

**NO. 49448-5-II**

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

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**STEPHEN W. MILLER,**

**Appellant.**

---

**BRIEF OF APPELLANT**

---

**John A. Hays, No. 16654  
Attorney for Appellant**

**1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084**

## TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES .....	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error .....	1
2. Issue Pertaining to Assignment of Error .....	1
C. STATEMENT OF THE CASE	
1. Factual History .....	2
2. Procedural History .....	6
D. ARGUMENT	
<b>I. TRIAL COUNSEL’S FAILURE TO OBJECT TO THE ADMISSION OF THE 911 CALL AS MORE PREJUDICIAL THAN PROBATIVE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL. ....</b>	<b>11</b>
<b>II. IF THE STATE SUBSTANTIALLY PREVAILS THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO IMPOSE APPELLANT COSTS .....</b>	<b>20</b>
E. CONCLUSION .....	25
F. APPENDIX	
1. Washington Constitution, Article 1, § 22 .....	26
2. United States Constitution, Sixth Amendment .....	26
3. ER 403 .....	27
G. AFFIRMATION OF PREJUDICE .....	28

**TABLE OF AUTHORITIES**

Page

*Federal Cases*

*Bruton v. United States*,  
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) ..... 12

*Church v. Kinchelse*,  
767 F.2d 639 (9th Cir. 1985) ..... 11

*Strickland v. Washington*,  
466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) ..... 11

*State Cases*

*State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001) ..... 14

*State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) ..... 12

*State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) ..... 12

*State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) ..... 13

*State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001) ..... 14

*State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000) ..... 20, 21

*State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001) ..... 17, 18

*State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016) ..... 20-22

*State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963) ..... 12

*Constitutional Provisions*

Washington Constitution, Article 1, § 22 ..... 11

United States Constitution, Sixth Amendment ..... 11

*Statutes and Court Rules*

RCW 10.73.160 ..... 20, 21  
ER 403 ..... 13  
RAP 14.2 ..... 21

*Other Authorities*

M. Graham, *Federal Evidence* § 403.1. at 180-81 (2d ed. 1986) ..... 13

## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. Trial counsel's failure to object to the admission of the 911 call as more prejudicial than probative denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

2. If the state substantially prevails on appeal this court should exercise its discretion and refuse to impose appellant costs because there is no evidence that the defendant has either the present or future ability to pay legal-financial obligations.

### ***Issues Pertaining to Assignment of Error***

1. Does a trial counsel's failure to object to the admission of the 911 call as more prejudicial than probative deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when the tape had little probative value, was highly prejudicial, and when the jury would probably have returned a verdict of acquittal but for the admission of that tape?

2. In a case in which the appellant does not have either the present or future ability to pay legal financial obligations, should an appellate court exercise its discretion and refuse to impose appellant costs if the state substantially prevails on appeal?

## STATEMENT OF THE CASE

### *Factual History*

Joyce Stoner and her husband live at 1010 Nicklaus Court SW, in Ocean Shores with their adult son, the defendant Stephen Miller. RP I 4.<sup>1</sup> On July 4, 2016, Joyce and her husband invited their granddaughter Jessica Lopez, her husband Ignacio, four of their five children, and a number of Ignacio's friends and family to spend the afternoon and night of the fourth with them. RP I 5, 24-28. As a result, on the afternoon of the fourth Jessica, Ignacio, four of their five young children, Ignacio's brother, Ignacio's friend Jose Hernandez, and a number of others arrived at 1010 Nicklaus Court SW to celebrate the fourth of July. *Id.* That afternoon they all ate together with most of the adults drinking beer and a few drinking Tequila. RP I 5-6, 24-28..

Later that evening the majority of those present walked over to the beach to view the fireworks. RP I 7-8, 31. However, Joyce's husband and the defendant stayed home and went to bed. RP I 8-9. According to the

---

<sup>1</sup>The record on review includes the following three volumes of verbatim reports, with each volume starting at a new page one: (1) Volume I - verbatim report of the AM portion of the jury trial on 8/30/16; (2) Volume II - verbatim report of the PM portion of the jury trial on 8/30/16 and the sentencing held on 9/9/16; and (3) Volume III - verbatim report of the second day of the jury trial on 8/31/16. These verbatim reports are referred to herein as "RP [volume number] [page number]."

defendant, he drank between 6 to 8 beers that afternoon, as well as “a couple” of bloody Mary’s at a local casino earlier in the day. RP II 66-67. Sometime very late in the evening the group came back to the house. RP I 10-11; RP II 32. Once back most of the group had a little more to eat, and then Joyce got her granddaughter Jessica and Jessica’s four children situated in the front room with blankets and pillows so they could go to sleep. RP I 10-11; RP II 32-34. Jessica’s husband Ignacio, Ignacio’s brother and Ignacio’s friend Jose retired to a van to sleep, and a family of Ignacio’s friend’s went to a tent they had pitched near the house. RP I 11; RP II 38-39. During this time the defendant had awoken and come out into the front of the house and was drinking more alcohol. RP II 36 While everyone was getting situated to sleep Joyce told them that she was leaving the front door open so anyone needing the bathroom could come in and use. RP II 37.

According to the defendant, Ignacio and his brother and friends did not go out and go to sleep. RP II 55. Rather, they continued to play loud music and wander around the property even though he asked them to be quiet, as everyone else was trying to sleep. RP II 55-57. In fact, the defendant later testified that when he first asked everyone to try to be quiet Ignacio said “Fuck you, you piece of shit.” RP II 55. The defendant went on to explain that a little later Ignacio came in the front door to use the bathroom, making a lot of noise. RP II 55-57. The defendant went on to

state that about 3:00 am he awoke to hear people in the garage, people walking around the house with flashlights, and loud music. RP II 57-58. Upon getting up he found Ignacio in the house. RP II 55-57. When Ignacio saw the defendant Ignacio pushed the defendant out of the way, and went into the bathroom while telling the defendant “Fuck you, you piece of shit.” RP II 57. As a result, the defendant locked the front door when Ignacio went out and then went back to bed. RP II 56.

According to the defendant about one-half hour later he again woke to loud music. *Id.* This time he got up, put on his coat, called the police, and then went out to the back porch to sit for a while. RP II 57-59. Once he sat down Ignacio and his friend Jose walked up, said something rude to him and entered the house to use the bathroom. *Id.* The defendant then became upset at their conduct, took a pistol out of his jacket pocket and shot it into the ground out of frustration. RP II 60. According to the defendant when he shot the pistol into the ground Ignacio had already gone into the house. *Id.* The defendant denied pointing the pistol at anyone, intending to assault anyone, or intending to scare anyone. *Id.*

Ignacio’s and his friend Jose’s version of what happened was that after everyone went to bed Ignacio twice entered the house. RP I 39-40. The first time was to check that his wife and children were safe. *Id.* The second time was to use the bathroom. *Id.* On the second occasion the defendant

came out of his room and said a number of rude things to Ignacio, claiming that he was making too much noise, although Ignacio stated that he and his friends were not making any noise. *Id.* According to Ignacio, a while later his friend Jose told him that he needed to use the bathroom. RP I 40; RP II 12. Jose then asked Ignacio to go into the house with him as Jose did not speak English and was not familiar with the owners. *Id.*

Ignacio agreed. RP II 12. However, when they got to the front door they found it locked. RP I 40; RP II 12. They then went around the house to use the back door, which was open. RP I 41-42; RP II 12-13. As they walked up to the house they found the defendant sitting in a chair. *Id.* When the defendant saw them he said, "Get the fuck out of my house! I don't want you here." RP I 41-42. When the defendant said this Ignacio said that he would go in and get his wife and children so they could leave. RP I 42. When Ignacio went to step into the house the defendant stood up and took a shot in Ignacio's direction. RP I 42-46; RP II 4, 13-16. At this point Ignacio and Jose returned to the front yard. RP II 5. A few minutes later the police arrived, spoke with everyone, and arrested the defendant. RP II 48-49. They also seized the defendant's gun from the kitchen counter where he had put it. *Id.*

### *Procedural History*

By information filed July 5, 2016, the Grays Harbor County Prosecutor charged the defendant Stephen Wesley Miller with one count of second degree assault against Ignacio Lopez, alleging that the defendant had assaulted Ignacio “with a deadly weapon to wit: .38 revolver.” CP 1. On August 15, 2016, two weeks before trial, the prosecutor amended this information to add a firearm enhancement. CP 12-13. On August 30, 2016, this matter came on for trial before a jury with the state calling Joyce Stoner, Ignacio Lopez, Jose Hernandez, Jessica Lopez and a police officer who responded to the house as its witnesses. RP I 12, 31; RP II 8, 24, 44, 54. The defendant then took the stand as the only witness for the defense. RP II 54. These witnesses testified to the facts set out in the preceding factual history. *See Factual History, supra.*

In addition, during Joyce Stoner’s testimony the prosecutor had Joyce ostensibly identify Exhibit No. 1 as an audio recording of a 911 call with her son’s voice on it. RP I 14-15, 23. While she was sure it was her son’s voice, she had no independent knowledge that her son had ever made a 911 call on the night in question or any other night. *Id.* Following argument, the court admitted this recording into evidence over the defendant’s objection that the state had failed to lay a proper foundation. RP I 15-27. The defense did not object on the basis that the evidence was more prejudicial than probative. RP

I 15-27. Following admission of the exhibit, the court allowed the state to play it for the jury. RP I 27-29. The following is the court reporter's transcription of the audio recording as played to the jury:

THE DISPATCHER: Grays Harbor 911. What's your emergency?

MR. MILLER: I have a bunch of Mexicans in my front yard and they won't – they're blocking my driveway. And I asked them

THE DISPATCHER: What's your address?

MR. MILLER: – to leave. Huh?

THE DISPATCHER: What is your address?

MR. MILLER: 1010 Nicholas Court Southwest, Ocean Shores, Washington.

THE DISPATCHER: Do you know who they are?

MR. MILLER: Yeah, I know who they are. They're my niece's – my niece's husband and all their damn Mexican friends. They're walking around the –

THE DISPATCHER: Wait a sec for me. Hold on. Okay, sir, what is your name?

MR. MILLER: Stephen Miller.

THE DISPATCHER: Okay. What was your first name?

MR. MILLER: Stephen.

THE DISPATCHER: Stephen. And do you have a phone number, please?

MR. MILLER: 253 330-7069.

THE DISPATCHER: Okay. And they're not supposed to be there?

MR. MILLER: They were – they're invited but I asked them not to come in at 3 o'clock in the damn morning, in and out. (Inaudible), they can piss outside. Then they were coming in and out and I said, "Hey, you can't be running in and out of my fucking house at 3 o'clock in the morning. If you do (inaudible) –

THE DISPATCHER: Stephen, are they still out there? Are they in the front or the back?

MR. MILLER: – through my window." Huh?

THE DISPATCHER: Are they in the front of your house or the back of your house?

MR. MILLER: They're in the front of my house. They have three cars blocked, you can't even get out of my driveway.

THE DISPATCHER: Okay. So are you complaining about the cars or –

MR. MILLER: They're in my driveway. The lights are blaring in my damn windows and –

THE DISPATCHER: Okay. They're still in the vehicles then?

MR. MILLER: – they think it's funny. Huh?

THE DISPATCHER: Are they still in the vehicles?

MR. MILLER: Yeah, they're still in the vehicles.

THE DISPATCHER: Okay. Have they been drinking tonight?

MR. MILLER: Yeah, they're all drunk.

THE DISPATCHER: Okay. Hold on, and I'll let them know, all right. If anything changes they want you to call us back.

MR. MILLER: If anything changes?

THE DISPATCHER: If anything changes before (inaudible).

MR. MILLER: Okay.

THE DISPATCHER: Good-bye.

RP I 27-30.

Following the presentation of evidence the court instructed the jury with neither party making any objections to the instructions given or taking exception to the refusal to give any proposed instructions. RP II 69; RP III 3-18. The parties then presented closing argument without objection from either side and the jury then retired for deliberation. RP III 18-26, 26-29, 29-31. After the jury retired, the court gave a provisional ruling over defense objection that if the jury wanted to listen to Exhibit No. 1 again he would have the clerk and the bailiff escort the jury into the courtroom, play the audio recording for them, and then have them return to the jury room for further deliberations. RP III 34.

Shortly after the court adjourned the jury sent out a note asking to listen to Exhibit No. 1 again. CP 28. Per the court's prior provisional ruling the clerk and the bailiff took the jury into the courtroom, played Exhibit No. 1 for them, and then returned the jury to the jury room for further deliberations. *Id.* The judge, court reporter and parties were not present. CP 39. About an hour after it adjourned the court reconvened upon its belief that

the jury had reached its verdict. *Id.* However, upon review the court noted that the jury had failed to render a verdict on the enhancement allegation. *Id.* As a result, the court sent the jury “back for completion of the Special Verdict Form.” *Id.* Five minutes later the jury returned, finding the defendant guilty of second degree assault and finding by special verdict that the defendant had been armed with a firearm during the commission of the offense. *Id.*

The court later sentenced the defendant to a term within the standard range, after which the defendant filed timely notice of appeal. RP II 72-79l; CP 45-56, 58.

## ARGUMENT

### I. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE ADMISSION OF THE 911 CALL AS MORE PREJUDICIAL THAN PROBATIVE 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, the defendant claims ineffective assistance based upon trial counsel's failure to object to the admission of the 911 call as more prejudicial than probative. Specifically, defendant argues that the 911 call had little relevance and was introduced principally for its prejudicial effect. Thus, defendant argues that the admission of this evidence denied him due process under the state and federal constitution and that counsel's failure to object denied him effective assistance of counsel. The following sets out this argument.

While due process does not guarantee every person a perfect trial, the due process clauses in both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, unfairly prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). It also guarantees a fair trial untainted by unreliable, unfairly prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is

embodied in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in

*State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In the case at bar, the state charged the defendant with second degree assault with a firearm under a factual allegation that he pointed a pistol at Ignacio Lopez and then intentionally shot at him. Ignacio Lopez and Jose Hernandez both testified to this claim. In response, the defendant admitted that he was upset with Ignacio Lopez because of the noise he was making and because of his rude statements and conduct. However, the defendant testified that (1) Ignacio Lopez was not present when the defendant discharged the firearm, (2) that he discharged the firearm into the ground, and (3) that he had no intent to assault or scare anyone. Thus, in this case the issue before the jury was principally one of credibility of witnesses. In other words, the only issue in dispute before the jury was whether the defendant discharged the firearm at Ignacio Lopez, as Ignacio Lopez and Jose Hernandez claim, or discharged the firearm into the ground after Ignacio Lopez went into the house as the defendant claimed. In light of this limited issue, the 911 call

provided little relevant evidence. The substance of the call was as follows:

THE DISPATCHER: Grays Harbor 911. What's your emergency?

MR. MILLER: I have a bunch of Mexicans in my front yard and they won't – they're blocking my driveway. And I asked them

THE DISPATCHER: What's your address?

MR. MILLER: – to leave. Huh?

THE DISPATCHER: What is your address?

MR. MILLER: 1010 Nicholas Court Southwest, Ocean Shores, Washington.

THE DISPATCHER: Do you know who they are?

MR. MILLER: Yeah, I know who they are. They're my niece's – my niece's husband and all their damn Mexican friends. They're walking around the –

THE DISPATCHER: Wait a sec for me. Hold on. Okay, sir, what is your name?

MR. MILLER: Stephen Miller.

THE DISPATCHER: Okay. What was your first name?

MR. MILLER: Stephen.

THE DISPATCHER: Stephen. And do you have a phone number, please?

MR. MILLER: 253 330-7069.

THE DISPATCHER: Okay. And they're not supposed to be there?

MR. MILLER: They were – they're invited but I asked them not

to come in at 3 o'clock in the damn morning, in and out. (Inaudible), they can piss outside. Then they were coming in and out and I said, "Hey, you can't be running in and out of my fucking house at 3 o'clock in the morning. If you do (inaudible) –

THE DISPATCHER: Stephen, are they still out there? Are they in the front or the back?

MR. MILLER: – through my window." Huh?

THE DISPATCHER: Are they in the front of your house or the back of your house?

MR. MILLER: They're in the front of my house. They have three cars blocked, you can't even get out of my driveway.

THE DISPATCHER: Okay. So are you complaining about the cars or –

MR. MILLER: They're in my driveway. The lights are blaring in my damn windows and –

THE DISPATCHER: Okay. They're still in the vehicles then?

MR. MILLER: – they think it's funny. Huh?

THE DISPATCHER: Are they still in the vehicles?

MR. MILLER: Yeah, they're still in the vehicles.

THE DISPATCHER: Okay. Have they been drinking tonight?

MR. MILLER: Yeah, they're all drunk.

THE DISPATCHER: Okay. Hold on, and I'll let them know, all right. If anything changes they want you to call us back.

MR. MILLER: If anything changes?

THE DISPATCHER: If anything changes before (inaudible).

MR. MILLER: Okay.

THE DISPATCHER: Good-bye.

RP I 27-30.

The principle reason the state sought introduction of this recording into evidence was to cast the defendant in as bad a light as possible by showing that he would use profanity and call people of Hispanic origin “damn Mexicans.” In other words, the purpose of this evidence was to argue that the defendant must have been guilty because he was a crude racist and assaulting Hispanic persons is what a crude racist does. As reference to the decision in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), reveals, this type of evidence was inadmissible because its unfair prejudicial effect far outweighed its evidentiary value.

In *Pogue, supra*, the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court’s permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state’s request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: “it’s true that you have had cocaine in your

possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

*State v. Pogue*, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

As was already stated, in the case at bar the sole factual question for the jury was one of credibility between the defendant on one side and Ignacio Lopez and Jose Hernandez on the other side. The substance of the 911 call had little relevance on this issue and a great deal of unfair prejudice. Thus, there was no tactical reason for trial counsel to fail to object to the admission of this evidence as more prejudicial than probative, particularly given the fact that counsel was actively seeking to exclude the tape from evidence with a foundation objection. As a result, trial counsel's failure to object that the evidence was more prejudicial than probative fell below the standard of a reasonably prudent attorney.

In this case two further arguments support the conclusion that this failure caused prejudice and undermines confidence in the outcome of the trial. First, there was little if any physical evidence to support the factual dispute between the defendant and Ignacio Lopez and Jose Hernandez. While the investigating officer said he did not find a bullet hole in the porch, the defendant did not claim that he shot into the porch. Rather, he claimed that he shot into the ground. In addition, the officer did not claim that he found any evidence of a bullet hole anywhere in the house near the area where Ignacio and Jose claimed Ignacio was standing when the defendant discharged the pistol. Second, only 10 minutes after the jury retired for deliberation it asked to hear the 911 recording again. After the jury again

heard this recording it retired for less than an hour of deliberation before returning a verdict of guilty. These actions of the jury strongly indicate that the guilty verdict was principally based upon the content of the 911 tape.

Given these facts, counsel's failure to make a proper objection to the admission of the 911 tape not only fell below the standard of a reasonably prudent attorney, it also caused prejudice. Thus, counsel's failure denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should reverse the defendant's conviction and remand for a new trial.

**II. IF THE STATE SUBSTANTIALLY PREVAILS THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO IMPOSE APPELLANT 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 3-4, 5, 59-61, 62-63. 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 recoument 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 54-year-old offender convicted of a violent offense who will have little capacity to find gainful employment and support himself, let alone pay legal financial obligations. His original Indigency Screening Form indicated that he was unemployed and was receiving welfare, food stamps and Social Security Income. *See* CP 3-5. He

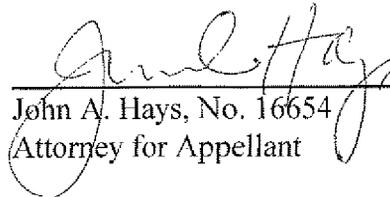
had no home and was living with his retired parents. Given the trial court's finding of indigency at the trial level and at the appellate level, it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

## CONCLUSION

The trial court's error in admitting a 911 tape into evidence without proper foundation denied the defendant a fair trial. As a result, this court should vacate the defendant's conviction and remand for a new trial. In the alternative and if the state substantially prevails, this court should exercise its discretion and refrain from imposing costs on appeal.

DATED this 1<sup>st</sup> day of February, 2017.

Respectfully submitted,



---

John A. Hays, No. 16654  
Attorney for Appellant

## **APPENDIX**

### **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.

**ER 403**  
**Exclusion of Relevant Evidence on Grounds of**  
**Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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

**STATE OF WASHINGTON,**  
**Respondent,**

**NO. 49448-5-II**

**vs.**

**AFFIRMATION  
OF SERVICE**

**STEPHEN W. MILLER,**  
**Appellant.**

---

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. Ms Katherine Svoboda  
Grays Harbor County Prosecuting Attorney  
102 West Broadway Ave., Suite 102  
Monteseno, WA 98563  
appeals@co.grays-harbor.wa.us
2. Stephen W. Miller, No.918788  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

Dated this 1<sup>st</sup> day of February, 2017, at Longview, WA.

  
\_\_\_\_\_  
Diane C. Hays

## HAYS LAW OFFICE

**February 01, 2017 - 3:57 PM**

### Transmittal Letter

Document Uploaded: 3-494485-Appellant's Brief.pdf

Case Name: State v. Stephen W. Miller

Court of Appeals Case Number: 49448-5

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: John A Hays - Email: [jahayslaw@comcast.net](mailto:jahayslaw@comcast.net)

A copy of this document has been emailed to the following addresses:

[ksvoboda@co.grays-harbor.wa.us](mailto:ksvoboda@co.grays-harbor.wa.us)