

**NO. 48082-4-II**

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

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM T. ROWLAND, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kitty-Ann van Doorninck

No. 14-1-04012-3

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where defense counsel elicited and later endorsed admission of testimony regarding the defendant's prior criminal behavior and other bad acts, did the court abuse its discretion in admitting the evidence?
2. Should the Court of Appeals rule on appellate costs before a cost bill is presented?
3. Should the Court of Appeals adopt a policy regarding appellate costs which is in derogation of legislative intent?

B. STATEMENT OF THE CASE.

1. Procedure

On October 8, 2014, the Pierce County Prosecuting Attorney filed an Information charging the defendant with violation of a domestic violence court order, felony harassment, and assault in the fourth degree. CP 1-3. Before the case went to trial, the State amended the Information to add two more counts of violation of domestic violence court order, and the sentence aggravating circumstance of RCW 9.94A.535(2)(c). CP 4-7.

September 14, 2015, the case was assigned to Hon. Kitty-Ann van Doorninck for trial. 1 RP 4. The State filed a motion to admit evidence of the defendant's prior bad acts, per ER 404(b). CP 16. The defendant filed a motion opposing this. CP 22. The court heard argument and granted the

defendant's motion in limine. 1 RP 74-77. Later, after an evidentiary hearing and argument, this evidence was admitted during the re-direct testimony of Dep. Heimann. 4 RP 334-335.

After hearing all the evidence, the jury found the defendant guilty of three counts of violating domestic violence court orders, one count of felony harassment, and assault in the fourth degree. CP 147-148, 161. The defendant filed a timely notice of appeal. CP 142.

## 2. Facts

On October 6, 2014, despite the fact that there were two valid no-contact orders (NCOs), the defendant was living with the protected party, Nicole<sup>1</sup> Rosoto, his girlfriend at the time. 4 RP 293, 352-353. That evening, a verbal argument grew into a physical altercation. 3 RP 238. The defendant slapped Kimberly, Nicole's mother, and held her to the ground. 3 RP 126, 238. Another visitor pulled the defendant off of her. 3 RP 128. The defendant threatened to kill the family. 3 RP 131. Kimberly then called 911. 3 RP 129.

Deputies Greiman and Heimann responded to the call. 3 RP 162. In the course of investigating the incident, Dep. Heimann discovered the two NCOs and arrested the defendant. Because the defendant had been cut in the domestic altercation, Dep. Heimann transported the defendant to St. Joseph's Hospital for medical attention. 4 RP 300.

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<sup>1</sup> Because two of the witnesses are named Rosoto, their first names will be used.

At the hospital, the defendant made several specific threats to kill Dep. Heimann and his family. 4 RP 301. Upon arrival at the Pierce County Jail, the defendant continued with additional threats to assault and to kill Dep. Heimann. 4 RP 302-303. A few days later, upon reflection, the defendant wrote Dep. Heimann a letter; apologizing, and admitting to making the threats and knowingly violating the NCO. 4 RP 305, 306.

C. ARGUMENT.

1. THE COURT COMMITTED NO ERROR WHERE DEFENSE COUNSEL HIMSELF ELICITED TESTIMONY REGARDING THE DEFENDANT'S PRIOR CRIMINAL BEHAVIOR AND BAD ACTS AND THEREBY OPENED THE DOOR TO ADDITIONAL TESTIMONY ON RE-DIRECT.

A trial court's determination of the admissibility and relevance of evidence is reviewed for abuse of discretion. *See, State v. Foxhoven*, 161 Wn. 2d 168, 176, 163 P. 3d 786 (2007). The decision regarding the scope of redirect examination is likewise reviewed for abuse of discretion. *State v. Gallagher*, 112 Wn. App. 601, 609, 51 P.3d 100 (2002).

Under the "open door" doctrine, otherwise inadmissible evidence becomes admissible when the defendant raises a related issue. *State v. Stockton*, 91 Wn. App. 35, 40, 955 P.2d 805 (1998).

[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination

or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

*State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). In order to be admissible after a defendant opens the door, such otherwise inadmissible evidence must still be relevant, *Stockton*, 91 Wn. App. at 40. It must also fall within the scope of the examination that opened the door. *State v. Alexander*, 52 Wn. App. 897, 901, 765 P.2d 321 (1988).

*Gallagher*, 112 Wn. App. 601, is an instructive case, with an issue similar to the present one. There, the defendant was tried for manufacturing methamphetamine. In a pretrial ruling, the court granted the defendant's motion to exclude evidence of certain drug paraphernalia found in defendant's home. *Id.*, at 606. At trial, defense counsel cross-examined a detective, trying to get him to concede that the police had not found large quantities of drug paraphernalia, cash, names of sources and buyers, or weapons in the defendant's home. *Id.*, at 609. This opened the door on re-direct to the evidence that had been inadmissible under the trial court's pretrial ruling. *Id.* The Court of Appeals decided that fairness dictated that the rules of evidence allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness. *Id.*, at 610.

In this case, the State wanted to admit testimony regarding the defendant's prior bad acts, as evidence supporting Dep. Heimann's basis

of fear. CP 16, 1 RP 74. Defense counsel moved in limine to exclude it, and argued against it. CP 22, 1 RP 76. The court agreed with the defense, finding that the evidence was relevant and probative, but that the prejudicial effect of the evidence outweighed its probity. 1 RP 77.

However, on a number of occasions during trial, defense counsel raised the prospect of the defendant's additional misbehavior. In cross-examination of Kimberly, he elicited that the October 6, 2014 incident was not the first time police had been called to the residence regarding the defendant's behavior. 3 RP 150. In cross-examination of Dep. Greiman, he elicited that through police contacts with the defendant, he knew that the defendant threatens to kill Kimberly "a lot". 3 RP 176.

In cross-examination of Dep. Heimann, defense counsel was apparently attempting to minimize the perceived threat, or to show that Dep. Heimann's fear was exaggerated or baseless. Defense counsel made the point that this incident was not the first time in his career that Dep. Heimann had been threatened. 4 RP 325. The State objected as to the relevance. *Id.* The court reminded defense counsel of the pre-trial order in limine and asked why it should not be applied here. 4 RP 326. The court went on to warn defense counsel that if he continued in this line of questioning, he would open the door to the testimony about the defendant's prior bad acts. 4 RP 327.

The State then made an offer of proof outside the presence of the jury. In the offer of proof, Dep. Heimann testified that he was "extremely"

familiar with the defendant. 4 RP 328. Dep. Heimann had been to the address over 20 times to respond to reports such as domestic violence incidents involving the defendant, drug overdoses involving Nicole, drug possession, and fights between various occupants and others. *Id.* He had previously arrested the defendant two or three times. *Id.* Dep. Heimann was very familiar with the defendant's connections to the drug world and drug "cartels". *Id.* Dep. Heimann testified that these facts were why he was so concerned about the defendant's current threats. 4 RP 329.

After the offer of proof, the court again warned defense counsel that, if he pursued his line of questioning, he would open the door to this testimony. 4 RP 331. Defense counsel responded that he was "fine with what just came out in the offer of proof". *Id.*

On re-direct, in front of the jury, Dep. Heimann testified consistently with the offer of proof. He said that he was very familiar with the defendant from responding to numerous calls regarding assaults and other criminal behavior. 4 RP 334. He went on to testify that the defendant was an avid drug user and was connected to a Mexican drug cartel and the local "drug Mafia". 4 RP 335. Dep. Heimann was concerned that, because the defendant knew where he lived, the threats could easily be carried out. *Id.*

On re-cross, defense counsel further elicited that the defendant had offered to work with police to capture major drug dealers or "big fish" in his area. 4 RP 336. The defendant was able to do this because of his

connections to the “Mexican Mafia”. 4 RP 337.

Despite successfully obtaining an order in limine to exclude relevant evidence regarding the defendant’s prior bad acts, defense counsel delved into it himself. Like the defense counsel in *Gallagher*, the one in this case tried to make the point that the law enforcement witness was exaggerating or over-reacting to the incident. Here, the court specifically warned him twice of the peril of his line of questioning. Defense counsel essentially shrugged his shoulders and forged ahead. Admission of the evidence he now complains of on appeal falls squarely on the defense counsel. The court properly included a limiting instruction regarding this evidence. CP 108. The court committed no error.

2. THE COURT OF APPEALS SHOULD WAIT TO RULE ON APPELLATE COSTS UNTIL THE STATE SUBMITS A COST BILL.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P. 2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000).

In *Nolan*, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State’s cost bill. *Id.*, at 622. As suggested by the Supreme

Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *State v. Sinclair*, 192 Wn. App. 380, 389-390, 367 P. 3d 612 (2016), prematurely raises an issue that is not before the Court. *If* the defendant does not prevail; and *if* the State files a cost bill; the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

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 defendant argues that the Court should not impose costs on indigent defendants. App. Brf. at 15. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In

1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank, supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). As *Blazina* instructed, trial courts should carefully consider a defendant’s financial

circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, *Blazina* does not apply to appellate costs. As *Sinclair* points out at 389, the Legislature did not include the “individual financial circumstances” provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of “manifest hardship.” See RCW 10.73.160(4).

The Legislature’s intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW 10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In *Blank, supra*, at 242, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as much as 12%. *Id.* RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that

the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

(2) The court may, on motion by the offender, following the offender's *release from total confinement*, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090(emphasis added). The rest of the “relief” is equally limited and demonstrative of the Legislature’s intent and presumption that the debts be paid:

(a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family*;

(b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;

(c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, “good faith effort” means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period, excluding any payments mandatorily deducted by the department of corrections*;

(d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations*. The court may grant the

motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2)(emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A, the Sentencing Reform Act, and most recently amended in 2015.

The unfortunate fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” Obviously, all these defendants have been found indigent by the court. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

Parties and the courts can criticize this legislation, its purpose and result, and that the debts accumulated by indigent defendants under RCW 10.73.160(3) (and 10.01.160) and the interest that accrues on it under RCW 10.82.090 and RCW 4.56.110 are onerous. The parties may even be in agreement in their criticism. The defendant cites law review articles on this topic in his brief at 11 and 12. In *Blazina* the Supreme Court was likewise critical of these statutes and their result. *See* 182 Wn. 2d at 835-836. Yet, the Court did *not* find the statutes illegal or unconstitutional.

The question for this Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in *Blank*, and what the Court did *not* do in *Blazina*. It is for the Legislature to change the statute if it so desires.

D. CONCLUSION.

The evidence of the defendant's prior criminal behavior was admitted because of strategy and choices made by defense counsel. There is no basis to claim legal error. The wisdom or even justice of the laws imposing legal debt on criminal defendants is properly addressed to the Legislature. Until such time as the Legislature changes the intent and result of these statutes, defendants are best to make full use of the relief provided in RCW 10.73.160(4) and 10.82.090(2).

The State respectfully requests that the conviction be affirmed.

DATED: June 13, 2016.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-13-16 

Date

Signature

# PIERCE COUNTY PROSECUTOR

**June 13, 2016 - 3:18 PM**

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