

NO. 49486-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTIAN NEWTON,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it admitted statements the defendant made during a second police interrogation held after the defendant invoked his right to silence.

2. Substantial evidence does not support the defendant's conviction for burglary because the record does not include evidence that the defendant unlawfully entered or remained in the Wal-Mart in which he was arrested.

3. Trial counsel's failure to object when the state elicited evidence that the defendant invoked his right to silence denied the defendant effective assistance of counsel.

4. Should the state prevail on appeal this court should exercise its discretion and refuse to impose costs because the defendant does not have the present or future ability to pay.

Issues Pertaining to Assignment of Error

1. Does a trial court err under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, if it admits statements a defendant makes during a second police interrogation held after that defendant invokes his or her right to silence during a first interrogation?

2. Does substantial evidence under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, support a conviction for burglary when the record does not include evidence that the defendant unlawfully entered or remained in any building?

3. Does a trial counsel's failure to object when the state elicits evidence that a defendant invoked his or her right to silence deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when that failure falls below the standard of a reasonable prudent attorney and causes prejudice?

4. If the state prevails on appeal should costs be imposed when a defendant has neither the present nor future ability to pay?

STATEMENT OF THE CASE

Factual History

On November 3, 2015, Abigayle Frias was working at the Aberdeen Wal-Mart in Asset Protection when she saw the defendant and a second male enter the store. RP 41-43, 47¹. Although she did not recognize the defendant she did recognize his companion as a person who had previously been trespassed from all Wal-Mart facilities. RP 47-48. Once she saw the pair she had another security employee call the police while she walked out to the sales floor to do surveillance. RP 51-53. Initially Ms Frias saw the defendant pick up two items in the electronics department and carry them over to mens wear. RP 53-54. Both of the items he carried were encased in clear plastic security boxes that will set off an alarm if taken through one of the exit doors. RP 51-53, 83-84.

Once in mens wear the defendant tried on a coat, replaced it on its

¹The record on appeal includes three volumes of verbatim reports. Court Reporter Brenda Johnston prepared the first and it covers the CrR 3.5 hearing held on 12/11/15, and the majority of the trial held on 12/15/15 and 12/16/16. It is continuously numbered and is referred to herein as "RP [page #]." Court Reporter Kandi Clark prepared the second and it covers a small portion of the trial on 12/15/15. It begins with a new page 1. It is referred to herein as "RP-KC [page #]." Court Report Janice Teagarder prepared the third volume and it covers the sentencing hearing held on 2/19/16. It also begins with a new page 1. It is referred to herein as "RP-JT [page #]."

hanger, and then picked up a pair of socks. RP 51-56. At that point Ms Frias lost sight of the defendant for a few seconds. RP 53-54. When she saw him again he was carrying the two items from electronics and the socks in a reusable Wal-Mart bag he had been carrying. *Id.* She then followed him around, eventually following him to the grocery part of the store where he walked past the cash registers toward the doors leading outside. RP 55-56. At that point there are two doors leading out to a breeze way, and then two doors that lead outside. *Id.*; Exhibit No. 1.

As the defendant walked toward the doors, Corporal Timmons and Officer Caputo from the Aberdeen Police Department saw the defendant, saw Ms Frias gesturing toward him, and quickly walked up behind him. RP 56-56, 90-92. They had entered via another door. *Id.* Upon seeing the defendant Officer Caputo walked quickly up behind him before the defendant exited the store and grabbed his arm. *Id.*; Exhibit No. 1. The defendant responded by pulling his arm away from Officer Caputo's grasp, dropping his bag, and running out the other door with Officer Caputo in pursuit. *Id.* Once the defendant got out the first set of doors Corporal Timmons tackled him to the ground, and he and Officer Caputo were able to get the defendant into handcuffs after a brief struggle. *Id.* Ms Frias then retrieved the dropped bag, which still contained the two electronic items in their security boxes and the one pair of socks. RP 56-57. She later retrieved a trespass notice from the

computer that she claimed precluded the defendant from coming into any Wal-Mart store. RP 56-63, 67. She also retrieved a security video of the incident. RP 56-63, 67.

After the officers subdued the defendant Officer Caputo took him to jail for processing. RP 94-95. At 8:59 that evening, Corporal Timmons went over to the jail and took the defendant into an interview room to interrogate him. RP 9-10. Initially he read the defendant his *Miranda* rights from a card and the defendant acknowledged that he understood those rights. RP 94-95. When asked if he wanted to make a statement the defendant invoked his right to silence. *Id.* At that point Corporal Timmons had the defendant taken back to his cell. *Id.*

At about 9:45 that same evening, Aberdeen Sergeant Lampky went into the jail to interview the defendant, ostensibly to ask him about the two officers' use of force during his arrest. RP 16, 98-100. Initially he reminded the defendant of his *Miranda* rights, told him that he wanted to talk about the two officers' use of force during the arrest, and walked the defendant toward a BAC interview room. RP 100-103. According to Sergeant Lampky, while they were on their way to the interview room the defendant admitted that he was guilty of trying to steal items from Wal-Mart. *Id.* By contrast, according to the defendant, when Sergeant Lampky asked him if he had anything to say, he responded with "[w]hat do you want me to do, tell you that I stole and that

I am guilty?" RP 23-25.

Procedural History

By information filed November 5, 2015, the Grays Harbor County Prosecutor charged the defendant Christian Newton with one count of second degree burglary. CP 1-2. Prior to trial the court called the case for a hearing under CrR 3.5, during which Corporal Timmons, Sergeant Lampky and the defendant were called as witnesses. RP 2-11, 12-21, 23-25. They testified to the facts contained in the preceding factual history. *See* Factual History. At the end of the hearing the court ruled that the defendant's statements to Sergeant were admissible into evidence in the state's case-in-chief. RP 37-40. The trial court later entered the following Findings of Fact and Conclusions of Law on that hearing.

UNDISPUTED FACTS

1. On or about November 3, 2015, at approximately 1908 hours, Corporal Timmons and Officer Caranto of the Aberdeen Police Department were dispatched to Walmart for a report of two male shoplifters

2. Upon arrival, the officers observed the described suspects and made contact with Christian Newton, hereinafter identified as the Defendant, and Matthew Perron at the exit doors of the store.

3. The officers used force in order to gain control of the Defendant during the struggle to arrest him. The Defendant was eventually handcuffed and placed under arrest.

4. The Defendant was transported to the Aberdeen Police Department. Corporal Timmons later contacted the Defendant at the

Aberdeen jail and read the Defendant his *Miranda* rights.

5. The Defendant acknowledged that he understood his rights, both verbally and by signing an Advisement of Rights form. The Defendant told Corporal Timmons that he did not want to talk. The Defendant did not request an attorney.

6. Sergeant Lampky later contacted the Defendant related to the Use of Force Interview. Sergeant Lampky reminded the Defendant that he had previously been advised of his rights and that he had declined to be interviewed by Corporal Timmons.

7. Sergeant Lampky advised the Defendant that he was there to interview him about the circumstances of his arrest related to the force used by the officer to detain him. The Defendant stated that he understood.

8. Sergeant Lampky advised the Defendant that he could not make him any offers, that the Defendant knew how the system worked, and that any leniency or alterations to the charges would be at the discretion of his attorney and the courts.

9. The defendant then advised that he did not wish to make a statement other than to say he had been kneed in the balls by the "Asian guy."

10. Sergeant Lampky asked the Defendant questions related to his injuries and about the Defendant allegedly grabbing Corporal Timmons near his holster during his arrest. The Defendant stated that his upper back and balls hurt and denied trying to grab anything, stating that he had only been trying to stop himself from falling during his arrest.

DISPUTED FACTS

1. It was disputed whether or not Mr. Newton [was] interrogated by Sergeant Lampky.

2. It was disputed that before Sergeant Lampky asked him any questions, the Defendant stated that he was guilty and that he did steal from Walmart. It was further disputed that the Defendant also asked

Sergeant Lampky if the interview would help him in any way with the charges.

Based upon the foregoing findings of fact, the court enters the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter herein.

2. The Defendant was read his *Miranda* rights by Corporal Timmons prior to any attempt to question him.

3. The Defendant invoked his right to silen[ce] with regard to speaking to Corporal Timmons.

4. An invocation of rights, including the right to remain silent, does not restrict the officer from recontacting a defendant. Sergeant Lampky's contact with the Defendant for a Use of Force Interview was not a violation fo the Defendant's rights.

5. It was Sergeant Lampky's intention to conduct a Use of Force Interview.

6. Sergeant Lampky did not conduct an interrogation.

7. The Defendant's statement to Sergeant Lampky that he was guilty and that he stole from Walmart and his inquiry as to whether the interview would help the Defendant in any way with the charges were made and not the result of an interrogation by Sergeant Lampky.

8. The defendant's statements to Sergeant Lampky are admissible.

CP 43-46.

This case later came on for trial with the state calling Abigayle Frias, Corporal Timmons and Sergeant Lampky as its only witnesses. RP 41-87,

88,97, 97-104. They testified to the facts set out in the preceding factual history. *See* Factual History, *supra*. In addition, during Ms Frias' testimony the state played the Wal-Mart security video of the incident for the jury. RP 70-80. The defense did not put on any witnesses. RP 110. In addition, during her testimony Ms Frias identified Exhibit No. 2 as a "trespass notice" issued on March 23, 3011, forbidding a person by the name of Christian A. Newton from entering any Wal-Mart property. RP 63. It purportedly had "Christian Newton's" signature on it. *See* Exhibit 2. However, Ms Frias did not claim that she had been present when it was issued and she did not claim that she could identify the defendant as the person named in the exhibit. RP 41-87. In addition, she explained that when Wal-Mart issues these notices they normally don't give copies of the documents to the person named in the notice. RP 47. Her testimony on this point was as follows:

If they ask for a copy we give them a copy, but most of the time we just have them sign, unless they are handcuffed.

RP 47.

When the state moved to admit this exhibit the defense objected on the basis of hearsay and relevance. RP 63. The court overruled these objections and admitted the exhibit into evidence. *Id.*

Following the presentation of evidence in this case the court instructed the jury without objection, and the parties presented their closing

arguments. RP-KC 4-14. The jury then retired for deliberation, eventually returning a verdict of guilty. RP-KC 14-31. The court later sentenced the defendant to a prison-based DOSA program. CP 94-105; RP-JT 1-17. The defendant then filed timely notice of appeal. CP 106.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ADMITTED STATEMENTS THE DEFENDANT MADE DURING A SECOND POLICE INTERROGATION HELD AFTER THE DEFENDANT INVOKED HIS RIGHT TO SILENCE.

The Fifth Amendment to the United States Constitution provides that no person “shall be compelled in any criminal case to be a witness against himself.” Similarly, Article 1, § 9 of the Washington Constitution, states that “[n]o person shall be compelled in any criminal case to give evidence against himself.” The protection of Washington Constitution, Article 1, § 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

In order to effectuate these rights, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant’s “custodial statements” may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: “ (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that

the police properly inform the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, *supra*. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of his or her rights under *Miranda* is "custodial interrogations." Just what the words "custodial" and "interrogation" mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). Generally speaking, an interrogation is "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Once an accused asserts his or her right to remain silent and right to counsel, all interrogation must cease until an attorney is present "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987). At this point, the right to silence and counsel must be "scrupulously

honored.” *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975); *State v. Grisby*, 97 Wn.2d 493, 504, 647 P.2d 6 (1982).

In order to implement the requirements the Supreme Court created in *Miranda*, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of a defendant’s post-arrest statements given in response to police interrogation. This procedure is found in CrR 3.5. Part (c) of this rule states:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5(c).

In the case at bar the trial court entered written Findings of Fact and Conclusions of Law as was required under the rule. As these findings indicate, there were a number of facts surrounding the defendant’s second alleged statement to the police that were not at issue. At the CrR 3.5 hearing the state and Officer Lampky admitted that the defendant was in custody at the time Sergeant Lampky had him pulled out of his cell for their conversation. In addition, the state and Corporal Timmons admitted that at 8:49 pm either just before or just after the booking process Corporal Timmons took the defendant into a room in the jail and read the defendant his *Miranda* rights, to which the defendant responded by immediately invoking

his right to silence. Finally, the state and Sergeant Lampky admitted that at 9:45 that same evening, just 45 minutes after the defendant had invoked his right to silence, Sergeant Lampky had the defendant taken out of his cell, during which process Sergeant Lampky reminded the defendant that Corporal Timmons had read him his rights, and that Sergeant Lampky then told the defendant he wanted to talk to him about the circumstances around the officers taking him into custody.

In the Memorandum of Authorities addressing the issues in the CrR 3.5 hearing the state cited to the decision in *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987), for the proposition that “[c]ourts have further recognized that the asking of routine questions during the booking process does not generally violate the prohibition found in *Miranda* and *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).” See Memorandum of Authorities at CP 15. The state then notes that “[a]n exception for routine booking procedures arises because the questions asked rarely elicit an incriminating response.” *Id.* However, the state cited to no authority to support the proposition that 45 minutes after a defendant unequivocally invokes the right to silence a police officer may then question that defendant about the facts surrounding his arrest when that arrest was concurrent with the defendant committing the alleged offense. In fact, a review of the decision *Wheeler* indicates that no such authority exists

In *Wheeler, supra*, the defendant was arrested on a burglary charge and booked into jail. The next day one of the investigating officers approached the defendant in jail, read the defendant his *Miranda* warnings, and asked if the defendant would make a statement. The defendant refused and stated that he was exercising his right to silence. The officer then asked the defendant a number of questions from a Personal Information Form, which the officer stated the court would need for arraignment. While asking those questions the officer asked the defendant if he was acquainted with a co-defendant also arrested for the same offense. The state later used the defendant's answer as evidence against him at trial.

Following conviction the defendant appealed, arguing in part that the investigating officer had violated the defendant's right to silence when he asked him the questions on the Personal Information Form after the defendant exercised his right to silence. In addressing this argument, the Washington Supreme Court noted that general questions at the jail unrelated to the defendant's alleged crime are allowed in spite of a defendant's exercise of his or her right to silence. However, the court also noted the potential for abuse of this exception. The court stated:

The limited exception to *Miranda* allowing background, biographical questions necessary to complete booking does not encompass all questions asked during the booking process. As the court stated in *United States v. Booth, supra* at 1238:

[W]e recognize the potential for abuse by law enforcement officers who might, under the guise of seeking “objective” or “neutral” information, deliberately elicit an incriminating statement from a suspect.

In the present case, Wheeler was twice advised of his *Miranda* rights, acknowledged he understood them, and twice refused to give a statement. Detective Hill then proceeded to fill out a “Personal Investigation Report”, and in the course of a series of descriptive and biographical questions asked the question contested here.

State v. Wheeler, 108 Wn.2d at 238-239. (some citations omitted).

The court then went on to note that the question about the defendant’s acquaintance with the co-defendant was not a “background” or “biographical” fact necessary to the booking process and thereby violated the defendant’s exercise of his right to silence. The court noted:

The questions contained in the Personal Investigation Report are the kind of routine questions generally permitted. The question asked as to whether defendant knew Tony Smith, however, was not a routine question in the booking process. Detective Hill conceded the question was not necessary to fill out the report. The implication to Wheeler, however, could well have been the opposite, since it was asked along with the other questions. Wheeler again indicated his continuing refusal to make a statement after Detective Hill completed the report questioning. We find the State has not sustained its burden to prove the defendant’s right to silence was scrupulously honored, and he voluntarily waived a known right not to answer the question being contested.

State v. Wheeler, 108 Wn.2d at 239.

Similarly, in the case at bar, Sergeant Lampky’s statement to the defendant that he needed to ask the defendant questions about his arrest and the amount of force used were not routine “background” or “biographical”

facts necessary to the booking process. Rather, their effect was to do precisely what they did: induce the defendant to make a statement about his alleged offense in spite of his previous exercise of his right to silence.

In making this argument the defense does not claim that every request for comments about the facts surrounding the use of force at arrest would necessarily be precluded following a defendant's exercise of the right to silence. For example, were an arrest remote in time to the alleged crime, and had the defendant actually made a complaint against one of the arresting officers concerning the use of force, and had the investigating officer warned the defendant to refrain from talking about the alleged offense, then the state might be able to "sustain[] its burden to prove the defendant's right to silence was scrupulously honored, and he voluntarily waived a known right not to answer the question being contested." *State v. Wheeler*, 108 Wn.2d at 239.

The problem with the court's ruling in the case at bar is that none of these facts attenuating the interrogation from the alleged crime existed. First, in this case the officer's actions physically restraining the defendant were contemporaneous with the offense the defendant allegedly committed. In fact, according to the state's theory of the case, the defendant was in the very act of committing the crime when the officers physically subdued him. Second, Sergeant Lampky began his interrogation of the defendant less than one hour after the defendant unequivocally exercised his right to silence.

Third, although Sergeant Lampky claimed that he was only following a “departmental policy” concerning use of force, this policy has a high “potential for abuse by law enforcement officers who might, under the guise of seeking ‘objective’ or ‘neutral’ information, deliberately elicit an incriminating statement from a suspect.” *State v. Wheeler*, 108 Wn.2d at 238-239. Finally, under the facts of this case, Sergeant Lampky was directly asking the defendant to comment about two other crimes, one of which the defendant undoubtedly committed and one that he possibly committed. The crime he did commit, although the state decided not to charge it, was resisting arrest. The crime he possibly committed was either second or third degree assault for possibly grabbing for the officers’s firearm during the arrest.

Under these facts, this court should find, just as did the court in *Wheeler*, that “the State has not sustained its burden to prove the defendant’s right to silence was scrupulously honored, and he voluntarily waived a known right not to answer the question being contested.” In addition, this court should also find that this error was not harmless beyond a reasonable doubt. As was stated in Argument III of this brief, in this case the defense argued that the defendant’s intent to steal had not been proven beyond a reasonable doubt given the fact that the defendant had tried to walk out of the store with items that would immediately sound an alarm. Given this fact, the defense argued that the defendant might well had acted inadvertently and not with

criminal intent. The court's decision to allow the state to present Sergeant Lampkey's claim that the defendant confessed to the intent to steal effectively eliminated this claimed defense. Thus, the admission of the defendant's statement was not harmless beyond a reasonable doubt. As a result this court should reverse the defendant's conviction and remand for a new trial.

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR BURGLARY BECAUSE THE RECORD DOES NOT INCLUDE EVIDENCE THAT THE DEFENDANT UNLAWFULLY ENTERED OR REMAINED IN THE WAL-MART IN WHICH HE WAS ARRESTED.

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.

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)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). 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 with second degree burglary under RCW 9A.52.030, which states as follows:

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

(2) Burglary in the second degree is a class B felony.

RCW 9A.52.030.

In order to sustain a verdict under this statute the record must contain

evidence that (1) that the defendant unlawfully entered or remained in a building, and (2) that the defendant had the intent to commit a crime “therein.” In the case at bar, substantial evidence supports the second element of the crime. Although the defense argued that the defendant was inadvertently walking out of the store without paying for the merchandise in his possession, the fact that he put the merchandise in a bag, went to walk out of the store, ran from the police when confronted and then resisted their efforts to take him into custody all constitutes evidence from which the jury could find the intent to steal. However, as the following explains, the evidence presented in this case, even seen in the light most favorable to the state, does not constitute substantial evidence on the first essential element of unlawfully entering or remaining.

In the case at bar the state called Abigayle Frias as its first witness during trial. Ms Frias testified that she works in “asset protection” at the Wal-Mart where the defendant was arrested. During her testimony she identified Exhibit No. 2 as a “trespass notice” issued on March 23, 2011, forbidding a person by the name of Christian A. Newton from entering any Wal-Mart property. It purportedly had “Christian Newton’s” signature on it. However, Ms Frias had not been present when it was issued and she was not able to identify the defendant as the person named in the exhibit. In addition, she explained that when Wal-Mart issues these notices they normally don’t

give copies of the documents to the person named in the notice. Her testimony on this point was as follows:

If they ask for a copy we give them a copy, but most of the time we just have them sign, unless they are handcuffed.

RP 47.

When the state moved to admit this exhibit the defense objected on the basis of hearsay and relevance. RP 63. The court overruled these objections and admitted the exhibit into evidence. In fact, this document was the only evidence presented that the defendant unlawfully entered or remained in the Wal-Mart store. As a review of the decision in *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), indicates, the trial court erred when it admitted this exhibit into evidence because the state did not present any evidence that the defendant was the person named in the trespass notice. Absent this connection to the defendant the evidence was not relevant.

In *State v. Hunter, supra*, the court addressed the issue of what constitutes substantial evidence on this issue of identity. In that case, the state charged the defendant Dallas E. Hunter with attempted escape, alleging that he had tried to leave the Cowlitz County Jail where he was being incarcerated pursuant to a felony conviction. In order to prove that the defendant was being held “pursuant to a felony conviction,” as was required

under the statute, the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named “Dallas E. Hunter” as the defendant. Following conviction, the defendant appealed, arguing in part that the trial court erred when it admitted the judgments because the state failed to present evidence that he was the person identified therein.

In addressing this argument, the court first noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant’s name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction. The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Harkness*, 1 Wn.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wn.App. 11, 573 P.2d 1343 (1978). See *State v. Clark*, 18 Wn.App. 831, 832 n.1, 572 P.2d 734 (1977).

State v. Hunter, 29 Wn.App at 221.

In *Hunter*, the state had also presented the evidence of a Probation Officer from the Department of Corrections who had revoked the defendant from his work release program, had personal knowledge of the fact of the defendant’s felony conviction, and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County Felony

Convictions. Based upon this “independent” evidence to prove that the defendant was the person named in the judgments, the Court of Appeals found no error in admitting the documents. The court stated:

We hold that [the Probation Officer’s] testimony was sufficient independent evidence to establish a prima facie case that defendant was the same Dallas E. Hunter as named in the certified judgments and sentences. After the State introduced this evidence, the burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents. *State v. Brezillac, supra.*

State v. Hunter, 29 Wn.App. At 221-222.

By contrast, in the case at bar, the asset protection employee the state called as a witness had no personal knowledge that the defendant was the person whose signature appeared on the trespass notice. She had not been present when it was signed. In fact, according to her testimony there was a strong likelihood that the person named in the notice had not even been served with a copy. Thus, in the case at bar, the trial court erred when it admitted Exhibit 2 into evidence because there was no evidence of its relevance. In addition, absent the admission of this exhibit, or even with the admission of this exhibit, there was no evidence that the defendant had unlawfully entered or remained at Wal-Mart. As a result, this court should vacate the defendant’s conviction for burglary.

III. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED EVIDENCE THAT THE DEFENDANT INVOKED HIS RIGHT TO SILENCE 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 when the state twice called upon a police officer to comment upon the defendant's exercise of his right to silence. As was stated in a previous argument in this brief, both the Fifth Amendment as well as Article 1, § 9 of the Washington Constitution preclude compelling evidence from a defendant in a criminal case. *State v. Earls, Id.* The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or making closing arguments inviting the jury to infer guilt from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979).

In the case at bar the state specifically elicited evidence from Corporal Timmons that the defendant refused to speak about the circumstances surrounding his arrest. This occurred during the following exchange on

direct examination:

Q. Who did the transport, was that you or Officer Caranto?

A. Officer Caranto.

Q. Was there ever a point that you then recontacted Mr. Newton?

A. Right. I returned to the jail and contacted him in the jail.

Q. And, why did you recontact him, or what did you do once you did?

A. Once I contacted him read him his rights and asked if he wished to talk to me?

Q. And what was his response?

A. He chose not to talk to me.

Q. Did it appear that he understood his rights and acknowledged that [he] understood his rights?

A. Right. He acknowledged and signed the form indicating that he understood.

. . . .

Q. Okay and once Mr. Newton indicated he didn't want to speak with you, what happened next?

A. At that point, I ended the interview and he was placed back into his cell.

Q. And did that essentially end your contact in this case?

A. Right.

MS. JANY: Nothing further, Your Honor.

RP 94-95.

There was no conceivable tactical reason for counsel to fail to object to this evidence, particularly in light of the defense presented. During closing counsel argued that the defendant was inadvertently walking out of the doors without paying for the items he had placed in the bag. In support of this argument the defense elicited the fact that two of the items were in clear plastic security boxes that would set off alarms once the defendant went out the doors. The defense reasoned that this fact supported the conclusion that the defendant had acted without intent to steal. This claim was seriously undercut by the fact that the defendant refused to speak to the police. The jury undoubtedly reasoned that had the defendant really acted inadvertently then he would have been at least willing, if not eager, to speak to the police officer and explain what had happened.

Given this defense, counsel's failure to object when the state twice elicited the fact that the defendant had exercised his right to silence not only fell below the standard of a reasonable prudent attorney, but it also caused prejudice sufficient to undermine confidence in the jury's verdict. This latter argument is bolstered by the fact that had this evidence not been elicited, the jury might well have concluded that there was a reasonable doubt on the issue of criminal intent given the fact that the defendant had not attempted to take the plastic security boxes off the items in his bag. Thus, counsel's failure to

object denied the defendant effective assistance of counsel under United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22.

IV. SHOULD THE STATE PREVAIL THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO IMPOSE COSTS BECAUSE THE DEFENDANT DOES NOT HAVE THE PRESENT OR FUTURE ABILITY TO PAY.

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 534-536. In the same matter this Court should exercise its discretion and disallow 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.

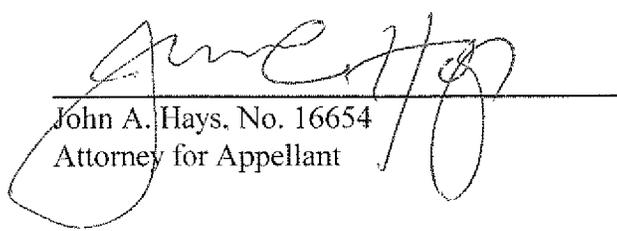
Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. In fact, the defendant is a 33-year-old drug addict who is currently serving a prison based DOSA sentence under which he will be in custody for 29 months, and then be under supervision and a requirement of out-patient treatment for 29 more months. In addition, the defendant’s affirmation given in support of her Motion for Order of Indigency reveals that he has no money or assets of any kind, and the only assistance he receives is food stamps. CP 107-110. Given these facts 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

Substantial evidence does not support the defendant's conviction for burglary. As a result this court should vacate the conviction and remand with instructions to dismiss. In the alternative, this court should vacate the defendant's conviction and remand for a new trial based upon the trial court's erroneous admission of the defendant's statement to the police and based upon trial counsel's failure to object when the state elicited evidence that the defendant had exercised his right to silence. Finally, should the state prevail in this appeal, this court should exercise its discretion and refrain from imposing any costs on appeal.

DATED this 20th day of March, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

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, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**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,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**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.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

NO. 49486-8-II

vs.

**AFFIRMATION
OF SERVICE**

**CHRISTIAN NEWTON,
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:

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Dated this 20th day of March, 2016, at Longview, WA.



Donna Baker

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