

NO. 49505-8-II

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

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA WEYTHMAN-BAKER,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it allowed the state over defense objection to introduce irrelevant, unfairly prejudicial evidence concerning the defendant's prior criminal conduct in the form of testimony that the defendant had an outstanding warrant when the police arrested him.

2. The trial court erred when it imposed legal financial obligations upon an indigent defendant who does not now and in the future will not have the ability to pay.

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

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows the state over defense objection to introduce irrelevant, unfairly prejudicial evidence concerning the defendant's prior criminal conduct in the form of testimony that the defendant had an outstanding warrant when the police arrested him?

2. Does a trial court err if it imposes discretionary legal financial obligations upon an indigent defendant who does not now and in the future will not have the ability to pay?

3. 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 August 15, 2015, Mason county residents Christopher Kendall and his wife returned home following their honeymoon to find that their house had been burglarized. RP 114. Items taken included a car, a compound bow and arrows, a television, a credit card, a mountain bike, a motorcycle helmet, a PlayStation gaming console, a laptop computer, shoes, other miscellaneous items, a gun safe, and seven firearms: (1) a .22 caliber Ruger rifle, (2) a Stoeger Condor 12 gauge shotgun (3) an AR-15 rifle, (4) a 7mm Remington Rifle, (5) a Mossberg 12 gauge shotgun, (6) a Smith and Wesson 9mm pistol, and (7) a Springfield .45 caliber semi-automatic pistol. RP 114-132. Having found the house burglarized, Mr. Kendall and his wife spent the night at Mr. Kendall's mother's house. RP 114. Upon returning on the 16th they found that someone had entered that previous evening and taken more property. RP 109.

On August 16th a number of Mason County deputies went out to the houses at 150 and 170 East Budd Drive in Shelton as one of them remembered seeing a gun safe a few days previous in the garage at 150 East Budd Drive that might have been the one taken in the burglary. RP 64. At the time the deputies went to the residence they knew that a bank had foreclosed on the two houses and that no one had permission to occupy them.

RP 66. In fact, the parents of a person by the name of Benjamin Betsch had previously owned the houses prior to foreclosure. RP 141. As of August 16th Mr. Betsch had been staying in the residence at 170 East Budd Drive for awhile without permission from the bank and had occasionally let friends stay with him. RP 142. Mr. Betsch occupied the master bedroom with its adjoining bathroom and walk-in closet. RP 142-143. A hatchway door in the floor of the walk-in closet provided access to the area under the house. RP 33, 142, 166. According to Mr. Betsch, around that time he was letting his friend James Gitchel stay in one bedroom and was letting the defendant Joshua Weythman-Baker stay in the other bedroom. RP 142-143.

Once the deputies arrived at the houses they walked up to the garage door at 170 East Budd Drive and heard two male voices within. RP 70, 76. They then ordered the people to exit. RP 77-79. Only one person came out; his name was James Gitchel. RP 76. At this point the officers used a dog to search both residences for other persons and found the defendant hiding in a closet of one of the bedrooms in 170 East Budd Drive. RP 77-79. In fact, by the time the K-9 officer got into the bedroom he found his dog had pulled the defendant half way out of the closet. *Id.* After the sweep for other persons the deputies secured a warrant and searched both homes. RP 28-29. During the subsequent search the officers found Mr. Betsch and determined that he had been hiding under the house, having accessed that area through the hatch

in the walk-in closet in the master bedroom where he resided. RP 39-68.

In addition, during the search the officers found all of the items stolen from Mr. Kendall's house. RP 29-44. His vehicle and his gun safe were in the garage at 150 East Budd Drive. RP 16, 157. His .45 pistol and some of the long guns were in the master bedroom that Mr. Betsch occupied at 170 East Budd Drive, along with the stolen television and other stolen items. RP 34. His compound bow and arrows were underneath the house where Mr. Betsch had hidden them. RP 49. The .45 pistol was in a backpack in the closet where the defendant had been hiding, along with a jacket with the keys to Mr. Kendall's stolen car and some of the stolen rifles. RP 40-41. The backpack and jacket had been stolen in the burglary. *Id.* The deputies also found the remaining firearms and stolen property at other locations throughout the house at 170 East Budd Drive. RP 51-62. Following the search the deputies arrested the defendant on an outstanding DOC warrant. RP 88. At the time the defendant was a convicted felon. CP 121.

The deputies also arrested Mr. Betsch, who later provided a statement claiming that the defendant had committed the initial burglary at Mr. Kendall's house alone and had stolen the vehicle, the gun safe, the seven firearms, and the majority of the property found at the East Budd residences. RP 137-170. He further claimed that the defendant had given him the .9mm pistol to sell, and that the defendant's plan was to sell all of the firearms. *Id.*

According to Mr. Betsch, he did go with the defendant to burglarize Mr. Kendall's house on the night of the 15th, but they did not take much property. RP 152-153.

Procedural History

By information filed August 19, 2015, and later amended, the Mason County prosecutor charged the defendant Joshua Weythman-Baker with residential burglary, seven counts of possession of a stolen firearm, first degree unlawful possession of a firearm, possession of a stolen motor vehicle, second degree possession of stolen property, second degree trafficking in stolen property, and bail jumping. CP 196-198, 138-143. The last charge arose out of the fact that the defendant had failed to appear at his pretrial after being released on bail. Exhibit 59A., 60, 61, 62.

This case later came on for trial with the state calling Christopher Kendall and Benjamin Betsch, as well as four of the deputies who investigated the case and a deputy Superior Court clerk as its witnesses. RP 27, 51, 63, 74, 102, 108, 138. They testified to the facts included in the preceding factual history. *See* Factual History. In addition, on re-direct examination of Deputy Justin Cotte, the state attempted to elicit the fact that after helping on the execution of the search warrant he had arrested the defendant on an outstanding DOC warrant. RP 83. The defense objected that this evidence was irrelevant. *Id.* This initial exchange went as follows:

Q. Why'd you arrest Mr. Baker?

A. Mr. Baker had an outstanding –

MR. JONES: Objection, your Honor. Relevance.

THE COURT: Let's take a side bar.

RP 83.

During the side bar the defense also objected on the basis that even if this evidence were marginally relevant, the unfair prejudice to the defendant outweighed whatever relevance the evidence had. RP 83-88.

Defense counsel argued:

So I'm not sure how probative the existence of this warrant is. It's highly prejudicial, and it's even more prejudicial when we're talking about a case where bail jumping is at issue because that's directly on point to the issue of bail jumping. And so the State's looking to – to get in evidence of a prior warrant that isn't terribly useful to its case, other than it has an unduly prejudicial effect on the jury.

Another question is, is it substantially outweighed by the prejudice. And I don't know how the probative value of this warrant isn't substantially outweighed by the prejudicial – telling the jury in a bail jumping trial that someone had an outstanding warrant on August 16th.

RP 84-85.

After the argument the trial court overruled the objection and allowed the state to elicit the fact that the officer had arrested the defendant on an outstanding warrant. RP 87-88.

Following the close of the state's case, the defense rested without

calling any witnesses. RP 181, 200. The court then instructed the jury without objection, and the parties presented closing argument. RP 181-198, 201-222, 222-249. At that point the court excused the jury and told them to return at 9:00 am the next day to begin deliberations. RP 252. The jury did so, and eventually returned verdicts of guilty on all counts at 3:49 pm the next day after almost a full day of deliberation. RP 258.

The court later sentenced the defendant to a term within the standard range, refusing the defendant's request for a prison based DOSA sentence. RP 263-267, 285-288. The court also imposed discretionary legal-financial obligations, including court costs and attorney's fees. CP 34. Prior to imposing these fees the court held the following colloquy with the defendant:

MR. WEYTHMAN-BAKER: Just that like Mr. Jones said, I never have denied my addiction. I've been addicted to methamphetamines more of my life than I haven't. I started smoking when I was 11 years old. I never have had any kind of treatment before. And I probably wouldn't have done a lot of the things that I've done in my life if I wouldn't have been addicted to meth. And you know, just I learned my lesson, you know. And that's all I have to say.

THE COURT: Your attorney indicated that there's nothing outside of being incarcerated that would preclude you from being able to be employed. Is that correct?

MR. WEYTHMAN-BAKER: Yes. Yeah, yeah – no, I mean I will be employed.

Following imposition of sentence the defendant filed timely notice of appeal. CP 83.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT ALLOWED THE STATE OVER DEFENSE OBJECTION TO INTRODUCE IRRELEVANT, UNFAIRLY PREJUDICIAL EVIDENCE CONCERNING THE DEFENDANT'S PRIOR CRIMINAL CONDUCT.

While due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from irrelevant, inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). They also guarantee a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999).

Under ER 401, “relevance” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In other words, for evidence to be relevant, there must be a “logical nexus” between the evidence and the fact to be established. *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a “tendency” to prove, qualify, or disprove an issue for it to be relevant. *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980).

Under ER 402, irrelevant evidence is not admissible. In addition,

under ER 403, 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 sought to introduce the fact that one of the officers who found the defendant hiding in a closet and who helped execute the search warrant arrested the defendant on an outstanding warrant. The court admitted this evidence over defense objection that it was irrelevant and prejudicial. In so ruling the trial court stated: "There's no question that this is relevant evidence because it gives a basis for the arrest of Mr. Weythman-Baker." In so holding the trial court erred because "the basis for the arrest" of the defendant was not "any fact that is of consequence to the determination of the action." Thus, by the very definition of ER 402, this evidence was not relevant.

Put another way, one could well ask the question as to what "fact that [was] of consequence to the determination" of this case was made more or less likely by the evidence that the officer arrested the defendant on an outstanding warrant? The facts of consequence in this case were whether or

not the defendant had committed a burglary, whether or not he knowingly possessed stolen firearms, whether or not he was a convicted felon precluded from possessing firearms, whether or not he knowingly possessed other stolen property, whether or not he intended to traffic in that stolen property, and whether or not he failed to appear at his pretrial. The only way the evidence of his arrest, and that on an outstanding warrant, is relevant is to support an argument that people with outstanding warrants as a group are more likely to have committed crimes such as those with which the defendant was charged than are people who do not have outstanding warrants. However, this is mere propensity evidence

It is fundamental under our adversarial system of criminal justice that “propensity” evidence, many times offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts

that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), 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. In the same matter in the case at bar, the erroneous admission of the evidence that the defendant had an outstanding warrant and that the officer arrested him on

that warrant also creates a “reasonable probability” that the error affected the out come of the trial. The following addresses this argument.

In the case at bar, the only evidence that tied the defendant to the burglary and the illegal possession of all but one of the firearms was the self-interested testimony of Benjamin Betsch. Absent his claims, there was no evidence that the defendant committed the burglary or that he possessed any firearm other than the one found in the closet where he was hiding. In addition, absent Mr. Betsch’s claims, there was no evidence presented that the defendant had even stayed in the bedroom where the police dog found him hiding. In fact, the evidence adduced at trial pointed more strongly toward Mr. Betsch as the person who committed the burglary and stole the firearms, the car and all of the other property.

First, one of the pistols and a number long guns were found in the master bedroom where Mr. Betsch was staying. Second, the compound bow and arrows were found under the house where Mr. Betsch had hidden them, having accessed that area through the walk-in closet in the master bedroom. Third, the house in which everyone was found had belonged to Mr. Betsch’s parents and he had been staying in the house for a period of time. By his own admission, the defendant was in the house as a guest. Thus, there is a far greater connection between Mr. Betsch and the house and the remaining stolen property than there was between the defendant and that stolen property.

Fourth, in this case the state did not present any evidence other than Mr. Betsch's testimony connecting the defendant with either the burglary or the possession of the property. Apparently the police did not try to physically connect any person with the stolen property via fingerprints or DNA evidence.

As the following explains, absent the suspect testimony of Benjamin Betsch there was little evidence connecting the defendant to any of the crimes (except the bail jumping). In this type of case, the state's evidence that the defendant was arrested on an outstanding warrant loomed much larger than it normally would. It gave the jury the opportunity to discard the existence of reasonable doubt upon a belief that the defendant must be guilty because he was a criminal, a conclusion implicit in the fact that there was an outstanding warrant for his arrest. Thus, in this case, there is a "reasonable probability" that the improper evidence of the warrant and the arrest on the warrant affected the outcome of the trial. As a result, this court should vacate the defendant's conviction (absent the bail jump) and remand for a new trial.

II. THE TRIAL COURT ERRED WHEN IT IMPOSED DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS UPON AN INDIGENT DEFENDANT WHO DOES NOT NOW AND IN THE FUTURE WILL NOT HAVE THE ABILITY TO PAY.

A trial court's authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

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

RCW 10.01.160(3).

Although the court need not enter written findings and conclusions in regards to a defendant's current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations and any punishment for willful failure to pay must meet the following requirements:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayments may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into

account;

5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;

6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and

7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The imposition of costs under a scheme that does not meet these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar the trial court imposed discretionary legal financial obligations in the form of court costs and attorney fees without any consideration of the defendant's ability to pay those obligations. In fact, the only question the court asked in regards to the ability to pay involved the defendant's ability to work after release from his nine and one-half years prison sentence. The defendant's reply was "I will be employed." RP 280. There was no question about where the defendant would be employed and

what type of job he could obtain as a drug-addicted person with 14 prior felony convictions involving drugs, illegal possession of firearms, and thefts. In addition, this colloquy completely failed to address the defendant's long-standing drug addiction. Absent a review of these type of critical facts, the trial court's imposition of discretionary legal financial obligations violated RCW 10.01.160(3), as well as the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the imposition of legal-financial obligations and remand for consideration of the defendant's ability to pay.

III. THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO IMPOSE COSTS SHOULD THE STATE PREVAIL ON APPEAL 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 3-4, 199-202. 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 recouping 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 29-year-old drug addict with no education and no assets who lives off of food stamps and medicaid. CP 199. The defendant’s Indigency Screening Form given in support of his request for a court-appointed attorney at the trial level, and the defendant’s affirmation

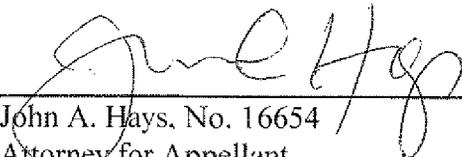
given in support of his request for an attorney on appeal, reveal that he has no money, no assets, and is \$6,000.00 in debt. CP 1-2, 199-200 Given these facts it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

This court should reverse the defendant's convictions (absent the bail jump) and remand for a new trial based upon the trial court's erroneous admission of irrelevant, prejudicial evidence that denied the defendant a fair trial. In the alternative, should the state prevail on appeal, this court should vacate the trial court's imposition of discretionary legal-financial obligations and refrain from imposing costs on appeal.

DATED this 31st 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.

**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. 49505-8-II

vs.

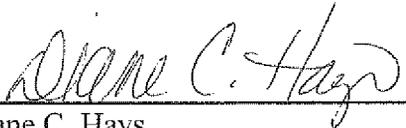
**AFFIRMATION
OF SERVICE**

**JOSHUA WEYTHMAN-BAKER,
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. Mr. Timothy Higgs
Mason County Prosecuting Attorney
P.O. Box 639
Shelton, WA 98584
timh@co.mason.wa.us
2. Joshua Weythman-Baker, No.383611
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Dated this 31st day of March, 2017, at Longview, WA.



Diane C. Hays

HAYS LAW OFFICE
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Transmittal Letter

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Court of Appeals Case Number: 49505-8

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