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Court of Appeals
Division III
State of Washington

No. 33252-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

STEPHEN WAYNE MILLER,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 14-1-00484-6

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The jury instruction did not violate double jeopardy.
2. There was no error when Ms. Miller testified how and when she met her husband.
3. There was no prosecutorial misconduct.
4. There was not a violation of the appearance of fairness doctrine.
5. The trial court did not comment on the evidence.
6. The “reasonable doubt” jury instruction was lawful.
7. Any juror misconduct was cured by the trial judge.
8. There was not cumulative error.
9. The State concedes that the combined term of confinement and community custody exceeds 60 months.
10. The State concedes that the community custody condition prohibiting the defendant from going places where minor children are known to congregate is void for vagueness.
11. The State concedes that the community custody condition prohibiting the defendant from possessing or perusing pornographic materials is void for vagueness.
12. Community custody conditions do not interfere with the defendant’s fundamental right to marriage and to parent.
13. The State concedes that the trial court did not make an individualized inquiry into the defendant’s ability to pay legal financial obligations.

II. STATEMENT OF FACTS

When S.L. (DOB: 02/22/1996) was in elementary school, her mother was addicted to methamphetamine and her father was an alcoholic.

2RP¹ at 73. When S.L. was eight years old, her parents lost custody of her, so she and her two siblings moved in with her mother's brother, Larry Esters, and his wife, Tisha. 1RP at 2-4; 2RP at 73-74. Mr. Esters worked for the Department of Corrections. 1RP at 2. Mr. Esters required the kids to do chores and follow the house rules. 1RP at 38; 2RP at 74.

When S.L. was in the eighth grade (September of 2010 to June of 2011), she turned 15 years old. 2RP at 73. During her eighth grade year, she met M.B. 2RP at 75. The defendant is M.B.'s stepfather. 1RP at 10. Toward the end of her eighth grade year, S.L. began to spend a significant amount of time at the defendant's home. 1RP at 10; 2RP 76, 85. The girls spent more time at the defendant's house because there were fewer rules and they could get away with more. 2RP at 76. The defendant and his wife would give S.L. cigarettes and alcohol. 2RP at 77, 81. S.L. began to look at the defendant as a father figure in her life. 2RP at 84-85. During this time, Mr. Esters would drop off S.L. at the defendant's house, and the defendant's family would bring her home. 1RP at 11. On some of those occasions, Mr. Esters would see the defendant drop off S.L. alone. 1RP at 12, 38.

¹ There are four volumes of the verbatim report of proceedings for jury trial referenced as follows: 1RP – January 13 & January 14 (A.M.), 2015 (Reporter McLaughlin); 2RP – January 14, 2015 (P.M.) (Reporter Lang); 3RP - January 15 & 21, 2015 (Reporter McLaughlin); 4RP – January 16 & 20, 2015 (Reporter Lang).

In the summer of 2011, the defendant began sexually assaulting 15-year-old S.L. at his home and in his car. 3RP at 123-25, 127-28. At first, the defendant requested that S.L. send him some inappropriate photos of herself. 2RP at 84-85. The behavior of the defendant soon escalated to touching and sexual intercourse. 3RP at 123-38. During some of those times, the defendant would give her money. 3RP at 138. One incident of sexual assault was in his backyard on the steps. 3RP at 124-25. S.L. described how he penetrated her vaginally. 3RP at 125. Another incident was in the defendant's basement. 3RP at 130-31. Another incident was against a bar in the defendant's house. 3RP at 136. During this incident, she saw something come out of his penis. 3RP at 136. The defendant would also touch her when he would drive her home. 3RP at 127-29. In September of 2011, S.L. stopped hanging out at the defendant's home because Ms. Miller found out that something was going on between her husband and S.L. 3RP at 133-34.

Nonetheless, the abuse continued. On October 22, 2011, the day of S.L.'s Homecoming dance, the defendant came to her house to give her money. 2RP at 4; 3RP at 136. The defendant penetrated S.L. vaginally and performed oral sex on her. 3RP at 136-38. After this incident, he gave her \$100. 3RP at 138.

Sometime after this last act of sexual abuse, Mr. Esters was talking to S.L.'s older sister and found out that S.L. was doing things he did not approve of. 1RP at 13. She was smoking cigarettes, drinking alcohol, and getting money from an unknown source. 1RP at 14. Mr. Esters confronted S.L. and she said she got the money from the defendant. 1RP at 14. Mr. Esters got mad at S.L. 1RP at 15; 3RP at 139-40. S.L. told her biological mother about it and her mother called Child Protective Services. 1RP at 16. Ultimately, Larry Esters decided it was best that S.L. move in with his ex-wife, Tisha. 1RP at 17; 3RP at 140.

While S.L. was living with her uncle's ex-wife in Richland, Washington, she continued to see the defendant. 3RP at 140. While she lived there, she was still 15 years old. 3RP at 141. J.R., S.L.'s cousin, also lived in this home. 2RP at 61-62. During that time, the defendant picked up 15-year-old S.L. and gave her money and cigarettes. 3RP at 140. This was witnessed by J.R. 2RP at 62-64.

On August 22, 2012, 16-year-old S.L. moved in with her biological father. 3RP at 141. During that time, the defendant picked her up in his work vehicle and took her back to his work so they could hang out. 3RP at 140-43. While there, the defendant took off S.L.'s clothes and laid her on his desk. 3RP at 146. He then pulled out a silver vibrator and penetrated her vagina with it. 3RP at 146-47. He also had sex with her. 3RP at 146.

S.L. said he took pictures of her, then took the SD card out of the camera and put the SD card on a shelf. 3RP at 147-48.

On Valentine's Day of 2013, S.L. was on the phone talking to her uncle. 1RP at 19. During that call, S.L. was complaining to her uncle about her father being drunk, and her stepmother and her father fighting. 1RP at 20. During that call, S.L.'s father shot himself. 1RP at 20.

After witnessing the death of her father, S.L. entered into therapy with Brandy Frisby. 1RP at 20, 39. On July 30, 2013, S.L. disclosed to Ms. Frisby what the defendant did to her. 1RP at 42. On August 1, 2013, Ms. Frisby made a mandatory report to Child Protective Services. 1RP at 42.

S.L. was interviewed by police on August 12, 2013. 1RP at 48. The police obtained search warrants for the defendant's office at the McNary Dam and the defendant's home. 1RP at 51. At the dam, they seized cameras and media storage devices and took pictures. 1RP at 72-96. At the defendant's home, they seized media storage devices and a silver "dildo." 1RP at 52-56; 2RP at 7. Officers also went to the location where the defendant lived when he sexually abused S.L. and took some outside pictures, to include the back steps. 1RP at 56, 69; 2RP at 7.

At the dam, the defendant was interviewed. 1RP at 78-85, 90-92. He immediately asked if this was about S.L. 1RP at 79. The defendant was

asked several questions about cameras. 1RP at 81-83. At the start of the conversation, he denied he had a camera and denied having any knowledge of how to transfer pictures. *Id.* Later during the search, a bag was found that contained his identification, a camera, an SD card, and an adapter/transfer cord. 1RP at 85-90. A later examination of all media storage devices produced no pictures of S.L. 1RP at 109-20.

The defendant was charged by amended information with two counts of Rape of a Child in the Third Degree and one count of Child Molestation in the Third Degree. CP 10-12. Trial commenced on January 13, 2015, through January 21, 2015, and the jury found the defendant guilty of one count of Rape of a Child in the Third Degree and one count of Child Molestation in the Third Degree. CP 41, 43; 3RP at 312.

III. ARGUMENT

A. **The jury instruction did not violate double jeopardy.**

The defendant argues that the jury was not given a “separate and distinct” jury instruction which instructs the jury that he cannot be convicted of Rape of a Child and Child Molestation based on a single act. Br. Appellant at 19. The State charged two counts of Rape of a Child in the Third Degree and one count of Child Molestation in the Third Degree. CP 10-12. At trial, the victim described numerous acts of each, to include one act of oral sex. 3RP at 125-26, 131, 137-38. The defendant now

argues that based on *State v. Land*, 172 Wn. App. 593, 295 P.3d 782 (2013), the court was required to instruct the jury that the basis of its convictions for Child Molestation and Rape could not both stem from the oral sex act. Br. Appellant at 16.

The State agrees with the defendant that the instruction should have been given but disagrees on how an appellate court should review allegations of double jeopardy on this set of facts. The proper review for allegations of double jeopardy is for the appellate court to review the entire record to establish what was done before the court. *State v. Noltie*, 116 Wn.2d 831, 848-49, 809 P.2d 190 (1991). The appellate court will consider the evidence, arguments, and instructions to determine if it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense and that each count was based on a separate act. *State v. Berg*, 147 Wn. App 923, 931, 198 P.3d 529 (2008).

In the present case, in its opening statement, the State told the jury:

You will hear that this occurred in Richland and he is also charged with child molestation in the third degree the exact same time frame he had sexual contact. Not only did he have sexual intercourse with her but there were times he would touch her genitalia with his hands, he would touch her breasts with his hands when he was dropping her off at her uncle's house after [she] was hanging out with his daughter. That she was at least 14 less than 16, not married,

and 48 months older and this occurred in the state of Washington.

RP 01/13/2015 “Opening Statement of the State,” at 4.

At trial, the victim testified to several acts of sexual intercourse and contact that occurred during the charging period. Specifically:

- (1) When describing the first time the defendant touched her. “He start kissing me and then he grabbed me and started touching me.” 3RP at 124. “Then he took my pants off and held me up against those stairs and had sex with me.” 3RP at 125. This happened at the defendant’s home in the backyard. 3RP at 124.
- (2) The child described what would happen when the defendant would drive her home. “He would drive me home and he would have me lay on the seat and he would touch me.” 3RP at 128. “He would touch my boobs. He would put his fingers inside me, stuff like that.” *Id.* “. . . in my vagina.” *Id.* He would touch her chest over and under her shirt. *Id.* He would talk to her about her body. 3RP at 128-29.
- (3) The child described another act of sexual intercourse at the defendant’s house. 3RP at 130. “Where Steve slept there was a couch and he took the pillows off the couch and like stacked them up and he made my bed over them. . . . He had sex with me.” 3RP at 131.

- (4) The child described another act of sexual intercourse at the defendant's house. 3RP at 135. "It was at the house up against the bar thing, not the cushions." 3RP at 136. "He had me stand there and he pulled down [my] pants and stood behind me and had sex with me." *Id.* She further described feeling stuff come out of his penis onto her legs and onto the floor. 3RP at 136.
- (5) The child described another act of sexual intercourse that occurred at her home. 3RP at 136. "He had sex with me." 3RP at 137. She stated he used "his penis." 3RP at 137. "He had oral sex with me. . . His mouth to my vagina." 3RP at 138. Oral sex had never happened before. RP at 138.

The child then went on to testify about a sexual act that occurred outside of the charging period in Oregon. 3RP at 144-48. During that act, the defendant used a silver vibrator on her and a silver vibrator was found in his house pursuant to a search warrant. 2RP at 7; 3RP at 146-47.

During closing argument, the State made an election to a specific act of Child Molestation in closing. At the beginning of the closing argument, the State went over the elements of the crimes charged:

February 22, 2011, to February 21st 201[2]², the defendant had sexual intercourse with [S.L.]. You're going to get that

² The transcript indicates that the State said 2015. This is a mistake and must be a typographical error as the information clearly states 2012.

definition of sexual intercourse. You heard the judge read it. Did you realize that you could have such a big definition of sexual intercourse? Well, you can. And I want you to know that it is oral, it is penetration with a penis, and it's also penetration with another body. And in this case, you heard about penetration, you heard about oral sex, and you also heard about when he placed his finger in her vagina when he was driving her around, okay, so there's three different types of ways under the law he had sexual intercourse with her.

So just think about that when you're back there deliberating. That she was at least 14, but less than 16. That's been established. That she was at least 48 months younger. You heard how old he was. And this all happened in Richland . . . as well. . . . And the child molestation is for the sexual contact, and the State's alleging that this is during when he would touch her breasts in the vehicle. Remember she testified about breasts and vagina inside the vehicle when he would drive her. Sometimes they would go park someplace. Sometimes he would just drive her home, and so that's what this charge encompasses.

4RP at 247-48.

The State submits that when reviewing the evidence presented, arguments by the parties, and the instructions to the jury, the State made a clear election to the jury regarding the Child Molestation charge.

B. There was no error when Ms. Miller testified how and when she met her husband.

The defendant contends that the State brought in Ms. Miller's extramarital affair on cross-examination and that this evidence was not properly admitted via ER 404(b). On direct, Ms. Miller testified that she has known the defendant for 15 years. 3RP at 266. She testified that she

had been married to the defendant since 2013. 3RP at 265. She testified that she has five children and three stepchildren and gave all their ages: 26, 25, 22, 18, 17, 13, 11, and 5. 3RP at 266. On cross-examination, Ms. Miller explained that she met the defendant when he was separating from his then current wife. 3RP at 282. She testified that she first moved in with him in 2007. 3RP at 283. She testified that their first child was born in 2001. 3RP at 283. She said their second child was born in 2003. 3RP at 284. She said they had a third child in 2009. 3RP at 284-85. She said that the defendant was still separating from his wife, and she was not living with the defendant during the birth of their first two children. 3RP at 285.

Ms. Miller clearly testified that the defendant was separating from his then wife during the start of their relationship. Nowhere in the record does she state they were having an affair. It is well-known that divorces take time, especially those involving children.

C. The prosecutor did not commit error in cross-examining Ms. Miller about dates.

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). There

was no misconduct in this matter, but should this court find misconduct, the defendant has not established that it was improper and prejudicial.

D. There was not a violation of the appearance of fairness doctrine.

The defendant argues that the trial court violated the appearance of fairness doctrine when the court allegedly (1) interrupted defense counsel and (2) commented on the evidence and/or added reasons for sustaining the State's objection. Br. Appellant at 32-33.

A defendant claiming a violation of the appearance of fairness doctrine must make a threshold showing of the trial court's actual or potential bias. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, *as amended by* 118 Wn.2d 596, 837 P.2d 599 (1992). It is presumed that the trial judge properly discharged his official duties without bias or prejudice. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004) (citing *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967)). The party seeking to overcome that presumption must provide specific facts supporting an allegation of bias. *Davis*, 152 Wn.2d at 692 (citing *Post*, 118 Wn.2d at 619 n.9). Judicial rulings alone almost never constitute a valid showing of bias. *Davis*, 152 Wn.2d at 692 (citing *Litkey v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)).

The defendant contends that the court made several improper comments on the evidence. Judges may not comment on the evidence. WASH. CONST. art. IV, § 16. A judge violates this rule if he communicates to the jury his feeling about the truth value of a witness's testimony. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). When a judge improperly comments on the evidence, prejudice is presumed and the State bears the burden of showing there was no actual prejudice, unless it affirmatively appears in the record that there could have been no prejudice. *Id.* at 838-39. To constitute a comment on the evidence, it must appear that the court's attitude toward the merits of the case are reasonably inferable from the nature and the manner of the questions asked and the things said. *State v. Cerny*, 78 Wn.2d 845, 855, 480 P.2d 199 (1971), *vacated in part on other grounds*, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The defendant points to nine instances when the judge either commented on the evidence or added reasons for sustaining the objection. Br. Appellant at 33. In each instance, the court was making a legal ruling. A court's statements giving reasons for its rulings, without indication that the court believes or disbelieves the testimony, do not constitute a comment on the evidence. *State v. Studebaker*, 67 Wn.2d 980, 983, 410

P.2d 913 (1996). The comments of the judge were not improper comments on the evidence.

E. The “reasonable doubt” jury instruction was lawful.

The defendant argues that the language in WPIC 4.01 that defines a “reasonable doubt” as “one for which a reason exists” tells jurors they must be able to articulate a reason for having a reasonable doubt and that telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence. Br. Appellant at 35-36.

The defendant did not object to WPIC 4.01 at trial. 4RP at 230. A defendant generally waives the right to appeal an error unless he or she raised an objection at trial. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). One exception to this rule is made for manifest errors affecting a constitutional right. RAP 2.5(a)(3); *Kalebaugh*, 183 Wn.2d at 583. An error is manifest if the appellant can show actual prejudice. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* To determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error. *Id.* at 100.

In *Kalebaugh*, the Washington State Supreme Court reaffirmed that WPIC 4.01 was the correct legal instruction on reasonable doubt. 183 Wn.2d at 584. The State submits that this Court is bound by the approval of the WPIC 4.01 reasonable doubt language in *Kalebaugh* and its predecessors. See *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The defendant cannot show manifest error justifying review under RAP 2.5(a)(3) of the unpreserved objection to WPIC 4.01 beyond a reasonable doubt.

F. Any juror misconduct was cured by the trial judge.

The defendant argues that the trial court should have granted a mistrial after a juror read a definition of reasonable doubt, which he had looked up prior to the trial starting, to the jury before the jury read the court's instructions. Br. Appellant at 44. A defendant is entitled to a new trial if a juror's use of extraneous evidence would have influenced the verdict and prejudiced the defendant. *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740 (2006). A trial court properly denies a motion for a new trial if it is satisfied beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. *Id.* at 333. The defendant, in attempting to overturn a trial court's decision to deny a mistrial, faces a high bar:

Initially, with regard to the claims of juror misconduct, it must be noted that a decision of whether the alleged misconduct exists, whether it is prejudicial and whether a

mistrial is declared are all matters for the discretion of the trial court. The decision of the trial court will be overturned on appeal only for an abuse of discretion. If misconduct is found, great deference is due the trial court's determination that no prejudice occurred. However, greater weight is owed a decision to grant a new trial than a decision not to grant a new trial. Further, a trial court only abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271, 796 P.2d 737 (1990) (citations omitted). In assessing whether prejudice occurred, the court must compare the particular misconduct with all the facts and circumstances at trial. *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992). The trial judge is a neutral, trained person observing both the verbal and nonverbal features of the trial and is therefore in the best position to make the required comparison. *Id.*

Clearly, Juror Number 2 committed misconduct when he read his own reasonable doubt instruction to the jury prior to the jury reading the court's instruction. The court determined that no prejudice occurred after questioning the bailiff, Juror Number Two, and then the entire panel of jurors. CP 196-211. The panel indicated they would only follow the court's instructions and the court was satisfied. CP 208-09. This conclusion was not manifestly unreasonable or exercised on untenable ground, or for untenable reasons. The trial judge properly denied the

motion for a mistrial and the subsequent motion for a new trial. CP 136-39, 208.

G. No cumulative error.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). This doctrine does not apply where the errors are few or have little or no effect on the outcome of the trial. *Id.* The State asserts there were no errors in this trial, but if the court does find errors, the defense has failed to show how they affected the outcome of the trial.

H. The State concedes that the combined term of confinement and community custody exceeds 60 months.

The State concedes that the combined term of confinement and community custody exceeds 60 months. The State agrees this matter could be remanded to amend the community custody in accordance with *State v. Bruch*, 182 Wn.2d 854, 346 P.3d 724 (2015).

I. The State concedes that the community custody condition prohibiting the defendant from going places where minor children are known to congregate is void for vagueness.

The State concedes that the community custody condition (number 16) which states: “Do not go places where minor children are known to congregate unsupervised without prior approval from your therapist and your community corrections officer, and then only in the presence of a

chaperone or guardian who has been approved by your therapist and your community corrections officer” (CP 127), be remanded to amend the condition. *See State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015). The condition should set forth clarifying language so that the defendant is given sufficient notice of what conduct is proscribed.

J. The State concedes that the community custody condition prohibiting the defendant from possessing or perusing pornographic materials is void for vagueness.

The State concedes that community custody condition number 19 as set forth in CP 127 should be remanded in accordance with *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). The term “pornographic” needs to be replaced with “sexually explicit conduct” as defined in RCW 9.68A.011.

K. Community custody conditions do not interfere with the defendant’s fundamental rights to marriage and to parent.

In the present matter, the defendant is prohibited from having contact with minor children in four prohibitions as outlined in CP 127. The defendant is allowed to have contact with his own minor children and his stepchildren. CP 127.

In the present case, the defendant offended against a minor child. Trial courts may impose crime-related prohibitions while a defendant is in community custody. RCW 9.94A.505(9), 703(3)(f). A crime-related

prohibition prohibits conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). Directly related includes conditions that are reasonably related to the crime. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870, *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014). The prohibition that he is not to have contact with minors outside of his biological and minor stepchildren is directly related to the crime the defendant was convicted of.

- L. The State concedes that the trial court did not make an individualized inquiry into the defendant's ability to pay legal financial obligations.**

The State concedes that the trial court did not make an individualized finding that the defendant had the current or likely future ability to pay costs as required by *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). This matter should be remanded so that can be done.

- M. Appeal costs should be imposed.**

- 1. The Court has the discretion to impose appeal costs.**

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). The legal principle that convicted offenders contribute toward the costs of a case, including appointed

counsel, is well-established. *See State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976); *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000); RAP 14.2; and RCW 10.01.160(2).

2. The Court should use its discretion and impose appeal costs.

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), provides guidance. First, the *Sinclair* Court noted that while it may be necessary to remand a case to the trial court to determine if the defendant can pay costs, that is not an appropriate remedy for the appellate courts. The statute imposing trial court costs (RCW 10.01.160(3)) is different from the statute authorizing appellate court costs (RCW 10.73.160). Ability to pay is one factor an appellate court can consider, but not the only one, and facts relevant to an exercise of discretion can be set out in a brief.

The defendant has the initial burden to show indigence. *See State v. Lundy*, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigence must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See Blank*, 131 Wn.2d at 236-37 (quoting *Fuller v. Oregon*, 417 U.S. 40, 53-54, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)).

Thus far, the defendant has only claimed that he is indigent in general terms. Of course, he is unemployed while serving his term of incarceration. But, the defendant declined to answer questions for the Pre-Sentence Investigation regarding his employment, education, and family resources. CP 107. Those, along with the defendant's age, criminal history, and length of sentence, were cited by *Sinclair* as factors an appellate court can consider in deciding whether to assess costs.

However, the Pre-Sentence Investigation shows the defendant is 47 years old (DOB: 03/11/1969) and he has historically been employed. CP 105, 107. He is married. CP 107. He has no other criminal convictions. CP 106. His sentence in this case is 30 months. CP 120.

While it may be more difficult for the defendant to gain employment, given that he has no previous criminal history, and therefore no other legal financial obligations; he has family support; he will not be incarcerated more than two and a half years; he will be younger than many in the work force; and he was able to hire an attorney for trial, this Court should impose appellate costs.

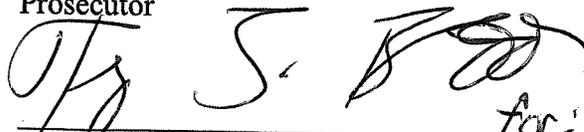
IV. CONCLUSION

Based on the aforementioned rationale, the defendant's convictions should be affirmed and the case remanded for the sentencing court to determine the defendant's ability to pay legal financial obligations.

RESPECTFULLY SUBMITTED this 7th day of July, 2016.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read 'A. Miller', written over a horizontal line.

Anita I. Petra, Deputy

Prosecuting Attorney

Bar No. 32535

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for:
Anita Petra

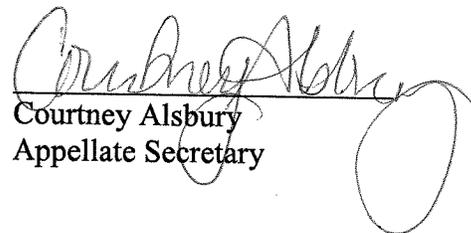
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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E-mail service by agreement
was made to the following
parties:
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Signed at Kennewick, Washington on July 7, 2016.


Courtney Alsbury
Appellate Secretary