NO. 49231-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA C. FRAHM,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Substantial evidence does not support the defendant's conviction for vehicular homicide because there was no proximate cause between the defendant's driving and the decedent's death.

2. Substantial evidence does not support the defendant's conviction for conspiracy to commit perjury because no evidence supports the conclusion that the defendant promoted or facilitated the commission of that offense.

3. Trial counsel's failure to object when three police officers repeatedly told the jury that the defendant was a liar and was guilty denied the defendant effective assistance of counsel.

4. Should the state substantially prevail, this court should exercise its discretion and refrain from imposing costs on appeal because appellant has neither the present nor future ability to pay those costs.

Issues Pertaining to Assignment of Error

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a defendant's conviction for vehicular homicide when there is no proximate cause between the defendant's driving and the decedent's death?

2. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a defendant's conviction for conspiracy to commit perjury when no evidence in the record supports the conclusion that the defendant promoted or facilitated the commission of that offense?

3. Does a trial counsel's failure to object when police officers repeatedly tell a jury that the defendant is a liar and is guilty of the charged offenses deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the failure to object undermines confidence in the outcome of the trial?

4. In a case in which the state substantially prevails on appeal, should the appellate court exercise its discretion and refrain from imposing costs on appeal when the appellant has neither the present nor future ability to pay discretionary legal financial obligations?

STATEMENT OF THE CASE

Factual History

At about 5:45 in the morning on Sunday, December 7, 2014, Steven Klase was driving his Honda CRV northbound on I-205 approaching the area where the highway crosses over Burton Road. RP 248-249, 455[1]. He was returning home to Battleground after having dropped his parents off at the Portland Airport. RP 249. Mr. Klase was in the far right of the three lanes. RP 249-252; Exhibit 38. As he approached the Burton Road overpass the defendant's white Ford F-150 truck approached from the rear at a high rate of speed in the same lane and struck Mr. Klase's CRV. RP 249-252, 1216. The impact spun the CRV a couple of times and sent it across the other lanes of travel into the concrete jersey barriers on the left side of the highway. RP 249-252. It hit the barriers with sufficient force to move a number of them over from their original anchor points. RP 275. After hitting the barriers Mr. Klase's CRV came to rest at an angle across the left lane extending a little into the middle lane generally pointing north. RP 281-283.

After Mr. Klase's CRV came to a rest a Toyota driven by Richard

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[1]The record on appeal includes 14 continuously numbered volumes of verbatim reports of the pretrial hearings held on 10/23/15, 3/2/16 and 3/10/16, the CrR 3.5 hearing held on 4/22/16, the nine day jury trial beginning on 5/9/16 and ending on 5/20/16, and the sentencing hearing held on 6/6/16. There are all referred to herein as "RP [Page #]."

Irvine approached from the south. RP 354-355. Upon seeing Mr. Klase's vehicle in the highway Mr. Irvine pulled his Toyota off the right side of the road, turned on his emergency flashers, got out, and walked over to Mr. Klase's CRV in the highway. RP 354-355, 457-458. Although Mr. Klase did not remember seeing Mr. Irvine, he did remember hearing Mr. Irving call out to see if Mr. Klase was injured. RP 251-252. As Mr. Irvine walked into the highway and approached the wrecked vehicle, a person by the name of Freddie Dela Cruz-Moreno approached the area from the south driving his Honda Odyssey mini-van within the speed limit. RP 281-283, 347, 453-455. At the time there were six other passengers with him in the mini-van. RP 453-455. They were on their way to a monthly church meeting in the Puget Sound area. RP 455.

Mr. Cruz-Moreno later gave two accounts of what happened. RP 498-505. In the first account given shortly after the event he stated that he was in the far left lane and did not see the wrecked CRV until he was almost upon it. RP 498-499. Thus, while he did apply his brakes, he was unable to stop in time and hit the CRV. *Id.* In his second account given at the time of trial Mr. Cruz-Moreno stated that he was actually in the center lane when he saw the emergency lights from Mr. Irvine's Toyota. RP 457-459. Seeing this he pulled over into the far left lane. *Id.* As he did he saw the wrecked CRV, attempted to stop, but was unable to avoid a collision. *Id.* Regardless of

which version was more accurate. Mr. Curz-Moreno hit the CRV. *Id.* Although Mr. Klase did not see this second vehicle drive up from the rear and hit him, he did remember feeling the impact from the second collision. RP 252. He then looked out and saw a person later identified as Mr. Irvine laying in the road. RP 173-174, 252.

Within a short time after the second accident emergency aid crews arrived on the scene along with Vancouver Police Department (VPD) and Washington State Patrol (WSP) officers in a number of vehicles. RP 171, 235-236. The aid crews took four passengers from the Mr. Cruz-Moreno's mini-van, Mr. Klase and Mr. Irvine to local hospitals. RP 61, 178, 191, 240. The passengers from the mini-van were not seriously injured and were shortly released. RP 494. By contrast, Mr. Klase had suffered a spiral fracture to his left femur, a compression fracture to his L-4 vertebrae, a fractured sternum, and cuts to his head and right leg. RP 253-255. Although the injuries were not life threatening, he did undergo surgery and then spent 5 to 6 days in the hospital, as well as subsequent physical therapy. *Id.*

While Mr. Klase's injuries were serious but not life threatening, Mr. Irvine's injuries were life threatening. RP 884-888. In fact, he had suffered a spinal fracture, broken ribs and a sub-dural hematoma. RP 884-888, 906. *Id.* By December 12th he was in the ICU, was still unconscious and was bleeding into the ventricles of his brain. *Id.* By that time his condition had

deteriorated to the point that he no longer had any reflexive impulses. *Id.* On the 16th he was stabilized and transferred to a hospice facility. *Id.* On the 19th, 12 days after the accident, Mr. Irvine died while still at hospice of pneumonia brought on by the multiple blunt injuries to his ribs and torso. RP 889.

Sometime during the morning on the day of the accident the defendant Joshua Frahm called to report that he had woken up to find that his truck had been stolen. RP 612, 698-700. According to the defendant, he had spent the prior evening at a local club with a friend, during which time he drank a few beers. 702-705. Sometime before closing, he returned to his sister's house in Vancouver were he was staying, parked his truck, walked into the house and went to bed. *Id.* When he got up late in the morning he found that his truck was gone. *Id.* In fact, that same day an acquaintance of the defendant who also lived in Vancouver called the police to report that someone had parked a damaged Ford F-150 pickup on his lawn. RP 559-561. The truck belonged to the defendant. *Id.* Later forensic evaluation of the truck and items taken from the scene of the accident conclusively proved that the defendant's truck had hit Mr. Klase's CRV on the morning of the 7th. RP 1072-1077.

Following the accident, investigators from the WSP contacted three persons with potential information about the case. RP 354-355; 1,002-1,003.

The first person was Ryan Lockhart. RP 354-355. Mr. Lockhart told the police that about 5:45 in the morning of December 7th he entered Highway 14 eastbound in Vancouver off of I-5 driving home from work when he was cut off by a white Ford pickup also entering Highway 14 eastbound. RP 400-403. Mr. Lockhart then followed the vehicle, which was driving in an eratic manner, weaving in its own lane and drifting to the right and left, almost hitting a jersey barrier at one point. RP 403-405. Concerned that the driver was intoxicated, he called 911. *Id.*

The second person the WSP investigators contacted was James Barlow. RP 354-355. Mr. Barlow told them that at about 5:45 on the morning of December 7th he was also driving eastbound on Highway 14 off of I-5 towards I-205. *Id.* In his case a white Ford F 150 pickup with "B7" as part of its license plate came up, passed him and jerked over into his lane almost hitting Mr. Barlow's Mini Cooper. RP 423-426. Mr. Barlow then watched as the pickup drover erratically, almost hitting a guard rail as it exited Highway 14 and went northbound on I-205. RP 426-427. Thinking that the driver was intoxicated, Mr. Barlow also called 911. RP 423-425.

The third witness the WSP investigators contacted was a person by the name of Allison Morton. RP 1,002-1,003. She told the WSP investigators that during the late evening of December 6th, she saw the defendant at a club called "Q" where he was with his friend. RP 923-928.

They spoke and danced and at about closing time the defendant suggested that they go to an after hours club in Portland. RP 931-932. She agreed and the defendant then drove them in his white Ford truck to the after hours club in Portland where they danced and continued to drink. *Id.* According to Ms Morton the defendant then drove them to her apartment in downtown Vancouver, where they continued to drink for a couple of hours and engage in sexual activity. RP 942-944. The defendant then left in his white Ford Truck early in the morning while it was still dark. RP 944. In her various statements about what had happened that night she related that she was very drunk, and that after they went to her apartment she was able to see that the defendant was also very drunk. RP 947-948.

The WSP investigators also obtained video tapes from Ms Morton's apartment complex and nearby businesses. RP 641-647, 642-646, 653-656, 665-666. These video tapes showed what appeared to be a white Ford Pickup pulling up to Ms Morton's apartment complex, a man and a woman exiting, and then a man returning to the truck and leaving about two hours later. *Id.* Other security cameras in the area also showed a white truck driving in the downtown Vancouver area about the time that Ms Morton stated that the defendant left her apartment. RP 641-647, 642-646, 653-656.

A number of weeks after the accident a person by the name of Dusty Nielsen contacted the police claiming to have information about the accident.

RP 1,288-1,289. During that interview Mr. Nielsen told the police that he was acquainted with the defendant, and that the defendant could not been the driver of the truck that caused the original accident because the defendant was with Mr. Nielsen at the time. *Id.* When confronted with evidence the investigators had obtained in the case, Mr. Nielsen admitted that he had just lied to them. RP 1,292; 1,295-1,296. He then told the police that actually he had been in the Clark County jail with the defendant and had become convinced of the defendant's innocence. *Id.* Mr. Nielsen then told the defendant that when he got out he was going to give the police a false alibi for him. RP 1,263-1,264. However, Mr. Nielsen later clarified that this was wholly his plan, that the defendant had not asked him to give a false alibi, and that the defendant had never agreed to or solicited this conduct. RP 1,218-1,325.

Procedural History

By information filed December 19, 2016, and later amended on three occasions, the Clark County Prosecutor charged the defendant Joshua C. Frahm with the following six offenses:

> I. Vehicular Homicide under both the driving while intoxicated and reckless alternatives for the death of Richard Irvine;
>
> II. First Degree Manslaughter for the death of Richard Irvine;
>
> III. Vehicular Assault under both the driving while intoxicated and reckless alternatives for the injuries to Steve Klase;

IV. Felony Hit and Run;

V. False Reporting; and

VI. Conspiracy to Commit First Degree Perjury.

CP 1-2, 4-5, 8-9, 21-23.

In this case the defendant signed and the court accepted three waivers of speedy trial. CP 25. The first was on 2/19/15 and accepted that as the new commencement date. CP 7. The second was on 4/9/15 and accepted that as the new commencement date. The defendant signed the third on 10/9/15 but this time accepted a new commencement date of 3/14/16, over five months after the date he signed the third waiver. CP 25. Six days later the defendant filed his own hand written motion to rescind this last speedy trial waiver and dismiss the charges under CrR 3.3(h). RP 26-29. The court later held a hearing on the defendant's *pro se* motion. RP 1-8. After hearing argument and reviewing the tape of the 10/9/15 hearing the court denied the motion to rescind the most recent speedy trial waiver and denied the motion to dismiss. RP 7-8.

On March 2, 2016, the parties again appeared before the court, this time with the defendant's attorney moving to continue the trial. RP 9-11. The defendant stated that he was "strongly opposed" to any continuance of the trial. *Id.* The court denied the motion to continue. RP 12-13. However, eight days later on March 10, 2016, the defendant's attorney again moved for

a continuance of the trial date, this time arguing that (1) two days previous the crime lab had given him a 200 page report on accident debris analysis as well as a 106 page report on DNA analysis, and (2) that given this new evidence he could not be adequately prepared to go to trial on the date set. RP 13-15. The defendant *pro se* objected to any continuance and moved to dismiss on his claim of a discovery violation. RP 17-27. The court denied the motion to dismiss finding no evidence of a discovery violation and granted the motion to continue upon a finding of good cause. *Id.*

Finally, on May 12, 2016, some 16 months after the state filed the charges, the court called this case for trial before a jury. RP 114. During that trial the state called 30 separate witnesses and twice recalled one of those witnesses. RP 167-1252. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History, *supra.* In addition, during the testimony of WSP Detective Sergeant Robert Brusseau the court, without objection from the defense, allowed the state to play the video recording of Detective David Ortner, Detective Justin Meier and Detective Brusseau's interview with the defendant. RP 755-804. On at least five occasions during that recorded interview Detective Ortner, Detective Meier and Detective Brusseau told the defendant that they knew that the defendant was lying about his truck having been stolen, that they knew that the defendant was lying about not being the driver during the accident and that they knew the

defendant had been intoxicated. RP 776, 778, 785, 787, 798. The following quotes these exchanges.

> ORTNER: – and (inaudible) fleeing the scene and things like that.
>
> So – so we have your vehicle, and we have access to gather all this evidence.
>
> And so what our problem is right now is your story doesn't really add up to a lot of the physical evidence that we have in the truck, the damage on the truck, the damage and the evidence that's at the – at the collision scene. And so I think – and where you were last night. I mean, I don't think you were asleep at your sister's house at ten o'clock and slept there all night, okay?

RP 776.

> BRUSSEAU: We – you know – well, you know, we can get all the records and everything.
>
> The point is you've been lying to us. We know you're lying to us because your family told us you were lying to us. And then we also know it because all the stuff that's on tape at the QuarterDeck and all of our other witnesses. The witnesses where the car is located it, it's unfortunate there's some young kids who stay awake at night on a holiday or on a weekend, you know, and they look out their windows and they see something weird and they give descriptions, you know, (inaudible).
>
> So I guess the point is – so you should know well enough by now that we know that you're lying to us, right?

RP 778.

> ORTNER: (Inaudible)? Did you see the picture of that guy?
>
> FRAHM: I did. You already frickin told me about it.
>
> ORTNER: It's a frickin old dude. Frickin old guy you crashed

into, man. Shit. That's why we're sitting in here.

BRUSSEAU: What do you think your mom and your sister's going to say when we call them later and tell them exactly what happened that night? Because they said they wouldn't be surprised.

RP 787.

MAIER: (Inaudible). I'm sure you didn't want to get a DUI, so when you fucking crashed into this guy and screwed him up, both of these guys, you're like, Oh, shit. I'm drunk. I can't get caught for a DUI. I'm out of here.

This isn't our first rodeo, (inaudible).

RP 791.

ORTNER: Because – I mean, again, it's like when you start lying, you just can't keep the story straight.

Your sister said you got home at 1:30.

FRAHM: (Inaudible.)

ORTNER: So we're, again, coming up with another lie.

BRUSSEAU: And you sleep on the couch, right, so they could see you if you were home by 1:30?

FRAHM: (Inaudible.)

ORTNER: Well, I thought you said you were home at 1:30, so...

MAIER: She told us that.

FRAHM: (Inaudible.)

MAIER: She's the one who hasn't lied to us. You're the one that's lied to us (inaudible).

RP 799.

At all occasions during the taped interview the state played for the jury the defendant denied that he had lied in any statement and denied that he had been the driver of the truck. RP 755-804. At no point during the trial did the defendant's attorney object to any of this evidence. *Id.*

Following the end of the state's case the defense moved to dismiss the vehicular homicide charge and the first degree manslaughter charges, arguing that there was insufficient evidence to prove a causal connection between the defendant's driving and the death of Richard Irvine. RP 1357-1382. The court denied the motion as to Count I, the vehicular homicide charge, but granted the motion as to Count II, the first degree manslaughter charge. RP 1396. The state did not cross appeal seeking review of this latter decision. *See* Court Docket.

After the court's ruling on the motion the defense called one witness, a consulting mechanical engineer specializing in forensic engineering. RP 1407. He testified that a driver traveling at highway speed should be able to identify and brake to avoid obstructions in the road. RP 1421-1422. He then went on to explain that the driver of the Odyssey minivan should have been able to slow down and swerve to avoid the second collision. RP 1423.

Following the close of the defendant's case the court instructed the jury with the defense objecting to the court's decision to given the state's proposed instruction on causation from WPIC 90.08, as opposed to the

defendant's modified version of WPIC 90.08. RP 1484, 1497-1519; CP 92-133. The parties then presented their closing arguments and the jury retired for deliberation. RP 1519-1582. During deliberation the jury asked the court to replay three of the 911 calls admitted into evidence in this case. CP 217-218; RP 1589-1590. The court granted the request without objection from either party. RP 1592-1597. The jury then retired for further deliberation, eventually returning verdicts of guilty on all the remaining charges. RP 16-5-1610; CP 219-225.

The court later held a sentencing hearing during which both parties agreed that the defendant's standard range on the most serious charge of vehicular homicide was from 111 to 147 months in prison. RP 1,611-1,651. Following argument the court imposed a standard range sentence of 140 months on that count, along with concurrent standard range sentences on all other felony counts and a concurrent sentence on the one misdemeanor conviction. CP 241-255. The court did not impose any discretionary legal financial obligations. CP 246-247. However, the court did impose $287,060.80 in restitution. *Id.* Following imposition of sentence the defendant filed timely notice of appeal. CP 267-291.

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR VEHICULAR HOMICIDE BECAUSE THERE WAS NO PROXIMATE CAUSE BETWEEN THE DEFENDANT'S DRIVING AND THE DECEDENT'S DEATH.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant's right under Washington Constitution, Article 1, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla

of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant in Count I with vehicular homicide under RCW 46.61.502(1)(a)&(b). This statute states:

> (1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:
>
> (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
>
> (b) In a reckless manner; or

RCW 46.61.502(1)(a)(&(b).

As part of this appeal the defendant argues that substantial evidence does not support the conclusion that Mr. Irvine's death was the "proximate result of injury proximately caused" by the defendant's driving. The following sets out this argument.

For crimes such as vehicular homicide which "require specific conduct resulting in a specified result, the defendant's conduct must be the 'legal' or 'proximate' cause of the result." *State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995). Thus, while a decedent's "contributory negligence" is not a defense to a vehicular homicide charge, if the death was the result of a "superseding intervening event," then there is a break in the chain between the defendant's conduct and the ultimate harm and no crime exists under RCW 46.61.520. *See i.e. State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 196 (2005).

A "superseding intervening event" is one without which the defendant's contributory negligence would not have caused the resultant injury or death. *State v. Meekins*, 125 Wn.App. 390, 105 P.3d 420 (2005); *State v. Souther*, 100 Wn.App. 701, 708–09, 998 P.2d 350 (2000). In the civil context, the Restatement of Torts (Second) defines a "superseding cause" as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another when his antecedent

negligence is a substantial factor in bringing about." Restatement (second), § 440 at 465 (1965). An "intervening force" is defined as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Restatement (Second), § 441(1). In *State v. Souther*, 100 Wn.App. at 710 the court defined "intervening act" as "a force that actively operates to produce harm to another after the actor's act or omission has been committed." (citing *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 17 n. 7, 810 P.2d 917, *amended by* 817 P.2d 1359 (1991)).

The legal concept of contributory negligence as opposed to a superceding, intervening event is further explained in WPIC 90.08 as used in this case. This instruction stated:

> If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death, it is not a defense that the conduct of the decedent or another may also have been a proximate cause of the death.
>
> However, if a proximate cause of the death was a new independent intervening act of the deceased or another which the defendant, in the exercise of ordinary care, should not reasonable have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act of omission has been committed.
>
> However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that

> the death fall within the general field of danger which the defendant should have reasonablely anticipated.

CP 12.

A number of cases deal with the distinction between mere contributory negligence as opposed to a superceding, intervening cause in vehicular assault and homicide cases. For example, *State v. Hursh*, 77 Wn.App. 242, 890 P.2d 1066 (1995), a defendant convicted of vehicular assault appealed, arguing that he had been denied a fair trial when the court had limited his ability to argue that the victim's failure to wear a seat belt mitigated his culpability. However, the Court of Appeals rejected this argument holding that under the vehicular assault statute "a defendant will be deemed responsible if his or her conduct is a proximate cause of another's injury." Thus, the failure to wear a seat belt, even if a contributory proximate cause, did not relieve the defendant of culpability because that failure did not constitute an intervening act responsible as the sole cause of the injury.

Similarly, in *Roggenkamp, supra,* a defendant appealed his conviction for vehicular assault and vehicular homicide arguing that sufficient evidence did not support the conviction because the conduct of the decedent in pulling out in front of him had constituted an superceding, intervening cause of the injuries. In that case, the defendant was driving down a residential county road and entered oncoming traffic lane to pass another vehicle. As he passed

he reached a speed of about twice the speed limit. While in the midst of passing, a vehicle pulled left out from an intersection in the same direction the defendant was traveling. Seeing this the defendant immediately applied his brakes. At that moment, a third vehicle driven by an intoxicated driver pulled out of the same intersection behind the second vehicle. The defendant then skidded into the third vehicle injuring three occupants and killing another.

Ultimately the Court of Appeals held that the intoxicated third driver's actions were not a superseding cause of the accident because the defendant should have foreseen the possibility that vehicles would turn onto a rural residential road that was lined with driveways and mailboxes and that had a posted speed limit of 35 miles per hour. Thus, while the intoxicated third driver's conduct contributed to the accident, that conduct was not a superceding, intervening cause sufficient to constitute a defense to the charges.

Turning to the case at bar, the facts as presented in the light most favorable to the state indicate that the defendant was driving his truck at a high rate of speed and while intoxicated northbound on I-205 in the far right lane when he came upon Mr. Klase's vehicle and hit it. Thus, there is no question for the purposes of this argument that the defendant's intoxicated and reckless driving were the proximate legal cause of the first collision.

There should also be little question that Mr. Dela Cruz-Moreno was negligent when he drove in the far left lane and was unable to stop in sufficient time to avoid the collision with Mr. Klase's disabled vehicle. As more than one witness pointed out during the trial one of the primary rules of the road is to drive in a manner so as to be able to stop for or avoid obstructions in front of you.

Although Mr. Dela Cruz-Moreno was undoubtedly "negligent" at least in a civil law context, the defendant does not claim that his conduct was a superceding, intervening cause to the second collision. Put another way, one might reasonably anticipate that (1) an accident might result in a disabled vehicle in the active lanes of a highway, and (2) that a subsequent driver might come upon the scene of the disabled vehicle and hit it even though a reasonable driver should be able to see obstructions and be able to stop or avoid them. Thus, Mr. Dela Cruz-Moreno's negligence in failing to stop before hitting Mr Klase's disabled vehicle does not qualify as a superceding, intervening cause.

While Mr. Dela Cruz-Moreno's negligence was foreseeable and does not qualify as a superceding, intervening cause, the same cannot be said of the decedent's actions. While one might reasonably expect a subsequent driver to come upon an accident, stop and call the police, it is not reasonable to expect a passerby to stop in the dark and walk out into the active lanes of

travel of a divided highway, particularly without paying close attention to oncoming vehicles. This is precisely what Mr. Irvine did. Since these actions would not be reasonably foreseen or reasonably anticipated, they constitute a new independent intervening act that breaks the chain of causality between the defendant's original action and the subsequent injuries to Mr. Irvine which eventually took his life. As a result, substantial evidence does not support the defendant's conviction for vehicular homicide and this court should vacate that conviction and remand for resentencing on his remaining felonies.

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR CONSPIRACY TO COMMIT PERJURY BECAUSE NO EVIDENCE SUPPORTS THE CONCLUSION THAT THE DEFENDANT PROMOTED OR FACILITATED THE COMMISSION OF THAT OFFENSE.

As was set out in Argument I, under the due process clauses to both our state and federal constitutions, in every criminal prosecution the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza, supra; In re Winship, supra.* Absent substantial evidence in each and every element of the offense charged, the only appropriate remedy is dismissal with prejudice. *State v. Anderson, supra.* In this case the defendant also claims a lack of substantial evidence to support his conviction for conspiracy to commit first degree perjury. The following sets out this argument.

Under RCW 9A.72.020, the legislature defined the crime of first degree perjury as follows:

> (1) A person is guilty of perjury in the first degree if in any official proceeding he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law.

RCW 9A.72.020.

Under this statute the offense includes four elements: (1) making "a materially false statement," (2) which one "knows to be false," (3) while "under an oath required or authorized by law", (4) "in any official proceeding." In this case the state did allege that the defendant made materially false statements which he knew to be false, the state did not allege that he did so under oath or in any official proceeding. Rather, the state alleged that the defendant conspired under RCW 9A.28.040(1) with Dusty Nielsen to commit this offense.

In RCW 9A.28.040(1), the Washington legislature has defined conspiracy as follows:

> (1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040(1).

Under this statute there are four elements to a criminal conspiracy:

(1) "an agreement with one or more persons," (2) "to engage in or cause the performance of," (3) "conduct constituting a crime", (4) when any member of the conspiracy "takes a substantial step" in furtherance of the agreement. *See In re Disciplinary Proceeding Against Smith*, 170 Wn.2d 721, 736, 246 P.3d 1224 (2011) citing ((*United States v. Becker*, 720 F.2d 1033, 1035 (9th Cir.1983) ("The essential elements of conspiracy are 'an agreement to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose and the requisite intent necessary to commit the underlying substantive offense.'"))

In the case a bar there was no question that Dusty Nielsen committed perjury when he initially spoke with the police and provided them with a materially false sworn statement which he later admitted was untrue. While on the stand he admitted the conduct to the jury. However, while Mr. Nielsen also claimed that he had informed the defendant that he intended to make the materially false statement to the police to the defendant's benefit, at no point in his testimony did Mr. Nielsen claim that the defendant in any way entered into an agreement with him to commit that offense. In fact, he explicitly denied that the defendant had in any way solicited or agreed with Mr. Nielsen's decision to commit perjury. As a review of the decision in *State v. Pacheco*, 125 Wn.2d 150, 882 P.2d 183 (1994), reveals, absent evidence of an agreement there can be no conspiracy.

In *State v. Pacheco*, *supra*, the state charged the defendant with a number of offenses including conspiracy to commit first degree murder and conspiracy to deliver a controlled substance. At trial an undercover police informant testified he met with the defendant on a number of occasions and asked that he provide security during drug deals. The defendant agreed to the offer and later went with the informant as security when the informant ostensibly sold drugs. Later the undercover informant met with the defendant and asked him to kill a drug buyer who had allegedly shorted him money on a drug transaction. The defendant agreed to commit the murder and went with the informant to a motel to commit the crime.

In fact, there were no drug deals and no drug buyer who had shorted the informant of money on a drug deal. Rather, all of the events were carefully staged ruses orchestrated first by the FBI and then by the Clark County Sheriff's Office. In fact, at the time the defendant was a Clark County Sheriff's Deputy. Once at the motel where the killing was supposed to take place the defendant was arrested. He was later convicted on both the conspiracy to commit murder charge as well as the conspiracy to deliver controlled substance charge. Although the Court of Appeals affirmed both convictions, the Washington Supreme Court reversed, finding that absent an agreement between two participating parties there could be no conspiracy. The court held:

> Subsection (1) of RCW 9A.28.040 expressly requires an agreement, but does not define the term. Black's Law Dictionary defines agreement as, "[a] meeting of two or more minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition". Black's Law Dictionary 67 (6th rev. ed. 1990). Similarly, agreement is defined in Webster's as "1a: the act of agreeing or coming to a mutual agreement ... b: oneness of opinion ...". Webster's Third New International Dictionary 43 (1986). The dictionary definitions thus support the Defendant's argument.
>
> Likewise, the common law definition of the agreement required for a conspiracy is defined not in unilateral terms but rather as a confederation or combination of minds. A conspiratorial agreement necessarily requires more than one to agree because it is impossible to conspire with oneself. We conclude that by requiring an agreement, the Legislature intended to retain the requirement of a genuine or bilateral agreement.

State v. Pacheco, 125 Wn.2d 150, 154–55, 882 P.2d 183 (1994) (some citations omitted).

In response to this case the Washington Legislature added subsection (f) to the conspiracy statute. This added section states:

> (2) It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired:
>
> . . .
>
> (f) Is a law enforcement officer or other government agent who did not intend that a crime be committed.

Although this amendment will now allow for a conspiracy charge even without an agreement if the other party is "a law enforcement officer or other government agent who did not intend that a crime be committed." this is the exception. In all other circumstances, such as the one in the case at bar,

the decision in *Pacheco* is still good law and stands for a proposition that there must be an agreement between the conspiring parties.

As was previously stated, in the case at bar Mr. Nielsen repeatedly testified on direct, cross, redirect, and re-cross that there had been no agreement between with the defendant for Mr. Nielsen to commit perjury. As Mr. Nielsen testified, the defendant did not "encourage" Mr. Nielsen to commit the crime. RP 1,264. Neither did the defendant request this conduct, agree to it or even share the police reports he had with Mr. Nielsen. RP 1,320-1,321. Rather, there was merely knowledge on the defendant's part. In such a case there was no "agreement" as is required under the conspiracy statute and thus no conspiracy. As a result, this court should reverse the defendant's conviction for conspiracy to commit perjury and remand with instructions to dismiss.

III. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THREE DETECTIVES REPEATEDLY TOLD THE JURY THAT THE DEFENDANT WAS A LIAR AND WAS GUILTY DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper

functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*. 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, defendant claims ineffective assistance based upon trial counsel's failure to object when the state played an audio tape before the jury during which the jury heard the hearsay statements of three police

officers repeatedly claiming that they knew the defendant was a liar and that they knew he was guilty. The following sets out this argument.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

> "[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); *see Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).
>
> The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701.

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

> A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wn.2d 312, at page 315. 427 P.2d 1012, at page 1014 (1967), said:
>
> > Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who

> participated in the burglary. The proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. To the question literally asked the witness to express ar opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.
>
> This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453. 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).
>
> So the testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

State v. Haga, 8 Wn.App. At 491-492.

In the case at bar the state charged the defendant with vehicular homicide, vehicular assault and felony hit and run under a claim that he drove his vehicle while drunk, ran into Mr. Klase's vehicle at a high rate of speed and then fled the scene, ultimately causing serious injury to Mr. Klase and ultimately setting in motion a chain of events that caused the death of Mr. Irvine. In the defendant's 911 statement to the police and later recorded statements to the police he claimed that his truck had been stolen and that he had not been the driver at the time of the accident. During the trial the court allowed the state to play the entirety of his WSP Detectives interrogation of the defendant to the jury. During that interrogation, three separate WSP detectives stated their opinions on five separate occasions that in their

opinions the defendant was the driver of the vehicle and that he was a liar. The following quotes those sections.

> ORTNER: – and (inaudible) fleeing the scene and things like that.
>
> So – so we have your vehicle, and we have access to gather all this evidence.
>
> And so what our problem is right now is your story doesn't really add up to a lot of the physical evidence that we have in the truck, the damage on the truck, the damage and the evidence that's at the – at the collision scene. And so I think – and where you were last night. I mean, I don't think you were asleep at your sister's house at ten o'clock and slept there all night, okay?

RP 776.

> BRUSSEAU: We – you know – well, you know, we can get all the records and everything.
>
> The point is you've been lying to us. We know you're lying to us because your family told us you were lying to us. And then we also know it because all the stuff that's on tape at the QuarterDeck and all of our other witnesses. The witnesses where the car is located it, it's unfortunate there's some young kids who stay awake at night on a holiday or on a weekend, you know, and they look out their windows and they see something weird and they give descriptions, you know, (inaudible).
>
> So I guess the point is – so you should know well enough by now that we know that you're lying to us, right?

RP 778.

> ORTNER: (Inaudible)? Did you see the picture of that guy?
>
> FRAHM: I did. You already frickin told me about it.
>
> ORTNER: It's a frickin old dude. Frickin old guy you crashed

into, man. Shit. That's why we're sitting in here.

BRUSSEAU: What do you think your mom and your sister's going to say when we call them later and tell them exactly what happened that night? Because they said they wouldn't be surprised.

RP 787.

MAIER: (Inaudible). I'm sure you didn't want to get a DUI, so when you fucking crashed into this guy and screwed him up, both of these guys, you're like, Oh, shit. I'm drunk. I can't get caught for a DUI. I'm out of here.

This isn't our first rodeo, (inaudible).

RP 791.

ORTNER: Because -- I mean, again, it's like when you start lying, you just can't keep the story straight.

Your sister said you got home at 1:30.

FRAHM: (Inaudible.)

ORTNER: So we're, again, coming up with another lie.

BRUSSEAU: And you sleep on the couch, right, so they could see you if you were home by 1:30?

FRAHM: (Inaudible.)

ORTNER: Well, I thought you said you were home at 1:30, so...

MAIER: She told us that.

FRAHM: (Inaudible.)

MAIER: She's the one who hasn't lied to us. You're the one that's lied to us (inaudible).

RP 799.

At all occasions during the taped interview the state played for the jury the defendant denied that he had lied in any statement and denied that he had been the driver of the truck. RP 755-804.

The error in the admission of these statements was twofold. First, the officers claims as cited above were all out-of-court statement offered to prove the veracity of the claims contained therein. As such they were inadmissible hearsay. Under ER 801(c) hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The phrase "other than one made by the declarant while testifying at the trial or hearing" includes an out-of-court statement made by an in-court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). Under ER 802 hearsay is "not admissible except as provided by these rules, by other court rules, or by statute."

Had the defendant at any point agreed to or adopted any one of the officers' claims that he was lying and that he was the driver of the truck then the statements would become the admission of the defendant, thereby ceasing to be the hearsay statements of the officers. However, at no point did the defendant ever agree or adopt any one of these statements. Rather, he continued to adamantly deny each allegation. Thus, the statements were objectionable as inadmissible hearsay.

While the officers' statements were improper as inadmissible hearsay,

they were much more objectionable as inadmissible statements of opinion on credibility of the defendant's claims and opinions of guilt. They were all the more harmful because they were repeatedly given by three separate officers in forceful and at times abusive language. Had each one of these detectives attempted to state in forceful and abusive language on direct examination that in his considered opinion the defendant was a liar and was guilty of the crime charged one would assume that there would have been an immediate objection, if not by the defendant's attorney then potentially by the court itself. The fact that officers made these same inappropriate and inadmissible statements to the jury via an audio recording does not change the nature of the statements.

The decision whether or not the defendant was driving his truck at the time of the accident and whether or not he lied to the police were questions that the jury was called upon to resolve as the trier of fact in the case. By playing an audio tape in which three detectives repeatedly call the defendant a liar and repeatedly state that they know the defendant is guilty, the state presented inadmissible opinion evidence on guilt that denied the defendant his right to a fair trial. There was no possible tactical reason for a defense attorney to knowingly fail to object to this type of evidence. As the court noted in *Carlin*, this type of evidence is particularly egregious when presented by a police officer. *State v. Carlin*, 40 Wn.App. at 703. Thus, in

this case trial counsel's failure to object to this evidence fell below the standard of a reasonably prudent attorney and denied the defendant a fair trial in which the jury acted as the sole trier of fact, not three WSP Detectives. Consequently, trial counsel's failure to object violated the defendant's right to effective assistance of counsel.

IV. SHOULD THE STATE SUBSTANTIALLY PREVAIL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFRAIN FROM IMPOSING COSTS ON APPEAL BECAUSE APPELLANT HAS NEITHER THE PRESENT NOR FUTURE ABILITY TO PAY THOSE COSTS.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra.* In the case at bar the trial court found the defendant indigent and entitled to the appointment of counsel at both the trial and appellate level. CP 3, 165-166. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule

states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan*, *supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts ***may*** require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing

"cannot displace the court's obligation to exercise discretion when properly requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra.* The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192

Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant's indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

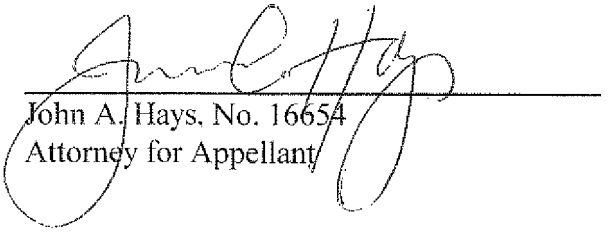
Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. In fact, the defendant is a 33-year-old man convicted of a violent offense serving a 140 months sentence who owes $287,060.80 in restitution. Given the trial court's finding of indigency at the trial level and at the appellate level, it is unrealistic to think that the defendant will ever be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

Defendant's convictions for vehicular homicide and conspiracy to commit first degree perjury are not supported by substantial evidence. As a result this court should vacate those convictions. In addition, trial counsel's failure to object when the state presented the hearsay statements of three WSP detectives that in their opinion the defendant was a liar and was guilty denied the defendant effective assistance of counsel. As a result, this court should vacate the defendant's convictions and remand for retrial. In the alternative, if the state substantially prevails on appeal, this court should exercise its discretion and refrain from imposing costs on appeal.

DATED this 17th day of February, 2017.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.28.040(1)
Criminal Conspiracy

(1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.72.020
Perjury in the First Degree

(1) A person is guilty of perjury in the first degree if in any official proceeding he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law.

(2) Knowledge of the materiality of the statement is not an element of this crime, and the actor's mistaken belief that his or her statement was not material is not a defense to a prosecution under this section.

(3) Perjury in the first degree is a class B felony.

RCW 46.61.520
Vehicular Homicide – Penalty

(1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:

(a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or

(b) In a reckless manner; or

(c) With disregard for the safety of others.

(2) Vehicular homicide is a class A felony punishable under chapter 9A.20 RCW, except that, for a conviction under subsection (1)(a) of this section, an additional two years shall be added to the sentence for each prior offense as defined in RCW 46.61.5055.

INSTRUCTION NO. 12

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death, it is not a defense that the conduct of the decedent or another may also have been a proximate cause of the death.

However, if a proximate cause of the death was a new independent intervening act of the deceased or another which the defendant, in the exercise of ordinary care, should not reasonable have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act of omission has been committed.

However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonablely anticipated.

WPIC 90.08

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **JOSHUA C. FRAHM,** **Appellant.**	**NO. 49231-8-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik
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   Vancouver, WA 98666-5000
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2. Joshua C. Frahm, No.391536
   Washington Corrections Center
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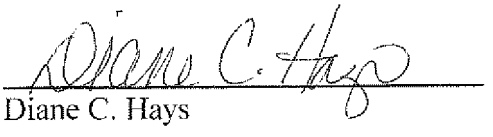
   Shelton, WA 98584

Dated this 17th day of February, 2017, at Longview, WA.



Diane C. Hays

HAYS LAW OFFICE

February 17, 2017 - 2:02 PM

Transmittal Letter

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Case Name: State v. Joshua Frahm
Court of Appeals Case Number: 49231-8

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