

No. 48183-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik D. Price, Judge
Cause No. 15-1-00526-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the evidence at trial was sufficient to prove, beyond a reasonable doubt, that Davis intended to assault the victim when he smashed the window of the victim's vehicle with a rock.

2. Whether, before the jury could return a finding that Davis was armed with a deadly weapon, it must be instructed as to the required nexus between the defendant, the crime, and the weapon. Further, whether this claim of error may be raised for the first time on appeal.

3. Whether the reasonable doubt instruction given by the court violated Davis's due process rights.

4. Whether this court should award costs on appeal to the State in the event it substantially prevails on appeal.

B. STATEMENT OF THE CASE.

1. Substantive facts.

Alec Kirkpatrick was, at the time of trial, twenty-two years old. On the evening of April 15, 2015, he was outside the Oyster House in Olympia. He observed Davis kick over a couple of cones and go to the parking lot of Bayview Thriftway, mumbling with slurred speech. RP 139-40.¹ Davis had neither a cane nor a wheelchair. RP 140. Kirkpatrick kept his distance, not wanting to have any conflict with Davis. RP 140. Kirkpatrick went to the bus stop directly in front of the Bayview Thriftway store. While waiting

¹ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated September 28-30, 2015.

there he heard glass break, but did not see what caused it. RP 116.

Willoughby Lee, an elderly retired general contractor and WW II veteran, was sitting in the front passenger seat of a Toyota Prius hatchback, parked in the Bayview lot. RP 58-59, 65. The driver, Lee's daughter, had gone inside the store. RP 59. The car was locked. RP 60. Davis approached the passenger window, talking to himself, and put his fingers to his lips in a motion that caused Lee to think Davis was asking for a smoke. RP 61. Lee yelled that he did not smoke. Davis then began pounding on the hood of the car. Lee was irritated and called 911 from his cell phone. RP 61-62. While Lee was on the phone, Davis went to the driver's side window and broke the glass. Lee thought he used his fist; he later learned Davis used a rock. RP 62. Davis opened the driver's door and entered the car. RP 62.

Lee was still in the passenger seat, watching Davis. Davis "just came across at me," putting his hands on Lee's forearm. RP 63-64. Lee, in an effort to protect himself, punched Davis in the face. RP 63-64. Almost immediately, Davis was grabbed from outside the vehicle and pulled from the car. RP 63.

When Kirkpatrick heard glass breaking, he looked toward the sound and saw glass on the ground next to the Prius. He ran toward the car. He observed Davis in the driver's seat, reaching over with both arms and grabbing onto Lee in the passenger seat. RP 116-17, 136-38. It was his impression that Davis was trying to pull Lee out of the car. RP 117, 120. He did not hear Davis say anything while in the car, RP 120, 135, but Lee was repeatedly saying, "Help me. Help me." RP 117, 119, 139. Kirkpatrick pulled Davis out of the car. RP 118. Davis said, "Get away from me. What are you doing?" Kirkpatrick repeatedly asked Davis what he was doing, and Davis said he was going to take the car. RP 118. Davis put his fists up, but did not try to hit Kirkpatrick. RP 118. Davis tried to walk away, but Kirkpatrick blocked his path. Davis said he was going to take the other cars. RP 118.

The police arrived very shortly thereafter and arrested Davis. RP 119. Lee got out of the car, and for the first time noticed a rock on the passenger floorboard right between his feet. It had not been in the car before Davis broke the window and Lee concluded Davis must have used it to break the window. RP 66. It was not until he got out of the car and someone called it to his attention that Lee realized his right forearm was cut and bleeding. A fireman wrapped

it in gauze. RP 67. The lacerations were consistent with cuts from glass. RP 85. Lee had been taking a blood thinner for several years and had to be extremely careful about bleeding. RP 67.

Olympia Police Officers Del Vigo and Fecick responded to the scene at about 8:30 p.m. RP 72. Del Vigo observed Davis, with a crowd of people standing behind him, acting erratically. Davis walked towards the officers, but when ordered to get down on the ground he promptly complied. RP 72. He was not in a wheelchair. He was handcuffed and escorted to a patrol car without incident. RP 72-73. Davis was not bleeding. RP 75.

Del Vigo contacted Lee, whom he described as “pretty shook up.” RP 74. After directing Lee to the medics to have his bleeding forearm treated, the officer examined the Prius. He saw that the driver’s side window was completely shattered, and there was a large rock on the floor of the passenger side. RP 75. Both the driver’s and passenger’s seats were covered in pieces of glass. RP 76.

At trial, Davis testified that he suffers from multiple sclerosis. RP 157. He said he approached Lee’s car because he thought an international agent was following him and he wanted Lee’s help.

RP 160, 162. He only vaguely recalled the events of that night, possibly because he had taken crystal meth. RP 161.

2. Procedural facts

The State accepts the appellant's statement of the procedural facts.

C. ARGUMENT.

1. The evidence presented at trial was sufficient to prove that Davis intended to assault the victim when he smashed the window of the victim's vehicle with a rock.

Davis argues that, while he may have been reckless when he smashed the window of the victim's car, there was no evidence that he intended to assault the victim by doing so.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical

probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Although Davis denied any intent to assault or frighten Willoughby Lee, the evidence was that he smashed the window of the vehicle, immediately entered the car, and “just came across at” Lee. RP 63. Lee punched Davis in self-defense. RP 63-64. When Kirkpatrick approached the car, Lee was saying, “Help me. Help me.” RP 117, 119, 139. It appeared to Kirkpatrick that Davis was trying to remove Lee from the car. RP 117, 120. Davis told Kirkpatrick that he was going to take the car. RP 118.

While specific intent cannot be presumed, it may be inferred as a logical probability from the circumstances. State v. Wilson,

125 Wn.2d 212, 217, 883 P.2d 320 (1994); State v. Elmi, 138 Wn. App. 306, 320, 156 P.3d 281 (2007), *affirmed*, 166 Wn.2d 209, 207 P.3d 439 (2009). In Elmi, the defendant, from outside the house, fired three bullets into the living room where his estranged wife and three young children were located, narrowly missing them. Id. at 310. The Court of Appeals, addressing the intent element of assault, said:

While there was no direct evidence that Elmi intended to frighten [his wife], there was circumstantial evidence from which a jury could have concluded as a matter of logical probability that Elmi intended all of the likely results of firing a gun at her, including putting her in apprehension of harm.

Id. at 320.

By striking the car window with the rock, it can be inferred that Davis intended the likely results, including apprehension and fear. Further, there was evidence that Davis was planning on taking the car, and it is a logical inference that he intended to use the rock to assault Lee if that is what he had to do. It is more likely that he dropped the rock and had to resort to using his bare hands in an attempt to remove Lee from the car than that he did not intend to assault Lee with the rock.

There was sufficient evidence introduced at trial to permit a rational trier of fact to logically infer that Davis intended to assault Lee with the rock.

2. Davis's failure to ask for a jury instruction explaining the nexus between the defendant, the crime, and the weapon waived his claim of error. In this case there was no nexus requirement. The instruction given adequately informed the jury of the facts it must find to conclude Davis was armed with a deadly weapon.

The jury was asked to find that Davis was armed with a deadly weapon at the time he assaulted Lee. The jury instruction read:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Count I.

A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.

Instruction No. 21, CP 104.

Davis did not ask for any other instruction. He made a confusing blanket objection to all of the State's instructions—"Well, I got objections to all of them, but no. Well, I can, but I mean . . . I

object to number 13.” RP 199. Davis did not designate the State’s proposed instructions as clerk’s papers, but from the context of his argument it is apparent that he was objecting to the definition of assault. RP 199-200. His primary objection was related to his misunderstanding that he was being accused of stealing the car. RP 195-99. Davis does not claim that he objected to the weapon enhancement instruction. Appellant’s Opening Brief at 11-12.

Generally, the failure to ask for a nexus instruction bars a claim of instructional error on appeal. State v. Eckenrode, 159 Wn.2d 488, 491, 150 P.3d 1116 (2007); State v. Thompson, 143 Wn. App. 861, 870, 181 P.3d 858 (2008). If the reviewing court does address the claim, it reviews claimed errors of law in the jury instructions de novo. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

[A] person is “armed” for the purpose of a deadly weapon enhancement if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.

Id. at 371, citing to State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). There must be a nexus between the defendant, the crime, and the weapon. State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). The presence of a deadly weapon at the

scene, its proximity to the defendant, or constructive possession alone are insufficient to prove the defendant was armed. Id.

Where the defendant had actual possession of the weapon during the commission of the crime, as happened here, the State will rarely be required to prove a nexus. State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366 (2006). The language in Instruction No. 21, CP 104, comes directly from WPIC 2.07. That pattern instruction includes a second paragraph explaining the nexus requirement; the notes following the instruction direct that this second paragraph not be used when the weapon was actually used and displayed at the time the crime was committed. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.07 (3d ed. 2008). *See also* State v. Hernandez, 172 Wn. App. 537, 544, 290 P.3d 1052 (2012), *review denied*, 177 Wn.2d 1022, 303 P.3d 1064 (2013) (“... the ‘nexus’ requirement is not applicable to firearm enhancements when there is actual, not constructive, possession of a firearm.”). There was no nexus requirement in Davis’s case.

The nexus between the defendant, the weapon, and the crime is “definitional,” not an element of the crime. State v. Johnson, 185 Wn. App. 655, 676, 342 P.3d 338, *review denied*,

184 Wn.2d 1012, 360 P.3d 817 (2015). It is “merely a component of what the State must prove to establish that a particular defendant was armed while committing a particular crime.” *Id.* at 677, *quoting Easterlin*, 159 Wn.2d at 206. Where the defendant does not ask for a nexus instruction, the failure to use that word does not “render the generally used enhancement instructions per se inadequate.” *Eckenrode*, 159 Wn.2d at 493. “Express ‘nexus’ language is not required.” *Willis*, 153 Wn.2d at 374.

The special verdict form need not include express nexus language, either, so long as the instructions, “taken as a whole, can be read to require such a relationship.” *In re Pers. Restraint of Reed*, 137 Wn. App. 401, 409-10, 153 P.3d 890 (2007).

A reviewing court examines the record to determine whether there was sufficient evidence to support the special verdict, even in the absence of any “nexus” language. *Eckenrode*, 159 Wn.2d at 494. “As long as any rational trier of fact could have found that [the defendant] was armed, viewing the evidence in the light most favorable to the State, sufficient evidence exists.” *Id.* “So long as the facts and circumstances support an inference of a connection

between the weapon, the crime, and the defendant, sufficient evidence exists.” Easterlin, 159 Wn.2d at 210.

Here the jury was instructed that it must find that Davis was armed with a deadly weapon. CP 104. The evidence, summarized above, was that Davis broke out the driver’s side window of the victim’s car. It is a reasonable inference that it would take something heavy and hard to do that. There was a rock on the passenger floorboards that was not there before the window was broken. Davis entered the car and grabbed at Lee. There was sufficient evidence that the jury could find a nexus between the rock, the assault, and Davis.

Even if the jury instruction in this case had been erroneous, it would be harmless error. An instruction which misstates the law or omits an element of the offense is subject to a harmless error analysis. State v. Howard, 127 Wn. App. 862, 878, 113 P.3d 511 (2005), *review denied*, 156 Wn.2d 1014, 132 P.3d 147 (2006). Where there is overwhelming evidence that a nexus existed between the weapon, the defendant, and the crime, any instructional error is harmless. Id.

Davis argues that Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), requires the court to “instruct the jury on the State’s burden to prove the elements required for the jury to return a ‘yes’ verdict to the enhancements.” Appellant’s Opening Brief at 9. But the Blakely opinion, which was issued before Willis, Howard, Thompson, Eckenrode, and Easterlin, only says that the jury must find all the facts that support the sentence enhancement. Blakely 542 U.S. at 303-04.

In Davis’s case the jury instruction informed the jury that it must find he was armed when he committed the crime. The evidence more than sufficiently proved that he was. Even if there was error, which the State does not concede, it was harmless.

3. The Washington Supreme Court has directed trial courts to give the reasonable doubt instruction given to the jury in Davis’s trial. It does not infringe on his right to a fair trial.

The jury in this case was instructed regarding reasonable doubt as follows:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction No. 4, final paragraph; CP 87. This instruction is taken verbatim from WPIC 4.01. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (3d ed. 2008).

Davis argues for the first time on appeal that “an abiding belief in the truth of the charge” directs the jury to determine what the truth is, equating proof beyond a reasonable doubt with “the truth.” Appellant’s Opening Brief at 13-14.

In general, appellate courts will not consider issues raised for the first time on appeal. It may be so raised if it is a “manifest error affecting a constitutional right.” RAP 2.5(a). Constitutional errors are treated differently because they can and often do result in injustice to the accused and may affect the integrity of our system of justice. “On the other hand, ‘permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials, and is wasteful of the limited resources of prosecutors, public defenders and courts.’” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (cite omitted, emphasis in original).

WPIC 4.01 has a status that is unusual and possibly unique. Ordinarily, trial courts have discretion to decide how instructions are worded. State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). WPIC 4.01, however, must be used without change. The Supreme Court has warned against any attempts to improve this instruction:

We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction.

State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). Davis argues that the Bennett court did not analyze the flaws in WPIC 4.01, but rather disapproved a different instruction. But that court instructed trial courts to use WPIC 4.01 “until a better instruction is approved.” Id. at 318. No better instruction has been approved, nor has Davis proposed one. To change that instruction would require overruling Bennett. This court is required to follow controlling precedent from the Supreme Court. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006). Only the Supreme Court can overrule Bennett.

As Davis observes, the Court of Appeals has already rejected his claim in State v. Federov, 181 Wn. App. 187, 199-200,

324 P.3d 784, *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014), and State v. Kinzle, 181 Wn. App. 774, 784, 326 P.3d 870, *review denied*, 818 Wn.2d 1019, 337 P.3d 325 (2014). As both of those cases held, an “abiding belief in the truth of the charge” is another way of saying “satisfied beyond a reasonable doubt.”

Davis is correct that the job of the jury is not to determine the truth of what happened, but rather to determine whether the State proved the charges beyond a reasonable doubt. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). It is a stretch, however, to equate “an abiding belief in the truth of the charge” with a determination of the objective truth of the matter. Obviously, truth does have some place in a courtroom. Otherwise there would be no point in placing witnesses under oath or instructing the jury that it is the sole judge of the credibility of the witnesses. Instruction No. 1, CP 83-84. Davis asks this court to reject Federov and Kinzle, in part because they affirmed the use of WPIC 4.01 “without analysis.” Appellant’s Opening Brief at 14. But sometimes there is not much to analyze, and this is one of those times. Bennett requires that trial courts give WPIC 4.01 and the claim that the language of the instruction tells the jury that it must find the truth is without merit.

4. Appellate costs may well be appropriate if the State substantially prevails on appeal.

In his Supplemental Brief, Davis argues that this court should not impose appellate costs in the event the State substantially prevails on appeal.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976², 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, 87 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 State v. Blank, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997), the Supreme Court held this statute constitutional, affirming the Court of Appeals’

² Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

holding in State v. Blank, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), noted that in State v. Keeney, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that “costs” did not include statutory attorney fees. Keeney, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in State v. Edgley, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. Nolan, 141 Wn.2d at 624-625, 628.

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, 389-90, ___ P.3d

___ (2016), prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. See Blank, 131 Wn.2d at 242; State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing State v. Baldwin, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. Baldwin, 63 Wn. App. at 311; see also State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. Id. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." Blank, 131 Wn.2d at 241-242. See also State v. Wright, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. See State v. Lundy, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty

in general terms in seeking remission or modification of LFOs. See State v. Woodward, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. See Blank at 236-237, quoting Fuller v. Oregon, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); Woodward, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. 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). The Court wrote that:

The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. Id., at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. Id., at 838-839.

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.

The 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. Under the defendant’s argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

Even though Davis has been found indigent in the trial court, that is not a finding of indigency in the constitutional sense.

Constitutional indigence is more than poverty. State v. Johnson, 179 Wn.2d 534, 553-54, 315 P.3d 1090, *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014). Only the constitutionally indigent are protected from the requirement to pay. Id. at 555. Indigency, moreover, is a “relative term” that “must be considered and measured in each case by reference to the need or service to be furnished.” State v. Rutherford, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964); Johnson, 179 Wn.2d at 555.

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, as Sinclair points out at 389, the Legislature did not include such a 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).

Certainly, in fairness, appellate courts should also take into account the defendant’s financial circumstances before exercising its discretion. It is to be hoped, pursuant to Blazina, that trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may

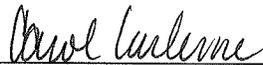
base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

In this case, the State has yet to “substantially prevail.” It has not submitted a cost bill. Davis offers no evidence of his future ability to pay other than that he was found indigent in the trial court and “this status is unlikely to change.” Appellant’s Supplemental Brief at 4. This Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Davis’s conviction.

Respectfully submitted this 20th day of April, 2016.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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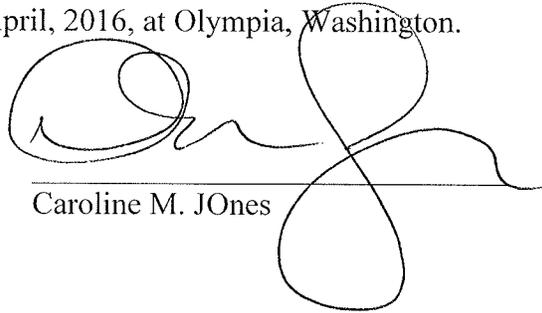
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 20 day of April, 2016, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTOR

April 20, 2016 - 2:15 PM

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