

No. 48471-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**XAVIER CERVANTES,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Did the State present insufficient evidence to sustain Cervantes' conviction for Possession of a Stolen Motor Vehicle?
- B. Did Cervantes receive effective assistance from his trial counsel throughout the proceedings?
- C. Should this Court impose appellate costs should the State prevail?
- D. Did the trial court abuse its discretion when it imposed discretionary legal financial obligations on Cervantes?

## II. STATEMENT OF THE CASE

On October 10, 2015, AS, who was 17 years old, called the police to report that her car had been taken from her driveway and she suspected her uncle, Cervantes had taken it.<sup>1</sup> RP 72-73. AS last saw the car before she went to sleep and was alerted by her grandfather that the car was missing. RP 73. AS lived with her mother, sister, grandparents, and Cervantes off Jackson Highway in the Toledo/Winlock area in Lewis County, Washington. RP 30, 73.

The car was a 1997, red, four door Honda. RP 31, 96. AS was not the registered owner of the vehicle, her mother, Veronica was the registered owner. RP 76, 97. AS was the one in the

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<sup>1</sup> The State will refer to Cervantes' niece as AS, as she was a minor at the time she testified. The State will also refer to AS's mother, Cervantes' sister, by her first name only, Veronica to protect AS's identity. The State means no disrespect.

household who usually drove the car, or her grandmother would drive the car. RP 74, 84, 97. Cervantes was only to drive the car to work, and only after obtaining permission from someone else in the household to take the car. RP 97, 104. Cervantes had taken the car several times previously without permission. RP 74, 77, 86, 97. Cervantes did not obtain permission to take the car from October 9, 2015 to October 11, 2015. RP 74-75, 86, 104.

Lewis County Sheriff's Deputy Spahn was dispatched to respond to AS's stolen vehicle complaint on October 10, 2015. RP 30. Deputy Spahn spoke to AS by telephone, obtained the information, and had the vehicle entered into the state and national crime databases as being stolen. RP 30-32.

On October 11, 2015 Chehalis Police Officer Thornburg was patrolling Stan Hedwall Park in Chehalis around 10:00 a.m. and saw a red Honda. RP 60-61. There had been a number of reports of stolen vehicles lately, so Officer Thornburg ran the plates of the Honda to see if it came back as stolen. RP 61. The Honda returned as stolen. RP 62.

Officer Thornburg did not initially see anyone inside the car. RP 64. As Officer Thornburg was backing up the reclined driver's seat came up and the head of Cervantes came into view. RP 64.

Officer Thornburg arrested Cervantes and read Cervantes his *Miranda*<sup>2</sup> rights. RP 64-65. Cervantes agreed to speak to Officer Thornburg. RP 65. By this time, Deputy Spahn had arrived on the scene. RP 32-33, 65-66.

Cervantes said he took the car from his sister because his girlfriend needed some transportation. RP 65, 66-67. Cervantes admitted he did not have permission to use the car. RP 35. Deputy Spahn asked Cervantes if he had a key to the car, Cervantes responded, no. RP 35. Cervantes explained that he started the car with a screwdriver. RP 35.

Deputy Spahn looked over the car. RP 36. Deputy Spahn could see that the steering column of the vehicle had been broken open, the ignition had been punched, or removed. RP 36. All of which are common traits of somebody stealing a vehicle. RP 36. There were a couple of screwdrivers, a pair of pliers, and the parts of the ignition were laying on the passenger floorboard of the Honda. RP 36. There also appeared to be fresh damage to the ignition. RP 36.

AS said they normally used a key to start the car. RP 74. When AS got the car back, the ignition had been ripped out. RP 75-

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

76. Cervantes acknowledged he did not have keys to the car and had taken the ignition out and used a screwdriver to start it. RP 99.

The State charged Cervantes with Possession of a Stolen Motor Vehicle. CP 1-2. Cervantes elected to try his case to a jury. See RP. Cervantes testified on his own behalf. RP 95-117. Cervantes explained that while he had taken the car before without permission, he always brings the car back in a reasonable time, in a matter of a few hours. RP 97. Cervantes acknowledged he did not have permission to take the car on October 10, 2015. RP 104.

Cervantes explained Veronica was working and AS was asleep when his girlfriend called asking for help. RP 97-98. Cervantes believed he would only have the car for a couple hours and took the car to Centralia to assist his girlfriend. RP 98. It took longer to help his girlfriend than planned. RP 98. Cervantes said he experienced the car shaking, so he pulled off at the park and checked the car out. RP 101. Cervantes said he decided to relax and chill at the park rather than drive the 10 minutes to the house to return the car. RP 101, 106-07. Cervantes explained he was not ready to take the car back. RP 107.

The jury convicted Cervantes as charged. CP 25. Cervantes was sentenced to 43 months in prison. RP 34-35. The trial court

imposed legal financial obligations. CP 36-37. Cervantes timely appeals his conviction. CP 43.

The State will supplement the facts as necessary throughout its argument below.

### III. ARGUMENT

#### A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT CERVANTES COMMITTED THE CRIME, POSSESSION OF A STOLEN MOTOR VEHICLE.

Cervantes argues the State did not present sufficient evidence to sustain the jury's verdict of guilty for his conviction for Possession of a Stolen Motor Vehicle. Brief of Appellant 7-9. The State presented sufficient evidence to sustain the jury's guilty verdict for Possession of a Stolen Motor Vehicle.

##### 1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

**2. The State Is Required To Prove Each Element Beyond A Reasonable Doubt And The State Did Such, Therefore, Presenting Sufficient Evidence To Sustain The Jury's Verdict For Possession Of A Stolen Motor Vehicle.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102

(1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Cervantes of Possession of a Stolen Motor Vehicle, the State was required to prove, beyond a reasonable doubt, that Cervantes, on or about October 10, 2015 through October 11, 2015, did possess a stolen motor vehicle, knowing the vehicle was stolen, and did appropriate or withhold the property to the use of a person other than the person entitled thereto or the true owner. RCW 9A.56.010(17); RCW 9A.56.020(1)(c); RCW 9A.56.068; CP 1.

The to-convict instruction stated:

To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about or between October 10, 2015 and October 11, 2015, the defendant knowingly received, retained, possessed, or concealed a stolen motor vehicle;
- (2) That the defendant acted with knowledge that the motor vehicle had been stolen;

(3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;

4) That any of these acts occurred in the State of Washington, County of Lewis.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 16, *citing* WPIC 77.21.

Cervantes argues that the State failed to present evidence to prove Cervantes received or disposed of a motor vehicle he knew to be stolen. Brief of Appellant 8. Cervantes also asserts the State presented insufficient evidence that Cervantes retained, possessed or concealed the car, knowing the car was stolen. Brief of Appellant 8-9. Further, Cervantes argues the State did not prove he withheld or appropriated the car. Brief of Appellant 9.

For a vehicle to be stolen it must be obtained by theft, robbery, or extortion. RCW 9A.56.010(17); RCW 9A.56.068. In this case, the State relied upon the “obtained by theft” definition of stolen. CP 18, *citing* WPIC 79.08; RCW 9A.56.010. Theft, in this case, “means to wrongfully obtain or exert unauthorized control

over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.” CP 17, *citing* WPIC 79.11; RCW 9A.56.020. There is no requirement that the intent to deprive be an intent to **permanently** deprive a person of the property or services. *State v. Komok*, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989) (emphasis added).

Cervantes downplays the events, stating he simply borrowed a family vehicle without asking first, because there was no one for whom he could ask, he had to help his girlfriend with an emergency, and he was en route to return the car when contacted by the police. Brief of Appellant 9. Contrary to Cervantes’ assertion in his briefing, Veronica did not testify that she did not consider the car stolen, she testified that she expected the car would be returned. RP 94.<sup>3</sup>

The testimony, even from Cervantes, was that Cervantes was not allowed to drive the car unless he was explicitly given permission to do so. RP 74-77, 86, 97, 104. Cervantes testified that he was only allowed to borrow the car to go to work and he had not been working lately, so he had not been allowed to drive the car.

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<sup>3</sup> The question and answer regarding whether Veronica considered Cervantes’ act of taking the car previously as stealing the car was objected to, sustained and stricken from the record. RP 87-88.

RP 97. AS, Veronica, and Cervantes testified that Cervantes did not have permission to take the car on October 10, 2015 or October 11, 2015. RP 74-75, 84, 86, 104. Cervantes had the car for over 24 hours, as it was reported stolen by AS around 1:00 p.m. on October 10, 2015, and Cervantes was located with the car at around 10:00 a.m. on October 11, 2015. RP 30-31, 61-65.

Cervantes stated he received a phone call the morning of October 10, 2015 and his girlfriend needed help, Veronica was at work, and AS was asleep, so he just took the car without asking. RP 97-98. Cervantes also stated it took longer to help his girlfriend, and he did not head back to return the car until October 11, 2015. RP 98-99. Cervantes did not have keys to the car. RP 99. Cervantes had to rip out the ignition and start the car with a screwdriver. RP 75-76, 99.

Cervantes, by his own admission, did not return straight home, but stopped 10 minutes from his home at Stan Hedwall Park in Chehalis. RP 33-34, 61-64, 101, 106-07. Cervantes did not park at the front of the park, but instead chose to drive all the way down to the back away from the major roadways. RP 115. Cervantes said he was not ready to go back home. RP 107. He was "just chilling, relaxing." RP 101.

Veronica, AS, and Cervantes testified that Cervantes exerted unauthorized control over the car, which there is no dispute the car was not Cervantes' property. Cervantes was required to obtain permission to drive the car, was only allowed to drive it to go to work, the last time he obtained such permission had been approximately two months prior, and all parties agree he did not get the required permission when he took the car on October 10, 2015. The car was taken for over 24 hours, which deprived AS, her grandmother, and Veronica, of the use of the car. While the car may technically belong to Veronica, as she is the registered owner, the testimony was that AS was the primary driver of the car along with AS' grandmother. RP 74, 84, 97. Therefore, the Honda was taken with the intent to deprive the owner, or primary users of the vehicle, of the property.

Cervantes wants this Court to discount that the vehicle was stolen because the registered and/or legal owner is not the person who reported the vehicle as stolen. That is not a requirement of Possession of a Stolen Vehicle. The vehicle was stolen, it was taken without authorization, and Cervantes knew the vehicle was taken without authorization, which constitutes theft. This act occurred on or about or between October 10, 2015 and October 15,

2015. Cervantes withheld and used the car with intent to deprive the true owner, his sister, or the person entitled to use the property, and AS and her grandmother, the use of the car. These acts all occurred in Lewis County in the State of Washington.

In the light most favorable to the State, with all reasonable inferences drawn in the State's favor, the required elements of Possession of a Stolen Vehicle have been proven beyond a reasonable doubt.

**B. CERVANTES RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.**

Cervantes' attorney provided competent and effective legal counsel throughout the course of his representation. Cervantes asserts his trial counsel was ineffective for failing to move to suppress his illegal arrest. Brief of Appellant 10-17. Cervantes' attorney is not required to bring a frivolous motion and was not ineffective in any of the areas of his representation of Cervantes.

**1. Standard Of Review.**

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be

considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

**2. Cervantes' Attorney Was Not Ineffective During His Representation Of Cervantes Throughout The Jury Trial.**

To prevail on an ineffective assistance of counsel claim Cervantes must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the

defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Cervantes argues his trial counsel was ineffective for failing to move to suppress Cervantes’ alleged “illegal arrest” and “the only evidence of the crime.” Brief of Appellant 9-17. Although, it is not entirely clear from Cervantes’ brief exactly which pieces of evidence he believes the trial court would have suppressed if his counsel had brought forward such a motion. *Id.*

An attorney is not required to bring forward frivolous motions, and counsel is not considered deficient for failing to file such motions. *State v. Kirwin*, 137 Wn. App. 387, 394, 153 P.3d 883 (2007). There was nothing illegal about Cervantes’ arrest, it is unclear what evidence, if any, would have been suppressed if there was an issue with the arrest, as the vehicle was not searched until the registered owner gave permission. RP 35, 83. Further, some of the “missing evidence” in regards to the exact information the officer had, why he took the steps he did, and the detailed nature of the arrest of Cervantes, were not necessarily fully developed in the

trial transcript, as it was not a suppression hearing focusing on that particular issue. This Court should find that Cervantes' attorney was effective, or in the alternative, has not shown he was prejudiced by the deficient performance.

The Washington State Constitution guarantees its citizens the right to not be disturbed in their private affairs except under the authority of the law. Const. art. I, § 7. People have a right to not have government unreasonably intrude on one's private affairs. U.S. Const. amend. IV. Article One, section seven, of the Washington State Constitution protects the privacy rights of the citizens of Washington State. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). A warrantless "seizure is considered per se unconstitutional unless it falls within one of the exceptions to the warrant requirement." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citation omitted).

The United States and Washington State constitutions permit an officer to seize someone for investigative purposes without a warrant if the officer has reasonable suspicion that the person has committed a crime. See *Terry v. Ohio*, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (federal constitution); *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (same); *State v. Brown*, 154 Wn.2d 787, 796, 117 P.3d 336 (2005) (state constitution). An officer must have some suspicion that the person he or she is detaining is connected to a particular crime and not a generalized suspicion that the person detained is up to no good. *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009) (citation omitted). An officer must be able to identify “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999), *abrogated by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (*citing Terry*, 392 U.S. at 21). When a court determines the reasonableness of the officer’s suspicion it looks at the totality of the circumstances. *Bliss*, 153 Wn. App. at 204.

When an officer bases their suspicion from an informant’s tip the State is required to show, under the totality of the

circumstances, that the tip bears some indicia of reliability. *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015). There must be “(1) circumstances establishing the informant’s reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer’s information was obtained in a reliable fashion.” *Z.U.E.*, 183 Wn.2d at 618. The corroborative observations do not have to be of blatant criminal activity but do have to be of more than just innocuous facts. *Id.*

Cervantes cites to *State v. O’Cain*, 108 Wn. App. 542, 31 P.3d 733 (2001), for the premise that the information Officer Spahn had entered the car’s information into the Washington Criminal Identification Center, listing the car as stolen, was insufficient to give probable cause to arrest the person found in possession or driving the car. Brief of Appellant 14-17. Cervantes spends at length arguing how it is for the State to prove that the information is accurate, how the database works, and none of that was done here.

*O’Cain* stands for the premise that in a case where officers have relied upon dispatch information that a vehicle has been stolen, “[i]f the resulting seizure is later challenged in court, the

State cannot simply rely on the fact that there was such a dispatch, but must prove the dispatch was based on a sufficient factual foundation to justify the stop.” *O’Cain*, 108 Wn. App. at 545. In *O’Cain*, the defendant brought such a motion and the State presented no testimony regarding the source of the information for the dispatch. *Id.* The cornerstone question is “whether police collectively had sufficient information at the time of the seizure to justify the stop.” *Id.* In *O’Cain* the defendant was stopped driving a car that was reported as stolen from a rental agency. *Id.* at 547. At the suppression hearing the State failed to provide any evidence beyond that the officer confirmed O’Cain did not have permission to have the car from the rental agency and the car was considered to be stolen. *Id.* at fn2.

In the present case, at the time of Officer Thornburg’s contact with Cervantes, the fact that the vehicle was stolen had been properly established, and the State presented that evidence by calling AS and Deputy Spahn. Deputy Spahn spoke to AS on the phone on October 10, 2015. RP 30. AS gave the vehicle information, which was for a 1997 Honda, license plate AHK1333, registered to AS’s mother, Veronica. RP 30-31. AS told Deputy Spahn that she thought her uncle, Cervantes, had stolen the car, as

he was not home. RP 44, 49. Deputy Sphan explained how the information was entered by Lewis County Dispatch into WASIC as stolen. RP 32. AS testified she called the police on October 10, 2015 to report that her car, the car that she normally drove, was stolen. RP 74-75. AS said, "I told him that my car was stolen and that I wanted to report a stolen car. And then later when I was called back, I told him that it was my uncle that I suspected took the car." RP 75. The above information was sufficient for police to justify the stop, detention, and arrest of Cervantes on October 11, 2015 when he was discovered with the reported stolen vehicle down in Stan Hedwall Park.

Cervantes appears to get stuck on the idea that a person besides a registered owner could never report a vehicle stolen. This would result in an absurd result, as many people use property that they are not the legal or registered owners of.<sup>4</sup> The fact that AS was not the legal owner of the vehicle does not invalidate her report of the vehicle being stolen. Nor does it invalidate the information the police had and relied upon when contacting Cervantes in a vehicle

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<sup>4</sup> There are numerous situations where a person who is not the legal/registered owner of a property would report it as stolen. A house sitter would report a burglary at a place they are caretaking; a person using a rental car that becomes stolen; a person borrowing their neighbor's lawn equipment and realize it is missing from their garage along with other items; any person in a family using a family car that realizes the car is now missing; a government worker whose government issued laptop gets stolen from their car, to name a few.

that was reported as stolen, one in which he was named as the person who likely stole said vehicle.

There was sufficient individualized suspicion that the person the officers were contacting was the person who had been reported as stealing the vehicle. It is obvious that the person the officers were contacting was not the legal owner of the vehicle, nor the reporting party, as both were female, and Cervantes male. There was nothing illegal about the detention, seizure, or arrest of Cervantes. Any motion would have been unfounded, frivolous and unsuccessful.

Cervantes parades a number of cases to argue it is not a legitimate trial tactic to fail to challenge the admissibility of evidence. Brief of Appellant 12-14. It is still unclear what evidence Cervantes, apart from maybe his statements, he is insisting would be suppressed. See Brief of Appellant. Is Cervantes stating that the police would not have been able to ask the registered and legal owner permission to take pictures of the inside of the vehicle, which were used at trial? See RP 35-43. Deputy Spahn was still able to see the damaged ignition from outside the vehicle prior to getting permission to search the vehicle from Veronica. RP 35-36.

While this Court, in *State v. Hamilton*, 179 Wn. App. 870, 320 P.3d 142 (2014), did hold it was deficient performance for that particular attorney to fail to move to suppress an illegal search of a purse, the facts of *Hamilton* are distinct to the facts in Cervantes' matter. As argued above, there was no illegal arrest or search, and there was no reason for defense counsel to file any such motion. Cervantes' trial counsel was effective in his representation of Cervantes throughout the trial.

Any failure for the record to further expand on what exactly the police knew at the time of the contact with Cervantes cannot be found at the fault of the State, as that was not the issue at hand during the trial. If this Court, *arguendo*, believes that Cervantes' trial counsel was deficient for failing to file the motion to suppress, Cervantes has not established prejudice. The State was not given the opportunity to more fully develop the record. *McFarland*, 127 Wn.2d at 337-38. On this record, there is no showing of prejudice. Cervantes' ineffective assistance of counsel claim fails, and this Court should affirm his conviction.

**C. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE  
IF THE COURT AFFIRMS THE JUDGMENT.**

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). As the Court pointed out in *State v. Sinclair*, the award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 192 Wn. App. 380, 385, 367 P.3d 612 (2016); *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976<sup>5</sup>, 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

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<sup>5</sup> Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

(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).

*Nolan*, 141 Wn.2d 620, 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. *Nolan* 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*, at 624-625, 628.

In *Nolan*, as in most 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 *Sinclair*, prematurely raises an issue that is not before the Court. *Sinclair*, 192 Wn. App. at 390-91. 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*, 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, 703-04, 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).

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 Division I pointed out in *State v. Sinclair*, the Legislature did not include such a provision in RCW 10.73.160. *Sinclair*, 192 Wn. App. at 389. 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. Hopefully, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. It should be the burden upon the defendant to make this record that he or she is unable to pay, as he or she holds all the cards, so to speak. The State is unable to refute much of what a defendant asserts to the trial court regarding their ability to pay, unless information has come out during the trial or other hearings that contradicts the defendant’s assertions. Without a factual record the State has nothing to respond to.

In this case the State has no information in regards to Cervantes’ alleged indigency. Cervantes was working prior to his incarceration, doing asphalt paving, he apparently lost the job because he was in jail. RP 160-61. If this is the standard this Court

wishes to use, there is nothing the State can do to rebut it. Every person facing a DOC commit would fall into this form of inability to work. This Court should award the State appellate costs as provided by court rule.

**D. WHETHER THE COURT ERRED IN IMPOSING THE DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS HAS NOT BEEN PRESERVED FOR REVIEW.**

Cervantes argues that the trial court impermissibly levied discretionary legal financial obligations (LFO) on him without doing an adequate inquiry regarding whether he had the present and future ability to pay those costs. Brief of Appellant 20-24. Contrary to Cervantes' assertion to this Court, Cervantes did not challenge the imposition of the discretionary LFO in the trial court. Brief of Appellant 21, *citing* RP 160. Cervantes' counsel asked the court for consideration of Cervantes' indigency status when assessing costs. RP 160. This is not the same as objecting to the discretionary cost as levied by the Court.

Generally the appellate court will not consider a matter raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue

then Cervantes bears the burden to show the error was manifest. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is “manifest” if Cervantes shows that he was actually prejudiced by it. If the court reaches the merits of the claimed error it may still be harmless. *Kirkman*, 159 Wn.2d at 927.

In *Blazina* the Washington State Supreme Court determined that legislature intended that prior to the trial court imposing discretionary legal financial obligations there must be an individualized determination of a defendant’s ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

*Blazina*, 182 Wn.2d at 837-38.

Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances and make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the

trial court imposes them. *Id.* The Supreme Court also suggested that trial courts look to GR 34 for guidance when evaluating whether a defendant has the means available to pay discretionary legal financial obligations. *Id.* at 838.

Cervantes does not address his burden of proof under RAP 2.5 apart from stating the error was preserved. The error was not preserved. Cervantes requested the trial court take into account his indigency, the trial court did so when it did not impose a discretionary jail fee or fine, and there was no objection to the fees and costs as imposed. RP 160-61, 163-64. This satisfies *Blazina*.

Further, Cervantes had not shown the alleged error regarding the imposition of discretionary LFO is of manifest constitutional magnitude that can be raised for the first time on appeal. This Court should exercise its discretion to not entertain Cervantes' unpreserved argument and affirm the trial court's imposition of the discretionary legal financial obligations.

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#### IV. CONCLUSION

The State presented sufficient evidence to sustain Cervantes' conviction for Possession of a Stolen Motor Vehicle. Cervantes received effective assistance from his trial counsel, as his attorney was not required to file a frivolous suppression motion. This Court should impose costs on appeal if the State prevails. Finally, Cervantes did not properly preserve any alleged error regarding the trial court's imposition of discretionary legal financial obligations. This Court should affirm Cervantes' conviction and judgment and sentence.

RESPECTFULLY submitted this 8<sup>th</sup> day of August, 2016.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



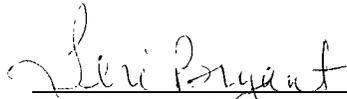
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,  Respondent,  vs.  XAVIER CERVANTEX,  Appellant.	No. 48471-4-II  DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On August 8, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email addresses: [LiseEllnerlaw@comcast.net](mailto:LiseEllnerlaw@comcast.net).

DATED this 8<sup>th</sup> day of August, 2016, at Chehalis, Washington.



\_\_\_\_\_  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

# LEWIS COUNTY PROSECUTOR

**August 08, 2016 - 2:50 PM**

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