, this Court has followed the RAP Title 14 procedures about the timing of cost bill requests and pleadings, but when faced with a Blazina issue and an indigent defendant, has been ordering appellate costs contingent upon the finding of the trial court on remand that the defendant had the required "ability to pay." See Sinclair, supra.

For Division One, however, this was problematic. 2016 WL 393719 at 4-5. That Division felt the procedure improperly delegates to the trial court the appellate court's duty of deciding appellate costs. 2016 WL 393719 at 5. Division One then crafted a completely new pleading requirement for its Division; that an *appellant* must set forth "[f]actors that

may be relevant to an exercise of discretion" to impose appellate costs in case there is a future request by the *respondent* for such costs to be imposed. Id. Ultimately, Division One thought it there might need to be a "rule change requiring the State to include a request for costs in the brief of respondent[.]" 2016 WL 393719 at 5-6. Absent such a change, however, Division One held, an appellant should "devote a section of its opening brief" to rebutting any potential request for imposition of appellate costs, with the prosecution then given "the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill." 2016 WL 393719 at 5-6.

This Court should not adopt the new pleading requirement created by Division One in Sinclair, because it is wrong as a matter of law and of policy on several levels. Further, the concerns expressed in Sinclair about this Court's procedure after Blazina are easily redressed without the extreme steps mandated by Division One.

First, Sinclair runs afoul of the clear holdings of our highest state court, in Blank, supra, and Nolan, supra. RAP Title 14 provides that the appellate court makes the decision on costs only "after the filing of a decision terminating review[.]" RAP 14.1(a). Further, the purpose of the RAPs allowing imposition of appellate costs are "designed to allocate appellate costs in a fair and equitable manner depending on the realities of the case." State v. Stump, __ Wn.2d __, __ P.3d __ (No. 91531-8, April 28, 2016). Until there is a decision on the merits, the balance of equities cannot be done; the "substantially prevailing party" not determined. That explains why RAP 14.4, which provides the procedure for seeking costs,

requires that the party seeking costs must file and serve a cost bill very shortly after a decision, i.e., "within 10 days after the filing of an appellate court decision terminating review." RAP 14.4(a).

Thus, costs are based upon information not even available until after the appeal has been decided on the merits. In this Division, parties are only tasked with drafting and filing their requests for costs on appeal from a criminal case, if any, *after* they know what the Court decided. In this way scarce criminal justice resources are only expended when needed, if the state believes it is the "substantially prevailing party" on review and chooses to seek costs. But under Sinclair, the parties will be required to brief the issue in every single case even if ultimately it will be irrelevant.

Another very serious problem with the ruling in Sinclair is the potential scope of the requirement and its lack of clear standards, which in turn will result in further significant waste. In deciding to craft a new pleading requirement in Sinclair, Division One thought it could do the proper evaluation of ability to pay "at least as efficiently" through appellate briefing as a trial court could do on remand. 2016 WL 393719 at 4-5.

Division One did not mention that a trial court is, by definition, a fact-finding court, as opposed to an appellate court which is tasked as a court of review. And that division also did not seem to recognize the potential scope of its order or what it was going to require. Comparing the situation to that in RAP 18.1(b), the court said, "[t]ypically, a short paragraph or even a sentence is deemed compliant with the rule," and that, as a result, "we are not concerned that this approach will lead to

overlength briefs." 2016 WL 393719 at 4-5. This implies that all it is requiring is a mere sentence, so that a declaration in an opening brief of continued indigence would seem enough.

However, Division One then stated that the parties should ensure they have sufficient information to present to the appellate court which would be relevant to the issue of whether costs should be imposed in the future if there is a substantially prevailing party and a proper request is made:

> Both parties should be well aware during the course of appellate review of circumstances relevant to an award of appellate costs. A great deal of information about any offender is typically revealed and documented during the trial and sentencing, including the defendant's age, family, education, employment history, criminal history, and the length of the current sentence.

2016 WL 393719 at 4-5.

And it is not only that information the court thought was needed to support its decisions regarding appellate costs, but also "current ability to pay" and indeed other factors. Indeed, the scope is unlimited, because the list in Sinclair "is not intended as an exhaustive or mandatory itemization of information that may support a decision one way or another." 2016 WL 393719 at 4. Division One concluded that parties should provide such briefing in order to assist the appellate court in the exercising its discretion "by developing fact-specific arguments from information that is available in the existing record," not only about ability to pay but also about the other factors it thought were relevant to the inquiry. 2016 WL 393719 at 5-6.

Thus, under Sinclair, counsel in criminal appeals will now be

forced in Division One not only to file supplemental briefing in every case they have pending in that Division in order to comply. They will also have to exhaustively investigate the existing record as to the ability to pay at the time of the sentencing in order to ensure that they do not commit ineffective assistance in failing to object in advance to any future potential effect. This will have the further tax on scarce resources by requiring this Court to consider motions to supplement and supplemental pleadings in every criminal case pending before the Court on appeal, *even* if those cases, when decided on the merits, may not involve any need for such effort or consideration. And it will cause significant delay in new filings, as counsel would scramble to satisfy a new pleading requirement lest they be deemed ineffective later.

Ultimately, the Sinclair Court properly declined to impose appellate costs on Sinclair, who was 66 years old, likely to die in prison and who qualified not only for an order of indigency at the trial court level but also for the purposes of appeal, concluding that, "there is no reason to believe Sinclair is or ever will be able to pay $6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent)." 2016 WL 393719 at 6. It did so despite the prosecution's claim that Sinclair had a solid work history and there was no evidence he would be unable to work in the future. Id. Division One noted that there is a presumption of continued indigency throughout appellate review under RAP 15.2(f), which requires the appellate court to "give a party the benefits of an order of indigency throughout the review unless the *trial court* finds the party's financial condition has improved to the extent that

the party is no longer indigent." Because there was no trial court order that his financial situation had improved or is likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s, the court exercised its discretion to deny the state's request for appellate costs.

Although it reached the right result by refusing to saddle the appellant in that case with costs after he unsuccessfully exercised his constitutional right to appeal, it did not in the other portions of Sinclair, by creating a novel new briefing requirement which puts appellate defense counsel in the position of "assuming the client may not prevail on substantive claims." 2016 WL 393719 at 2-6. Not only that, Division One recognized that its new procedure has "practical inefficiencies," because it may require counsel to "include a presumptive argument against costs in every case" even if the state does not intend to seek costs later.

It is consistent with the rules for Division One to honor and apply the presumption of indigence set forth in RAP 15.2(f). But the new requirements Division One created by engrafting RAP 18.1(b) onto this situation were improper.

Notably, in Blank, our highest Court specifically rejected the same claim as that raised by Division One in Sinclair - that the briefing requirements of RAP 18.1 should apply to imposition of costs on appeal. The Blank Court declared that those "expenses which ay be recouped under RCW 10.73.160 **do not fall within RAP 18.1.**" Blank, 131 Wn.2d at 250 (emphasis added).

Sinclair requires briefing not previously required, anticipatory to any issue even being raised, on an issue which may never need to be decided by the Court, in advance of the existence of the very facts which will be required for the decision to be made. Put simply, it is nonsensical and a waste of scarce resources to engraft a new pleading requirement in this fashion. This Court should decline to follow Division One's improper decision in Sinclair.

In the alternative, the Court should follow Sinclair only to the extent that Division One honored the continuing presumption of indigency set forth in the Rules of Appellate Procedure, and should decline to impose costs on appeal on appellants who, like Mr. Newlen, remain indigent and have no more ability to pay onerous costs for exercising their constitutional right to an appeal than they do to pay other legal financial obligations. This Court should deny any later state's request for appellate costs, even if the prosecution somehow ends up having an argument it is the "substantially prevailing party" on reviews, not only because it is no longer consistent with the constitutional mandates of Fuller to do so but also because Mr. Newlen's continued indigence has not been rebutted.

E. CONCLUSION

The prosecutor's serious, flagrant and prejudicial misconduct compels reversal. Counsel was also prejudicially ineffective and this Court should order new appointed counsel on remand. Finally, this Court should decline to follow Sinclair and refuse to create a new, inefficient briefing requirement. As Mr. Newlen is and remains indigent, imposition of costs on appeal would be inappropriate in any case under Blazina.

DATED this 1st day of June, 2016.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, Box #176
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at prosecutor@co.cowlitz.wa.us, and to appellant by depositing a true and correct copy in the U.S. mail, first class postage prepaid to Mr. Clifton Newlen, 185 Vision Drive, Kelso, WA. 98626.

DATED this 1st day of June, 2016.

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 N.E. 65th St. #176
Seattle, Washington 98115
(206) 782-3353

RUSSELL SELK LAW OFFICES

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KARSdroit@aol.com
valerie.kathrynrussellselk@gmail.com
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