

No. 48201-1-II

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

**STATE OF WASHINGTON,**

Respondent,

v.

**NORMAL RAY GOODRUM,**

Appellant.

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

**I. ANSWERS TO ASSIGNMENT OF ERROR ..... 3**

**II. STATEMENT OF THE CASE..... 3**

**III. ARGUMENT..... 3**

**A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE  
CONVICTION FOR BURGLARY ..... 3**

**B. THERE WAS NO PROSECUTORIAL MISCONDUCT IN THIS  
CASE ..... 5**

**C. THE COURT IMPOSED ONLY MANDATORY COSTS, NO  
RESENTENCING IS REQUIRED..... 13**

**D. NO APPELLATE COSTS HAVE BEEN REQUESTED OR  
IMPOSED, SO THE ISSUE IS NOT RIPE FOR REVIEW ..... 14**

**IV. CONCLUSION.....15**

## TABLE OF AUTHORITIES

### Cases

<i>In re Pers. Res. Of Glasmann</i> , 175 Wn.2d 696, 704 (2012) .....	8, 9
<i>Jones v. Hogan</i> , 56 Wn.2d 23, 351 P.2d 153 (1960) .....	7
<i>State v. Allen</i> , 127 Wn. App. 125, 110 P.3d 849 (2005) .....	4
<i>State v. Bebb</i> , 44 Wn.App. 803, 723 P.2d 512 (1986) .....	7
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997) .....	14
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015) .....	14
<i>State v. Borboa</i> , 157 Wn.2d 108, 135 P.3d 469, 476 (2006) .....	10
<i>State v. Brett</i> , 126 Wash.2d 136, 892 P.2d 29 (1995) .....	6
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997) .....	9
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997) .....	6, 10
<i>State v. Contreras</i> , 57 Wn.App. 471, 788 P.2d 1114 (1990) .....	9
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984) .....	9
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.2d 432 (2003) .....	9
<i>State v. Duncan</i> , 185 Wn.2d 430, 374 P.3d 83 (2016) .....	13
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012) .....	8
<i>State v. Fiallo-Lopez</i> , 78 Wn.App. 717, 899 P.2d 1294 (1995) .....	10
<i>State v. Fleming</i> , 83 Wn.App. 209, 921 P.2d 1076 (1996) .....	11
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995) .....	4, 6
<i>State v. Green</i> , 95 Wn.2d 216, 616 P.2d 628 (1980) .....	3
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991) .....	7
<i>State v. Killingsworth</i> , 166 Wn.App. 283, 269 P.3d 1064 (2012) .....	12
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007) .....	9
<i>State v. LaPorte</i> , 58 Wn.2d 816, 365 P.2d 24 (1961) .....	9
<i>State v. Luvene</i> , 127 Wash.2d 690, 903 P.2d 960 (1995) .....	6
<i>State v. Mak</i> , 105 Wash.2d 692, 718 P.2d 407 (1986) .....	6
<i>State v. Mathers</i> , 193 Wn.App. 913, 376 P.3d 1161 (2016) .....	13
<i>State v. Pavelich</i> , 150 Wash. 411, 273 P. 182 (1928) .....	10
<i>State v. Phillips</i> , 65 Wn.App. 239, 828 P.2d 42 (1992) .....	14
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997) .....	3
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994) .....	7, 9
<i>State v. Sells</i> , 166 Wn. App. 918, 271 P.3d 952 (2012) .....	12
<i>State v. Sinclair</i> , 192 Wn.App. 380, 367 P.3d 612 (2016) .....	15
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997) .....	6
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990) .....	8
<i>State v. York</i> , 50 Wn.App. 446, 749 P.2d 683 (1987) .....	7
<i>United States v. Hiatt</i> , 581 F.2d 1199, 1204 (5th Cir. 1978) .....	5

### Statutes

RAP 14 .....	14
RCW 10.73.160 .....	14

## **I. ANSWERS TO ASSIGNMENT OF ERROR**

1. There was sufficient evidence that the Appellant unlawfully entered or remained in the hotel lobby.
2. There was no prosecutorial misconduct.
3. Because there was no prosecutorial misconduct, Appellant was not denied effective assistance of counsel.
4. The trial court struck all non-mandatory fees and costs.
5. Through 7. Because appellate costs have not yet been imposed, nor have they been sought by the State, there is no issue or error to review.

## **II. STATEMENT OF THE CASE**

The Respondent generally accepts the Appellant's recitation of the facts. Specific additions will be made where appropriate in the context of argument.

## **III. ARGUMENT**

### **A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR BURGLARY**

There was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Appellant had remained unlawfully in the Travelodge on March 6<sup>th</sup>, 2015. The standard of review for a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997), *citing State v. Green*, 95 Wn.2d 216, 221, 616 P.2d 628

(1980). When the Appellant challenges the sufficiency of the evidence, they admit “the truth of the State’s evidence and all inferences that can reasonably be drawn from that evidence.” *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). This is an intentionally generous standard, emphasizing that deference that should be shown to a jury verdict. There was sufficient evidence presented that a rational trier of fact could have found Goodrum remained unlawfully.

*State v. Allen* is almost exactly on point. In that case, there were three allegations of burglary and “all three buildings were open to the public and Allen was...privileged to enter.” *State v. Allen*, 127 Wn. App. 125, 137–38, 110 P.3d 849, 855–56 (2005). The trick was that in each situation, the defendant had “exceeded that privilege and unlawfully remained.” *Id.* The court noted how in each of the three instances, there were either signs, physical barriers, or other indications that the areas were not open to the public. *Id.* This was considered sufficient evidence to support the burglary counts. *Id.* The court also noted that there was no issue with unanimity because there was no evidence of unlawful entry and the unlawfulness of the entry was not otherwise disputed. *Id.* at 135-136.

Similarly, in this case, security videos, entered as Trial Exhibit 1 and Trial Exhibit 2, clearly illustrated the physical layout of the lobby and that Goodrum walked around the reception desk to the area

obviously reserved for the clerk and tore open the cash drawer. There was no evidence and no argument that the entry was “unlawful,” but it was clear that Goodrum exceeded the scope of his implied privilege in tearing out the cash drawer. This situation is exactly what *Allen* considered when it discussed the “unlawful remaining concept,” noting that it was “intended primarily for situations in which the initial entry to a building [was] lawful, but the defendant either exceed[ed] the scope of the license or privilege to enter, or the license [was] impliedly or expressly terminated.” *Id.* at 133. As discussed in *Allen*, there was sufficient evidence here that a rational trier of fact could have found beyond a reasonable doubt that Goodrum had unlawfully remained behind the reception desk at the Travelodge and the jury’s verdict should be affirmed.

**B. THERE WAS NO PROSECUTORIAL MISCONDUCT IN THIS CASE**

Goodrum waived his claim of prosecutor misconduct when he did not object to the prosecutor’s rebuttal of his attorney’s closing argument. “[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 p.2d 747 (1994) (citing *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir. 1978)). Although Goodrum did not object to the prosecutor’s rebuttal argument, he now raises a claim of prosecutor misconduct for the first time on appeal. Because the

prosecutor's remarks were not improper, much less so flagrant and ill-intentioned that they resulted in enduring prejudice that could not have been cured by an admonition to the jury, Goodrum's claim of misconduct fails.

"A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *Id.* at 718 (citing *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvane*, 127 Wash.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper "prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *Stenson*, 125 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial

misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a heightened standard of review applies: “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn.App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not “remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal.” *State v. Bebb*, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) (“If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.”).

“Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect.” *Russell*, 125 Wn.2d at 85. If a defendant—who did not object at trial—can establish that

misconduct occurred, then he or she must also show that “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). Under this heightened standard, “[r]eviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (“Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.”). Importantly, “[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

Of course, “[i]n closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence.” *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.3d 1105 (1995). When a prosecutor does no more than argue facts in evidence or suggest reasonable inferences from the evidence there is no misconduct. *See State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d

1306 (1985). Any allegedly improper statements by the State in closing argument “should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

Further, a prosecutor’s remarks in rebuttal, even if they would otherwise be improper, are not misconduct if they were “invited, provoked, or occasioned” by defense counsel’s closing argument, so long as the remarks do not go beyond a fair reply and are not unfairly prejudicial. *State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (quoting *State v. LaPorte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)). “When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant’s theory of the case is subject to the same searching examination as the State’s evidence.” *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). Although a prosecutor may not shift the burden of proof to the defendant, *see, e.g., In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012), a prosecutor’s “remarks even if they are improper, are not grounds for reversal if they were

invited or provoked by defense counsel and are in reply to his or her acts and statements. . . .” *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995) (citing *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994)). Arguing that facts indicate a witness is truthful is not misconduct. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 730, 899 P.2d 1294 (1995). Even strong “editorial comments” by a prosecutor are not improper if they are in response to arguments made by the defendant. *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997).

Here, Goodrum argues that the State committed misconduct basically along two lines. First, that the State shifted the burden to Goodrum by indicating that there “[was] no other explanation” and that there was “no evidence for any other suspects for the robbery.” 3RP127, 130. Second, that the State argued facts not in evidence, when it referred to a gun case. 3RP 140. Under any standard, neither of these instances arise to the level of prosecutorial misconduct.

In terms of the “no evidence” argument, there was no misconduct. “A prosecuting attorney may comment on a lack of defense evidence so long as the prosecuting attorney does not directly refer to the defendant's decision not to testify” *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469, 476 (2006), citing *State v. Pavelich*, 150 Wash. 411, 420, 273 P. 182 (1928). There is nothing in the record to suggest the State made any comment on Goodrum’s right to remain silent, or suggested that he somehow failed produce evidence. This is

the crucial link between Goodrum's argument, which relies on a misunderstanding of *Fleming*, and actual misconduct. Because he cannot show this link, he cannot show misconduct.

In making his argument, Goodrum wrote that *Fleming* said "a prosecutor commits misconduct in arguing that the jury should find the defendant guilty because there was no evidence showing he was not." App. Opening Brief, 21. This is absolutely not what *Fleming* indicated, because the conduct at issue in *Fleming* involved the prosecutor actually shifting the burden, as opposed to arguing the lack of evidence. Specifically, in *Fleming*, the court wrote that the prosecutor argued "the jury...could only acquit if it found that the complaining witness lied or was confused," then argued that there was no evidence the witness was lying or confused, and finished, in the court's words, by arguing that "if there had been any such evidence, the defendants would have presented it." *State v. Fleming*, 83 Wn.App. 209, 214, 921 P.2d 1076 (1996). The prosecutor went on to argue that "you...would expect and hope that if the defendants are suggesting there is reasonable doubt, they would explain some fundamental evidence in this [matter]." *Id.* The prosecutor then listed a number of specific pieces of evidence and noted that "the defendants had not explained" them and they're failure to explain them meant they were guilty. *Id.* at 214-215. This was the specific conduct the *Fleming* court addressed and it goes FAR beyond the alleged

misconduct in this case. There is no indication the prosecutor in this case engaged in any attempt to shift the burden of proof to Goodrum, which is a necessary step to show misconduct.

Moreover, the comments were made in the context of attacking the defense theory of the case, as raised by Goodrum's attorney in closing argument. 3RP 119-120. A prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case. *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952, 958 (2012); *citing State v. Killingsworth*, 166 Wn.App. 283, 291-292, 269 P.3d 1064 (2012). As noted, this court must consider any statements made by the State in the overall context of the argument. Because there is nothing in the record to show the State shifted the burden, or argued that Goodrum failed to produce any evidence, Goodrum's claim of misconduct relating to burden shifting should be denied.

Regarding the alleged use of facts not in evidence, it was simply not prosecutorial misconduct. It is clear from the record that the prosecutor's statement regarding the gun case was a simple mistake and could have easily been clarified by a timely objection. The prosecutor was obviously referring to the gun cleaning kit that had been previously admitted as Exhibit 17A and which was specifically referenced by the prosecutor in his initial closing. 3RP 130. There is no other mention of a gun case, but there is substantial testimony and argument about the fact that a gun cleaning kit had been found at

Goodrum's residence, which tended to support Excel's statement that Goodrum had a gun during the robbery. 2RP166-67, 3RP 130. Nor was there any likelihood that the prosecutor's mistaken mention of the gun case yielded any prejudice, since an eyewitness testified to the presence of the gun, there was a video that showed Goodrum holding something akin to a gun, and there was a gun cleaning kit found at his apartment.

Ultimately, the State committed no misconduct in this case. Because there was no actual misconduct, defense counsel could not have been ineffective for failing to object. Even if defense counsel should have objected, there is no showing of prejudice from that failure to object. The jury's verdict should be affirmed.

**C. THE COURT IMPOSED ONLY MANDATORY COSTS, NO RESENTENCING IS REQUIRED**

The court imposed only two "costs" on Goodrum, the Victim's Penalty Assessment ("VPA") and restitution. Neither of these costs is discretionary and thus they do not fall under the purview of *Blazina*. *State v. Duncan*, 185 Wn.2d 430, 442 fn 3, 374 P.3d 83 (2016). As noted in *State v. Mathers*, it is not error to fail to conduct an individualized inquiry into an individual's ability to pay the Victim Penalty Assessment ("VPA"). 193 Wn.App. 913, 929 fn.1, 376 P.3d 1161 (2016). The trial court properly imposed the VPA because it is a mandatory cost that was not affected by *State v. Blazina*. *Id.* at 928. The trial court also properly imposed restitution, because, as

recognized in *Duncan*, it is one of the fees considered mandatory by the legislature. 185 Wn.2d at 442 fn 3. Goodrum's request for resentencing and an individualized inquiry into his ability to pay should be denied, because he was subject to no discretionary fees.

**D. NO APPELLATE COSTS HAVE BEEN REQUESTED OR IMPOSED, SO THE ISSUE IS NOT RIPE FOR REVIEW**

Because the State has not attempted to recoup appellate costs in this case, the appellate cost issue raised in Goodrum's brief is not ripe for review at this time. "[A]ny constitutional issues that might be raised with regard to penalties imposed are not presently ripe for review. It is only when the State attempts to collect ... payment ordered by the trial court that such issues may arise." *State v. Phillips*, 65 Wn.App. 239, 244, 828 P.2d 42 (1992). RCW 10.73.160 permits the court to require a person convicted of a crime to bear the responsibility of paying his or her appellate costs. Prior to an award of appellate costs being ordered, two things must occur. First, because the statutory provision authorizing recoupment of appellate costs requires a conviction, a conviction must first be affirmed. See RCW 10.73.160(1). Second, the State must request the award of appellate costs according to the rules of appellate procedure. See RCW 10.73.160(3); RAP 14.

It is well-settled that the relevant time to address the issue of payment of costs is at "the point of collection and when sanctions are sought for nonpayment." *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d

1213 (1997). In *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), the Supreme Court ruled that the trial court erred by imposing legal financial obligations without conducting an inquiry into the defendant's ability to pay. Subsequently, Division One of the Court of Appeals refused to award appellate costs that were sought by the State when the record caused the court to conclude the indigent appellant's financial condition was not likely to improve. *State v. Sinclair*, 192 Wn.App. 380, 393, 367 P.3d 612 (2016).

Here, unlike *Sinclair*, the State has not sought appellate costs. There is no need to conduct an inquiry into Goodrum's ability to pay unless the State attempts to recoup appellate costs. Should the State later seek an order for recoupment of appellate costs, then Goodrum would be permitted to oppose them at that time. However, until such time as the award of these costs is sought, his argument regarding appellate costs should not be considered.

#### **IV. CONCLUSION**

This court should affirm the verdict of the jury, which was based on sufficient evidence for all essential elements of the crime of Burglary in the Second Degree. There was ample evidence that Goodrum exceeded the scope of the implied privilege the hotel lobby extended to him, including a security video showing him going behind the desk clerk's desk and tearing out the case drawer. This was

sufficient evidence under *Allen* to show he unlawfully remained in the building. This court should not disturb the lawful verdict of the jury.

There was no prosecutorial misconduct and the verdict should not be disturbed. The State never actually engaged in anything approaching the sort of misconduct contemplated by appellate courts when considering arguments related to shifting the burden of proof or with commenting on the right of the accused to remain silent. The prosecutor's arguments were lawful and within the bounds of established caselaw. Nor did the prosecutor's apparent mistake in referring to the admitted gun cleaning kit as a gun case rise to the level of misconduct. Even if it did, it was brief, isolated, and could have easily been cured by a cautionary instruction by the court. Finally, if it rose to the level of misconduct, there was certainly no prejudice as there was already a substantial amount of other evidence of the gun, including 1) eyewitness testimony, 2) a security video, and 3) the aforementioned gun cleaning kit.

Because the prosecutor's statements did not rise to the level of misconduct, Goodrum's argument should be rejected. Even if considered misconduct, waiver applies. And if the court considers the question of ineffective assistance of counsel, there was no prejudice to the alleged remarks. The verdict of the jury should not be disturbed.

Goodrum is not entitled to relief per *Blazina*, because all non-mandatory costs were waived. Only the VPA and restitution were

imposed and both are considered mandatory by the legislature and fall outside the bounds of *Blazina*. This court should not remand the case for resentencing as to costs

Finally, there is no need to consider Goodrum's ability to pay at this time because no costs of have been requested by the State, nor have they been ordered by the court. The issue is not ripe.

This court should affirm the verdict of the jury and the decisions of the lower court on the various issues raised by the appellant.

Respectfully submitted this 10<sup>th</sup> day of October, 2016 .

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## APPENDIX

## **RCW 10.73.160**

### **Court fees and costs.**

(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 10.73.160.

(5) The parents or another person legally obligated to support a juvenile offender who has been ordered to pay appellate costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the 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 parents or another person legally obligated to support a juvenile offender or on their immediate families, the sentencing court may remit all or part of the amount due in costs, or may modify the method of payment.

## RULE 14.1

### COSTS GENERALLY

(a) **When Allowed.** The appellate court determines costs in all cases after the filing of a decision terminating review, except as provided in rule 18.2 relating to voluntary withdrawal of review.

(b) **Which Court Determines and Awards Costs.** Costs on review are determined and awarded by the appellate court which accepts review and makes the final determination of the case.

(c) **Who Determines and Awards Costs.** If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination. In all other circumstances, a commissioner or clerk determines and awards costs by ruling as provided in rule 14.6(a). A party may object to the ruling of a commissioner or clerk as provided in rule 14.6(b).

(d) **Who Is Entitled to Costs.** Rule 14.2 defines who is entitled to costs.

(e) **What Expenses Are Allowed as Costs.** Rule 14.3 defines the expenses which may be allowed as costs.

(f) **How Costs Are Claimed--Objections.** A party claims costs by filing a cost bill in the manner provided in rule 14.4. A party objects to claimed costs in the manner provided in rule 14.5.

# COWLITZ COUNTY PROSECUTOR

**October 12, 2016 - 9:33 AM**

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