

FILED
OCTOBER 14, 2016
Court of Appeals
Division III
State of Washington

NO. 33933-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AMANDA TORRES,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant has set forth six assignments of error, these as set out by Appellant as follows;

1. Whether the police officer's warrantless entry and seizure of appellant in her home violated the Fourth Amendment and article I, section 7 because no exception to the warrant requirement justified those actions, requiring suppression of the confession and reversal of the convictions?
2. Whether defense counsel was ineffective in failing to move to suppress the confession based on the officer's warrantless entry and seizure because there is a reasonable probability that motion would have been granted?
3. Whether the court erred in refusing the defense request to clarify that the locomotive windows did not constitute a part of its "operating mechanism" as that term is used in RCW 81.60.080(1), where such instruction was necessary to avoid misleading the jury on what evidence it could rely on to convict?
4. Whether the prosecutor committed misconduct in closing argument in contending the locomotive windows constituted part of the "operating mechanism," thereby misstating the law and misleading the jury on what evidence it could rely on to convict?
5. Whether the community custody condition requiring appellant to obtain a drug and alcohol evaluation/treatment is invalid because only alcohol contributed to the offense, requiring remand to strike the drug portion of the condition?
6. Whether the judgment and sentence should be corrected to reflect the correct amount of legal financial obligations owing?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no warrantless entry into the residence where Appellant was sleeping. Therefore, there was no violation of either the 4th Amendment or article I section 7.
2. The trial attorney was not ineffective for not moving to suppress Appellant's confession on the alleged warrantless entry and seizure because there was no illegal entry into the residence.

3. The court did not improperly deny the defense request by Appellant regarding the locomotive windows.
4. The deputy prosecuting attorney did not commit prosecutorial error in closing argument.
5. This condition is moot, defendant testified that she had completed treatment by the time of sentencing.
6. The amount set forth in the Judgment and Sentence for the restitution amount was overstated. The value set forth in that document should be struck, the actual total that should be reflected in that document should be \$800.00.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed within the body of this brief.

III. ARGUMENT

Response to allegations one and two. There was no error, there was no illegal entry therefore trial counsel was not ineffective for not moving to suppress the entry.

The entry into the residence where Appellant was sleeping was done so by the invitation/consent of a co-occupant, it was not a search. Dep. Reyna did not go to this home to search it for evidence and in fact did not search anything while in the residence. It is undisputed that he went there for the sole purpose of attempting to locate the owner of the ID card that was found at the scene of a crime.

Dep. Reyna was met at the door of the residence that corresponded

to the address on the ID that was found at the crime scene by a person whom the record indicates apparently also lived in this house. When asked by Dep. Reyna if Amanda Torres was home he was escorted to the room or area where Torres had a bed. At no time, and there was never any allegation or insinuation in the trial court, did this officer attempt to turn this invitation and escort into a search for evidence.

Upon finding Torres in bed with a man in an area of the basement that was “walled” off with a blanket, the officer decided to discuss this matter with Torres outside in his patrol vehicle. Out at this vehicle Torres was read her Miranda¹ rights and confessed her involvement in this crime.

It must be noted that Torres has not challenged the findings of the trial court regarding the CrR 3.5 hearing therefore those findings are verities. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); State v. Horrace, 144 Wn.2d 386, 391-92, 28 P.3d 753 (2001) Whether a person is seized is a mixed question of law and fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). A person will be considered to have been "seized" only if a reasonable person would have believed that he or she was not free to leave based on all the objective circumstances surrounding the incident. Armenta, 134 Wn.2d at 10-11; State v. Nettles, 70 Wn. App.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966)

706, 710, 855 P.2d 699 (1993). This court will focus its review on whether the police conduct was coercive. State v. Thorn, 129 Wn.2d 347, 353, 917 P.2d 108 (1996).

The officer did not try to elicit information, evidence, regarding this crime until he and Torres had left the residence. It is not a seizure where an officer approaches an individual in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away. Armenta, 134 Wn.2d at 1112. Torres was not placed under arrest until after she was read her rights per Miranda and confessed her involvement in this crime.

Torres was at the time of this contact a 30-year-old person who has both her aunt, boyfriend and married cousin present when the officer requested to speak to her. Who apparently had had at least several previous contacts with the law. (“Amanda has DUI’s she’s had interlock issues and driving while license suspected (sic), but no crimes that would even get close to a felony.... she owes a lot of money on the old DUI’s.” RP 284)

In the CrR 3.5 hearing conducted at the time of the trial, defense counsel attempted to get officer Reyna to testify that the person who opened the door was “9” later the defendant herself stated the following in response to questions by her trial attorney:

(Question from defense attorney)
Who was the little girl that was in the house?
A. Her name is Isabel Batista.
Q. And what relationship is she to your aunt?
A. That ' s my aunt's daughter-in-law.
Q. Okay. So - - daughter- in- law?
A. Yeah.
A. She' s under 18.
Q. Okay.
A. At the time, I believe she was like 14, maybe.
Maybe 13, 14.
RP 29-30 (Emphasis added)

Torres claims that this is an issue that should be allowed to be considered for the first time on appeal, but as was so accurately stated in State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995):

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be "manifest" - i.e., it must be "truly of constitutional magnitude". Scott, 110 Wn.2d at 688. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review. Scott, 110 Wn.2d at 688; Lynn, 67 Wn. App. at 346. *If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.* State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

...

It is not enough that the Defendant allege prejudice - actual prejudice must appear in the record. In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3).
(Footnote omitted, emphasis mine.)

There is no definitive record of the age of the person who granted entry, Mrs. Batista, because this issue was not raised in the trial court. This issue is the perfect example as to why matters must be raised in the trial court and a record made. Nor is there anything in this record that would indicate that Torres who was sleeping in a room in basement that did not even have a door had any type of superior rights than Mrs. Batista.

State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008):

In general, an error raised for the first time on appeal will not be reviewed. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "narrow" exception. Kirkman, 159 Wn.2d at 934, 155 P.3d 125 (quoting State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)). A "manifest" error is an error that is "unmistakable, evident or indisputable." State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992). An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "plausible showing" that the asserted error had practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257

(1999) (quoting Lynn, 67 Wn.App. at 345, 835 P.2d 251). "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (citing WWJ Corp., 138 Wn.2d at 603, 980 P.2d 1257).

It is very noteworthy that the defendant describes this "[m]aybe 13, 14" year old as the "daughter-in-law" of her aunt, a term that literally means "the wife of one's son" and it is doubtful to say the least that this married person who answered the door is "[m]aybe 13,14." RP 29-30, Apps brief at 12.

This testimony places the age of Mrs. Batista into the age range addressed in State v. Jones, 22 Wn.App. 447, 452-3, P.2d 796 (1979);

Some minors, simply by reason of their age or immaturity, may be incapable of consenting to a police entry; others may be overawed and will permit entry despite strict parental instructions or admonitions not to permit an entry. The record in this case appears to be devoid of either impediment. In Davis v. United States, 327 F.2d 301 (9th Cir. 1964) the court upheld an invitation to enter extended to police by an 8-year-old girl, in the absence of any indication in the record that her opening the door and invitation to enter were not unusual or unexpected or unauthorized acts. We believe that is a sound rule to follow. Furthermore, it is reasonably clear in the case at bench that the officers entered the apartment peacefully and were not motivated primarily to search it.

And later by this very court in State v. Cordero, 170 Wn.App. 351, 362-3, 284 P.3d 773 (Wash.App. Div. 3 2012)

And the reasoning of the *Jones* case that teenagers can, in appropriate circumstances, provide the consent necessary for law enforcement officers to enter a homeJones adopted what it characterized as a " sound rule," 22 Wn.App. at 452, announced by the Ninth Circuit Court of Appeals in Davis v. United States, 327 F.2d 301, 304 (9th Cir. 1964), in which the court provided the following explanation why the officers' entry in that case at the invitation of the eight-year-old daughter of the owners was not without consent:

When the defendant was on the stand, he made no claim that [his daughter's] actions in opening the door or inviting the men in was in any way unusual or unauthorized, nor did [his daughter] testify that the opening of the door or telling the officers to come in was against the instructions of either of her parents. From all the evidence before it, the trial court was entitled to conclude then that her opening the door and invitation to enter were not unusual or unexpected or unauthorized acts.

The rule of *Davis* adopted by *Jones* was its conclusion that a child-resident's invitation to enter premises can be effective " in the absence of any indication in the record that her opening the door and invitation to enter were not unusual or unexpected or unauthorized acts." 22 Wn.App. at 452.

The testimony is undisputed that the Deputy knocked on the door of this residence attempting to locate the owner of the ID card that was found at the scene of this crime. He had no evidence that this defendant was involved in the crime, he was doing follow-up when he "detailed" to that house. RP 8-9, 154-157, 173-76

The testimony is also undisputed that when he arrived at this residence he merely asked to speak to the Appellant. This officer did not

barge in, he did not demand entry, he did not order the co-occupant to take him to the defendant he “asked if he could speak to Amanda Torres.” and was then escorted by the co-occupant to the basement where the Appellant was sleeping with her boyfriend after a night of drinking. Officer Reyna:

A. I knocked on the door. A female answered the door. I asked if Amanda Torres was home. She said she was. She then - - I then was led to a - - to a bedroom where I asked to speak to Amanda Torres. RP 10

...
A. When I arrived at the house, I knocked on the door. I spoke to a young lady there. I asked if I could speak to Amanda Torres. I was then led into a downstairs bedroom.

Q. Led by whom?

A. By the young lady that let me in.

RP 157

There is no testimony that Dep. Reyna placed Torres under arrest.

In fact, Torres’ testimony was that “...he knocked” and said “I need Amanda Torres to come out.” RP 36 The initial discussion was inside her home, she was not isolated, she was not handcuffed, she was not threatened. RP 35-7

It is permissible for officers to approach a home to contact the inhabitants. See, e.g., State v. Rose, 128 Wn.2d 388, 392, 909 P.2d 280 (1996) (officer entitled to walk upon to porch, which was the usual access route to the house); State v. Dodson, 110 Wn.App. 112, 123, 39 P.3d 324 (2002) (an officer may access that portion of the curtilage “apparently

open to the public, such as the driveway, the walkway, or any access route leading to the residence.”); State v. Gave, 77 Wn. App. 333, 337, 890 P.2d 1088 (1995) (driveway, walkway, or access routes leading to residence or to porch or residence are all areas of “curtilage” impliedly open to the public). The constitutionality of entries into the curtilage hinge on whether the officer’s actions are consistent with an attempt to initiate consensual contact with the occupants of the home.

Torres states that she felt she was under arrest. However, she testified in the CrR 3.5 hearing that she was shown her ID card while still inside the house. That her aunt had come in and was at that time challenging the officers right to be inside the home. According to Torres statement her aunt had confronted Deputy Reyna in front of her as to who had allowed him into the home and they further challenged his ability to take any action without “his warrant.” RP 30 The officer may have touched Torres elbow on the way to the car.

Torres’ testimony is a tale that is clearly made from whole cloth. She is a 30-year-old person in her own home who alleges that another adult, the owner of the home confronted the officer with his right and ability to be in this residence and, apparently arrest without a warrant, and yet her will was overbore and she was forced by a possible touching of her elbow to go out to the officer’s car.

This was a voluntary act on the part of this defendant. The totality of her story is such that it hits most if not all of the buttons needed to trigger the right to have this issue suppressed, clearly Mr. Dold, an experienced trial litigator did not believe that was a valid basis to challenge this entry, he did challenge the statement given and the legality of the State's right, ability, to use the statement given but clearly counsel did not believe that the entry into the home or the movement to the exterior location for the interview were illegal.

This story included testimony that the officer locked Torres in the back of his car and conducted this interview through the window of the police car with the window only partially open. Torres' testified that Dep. Reyna told her what he had found at the scene of the crime. A statement that would have been complete fabrication of inculpatory evidence that the officer had found. RP 31-3, 34 Torres also maintained throughout that the deputy had never read her, her rights per "Miranda." She states that as soon after she was locked in the back of the car shoeless she requested an attorney. In this initial telling of this story she was also crying. RP 30, 33-4, 36-7

Another very important and also undisputed portion of the trial testimony of Dep. Reyna is the following:

BY MR . CHEN :

Q. With regards to the male in the bedroom with the defendant, do you recall telling us in a prior interview that she wanted to leave or didn't want to be talking to you with a male present?

A. I believe she was uncomfortable with the male. But it was her boyfriend. Turned out to be her boyfriend.

Q. Okay. And do you recall what exactly she told you as far as what led you from that room to going outside?

A. Well, taking her outside was my decision.

Appellant's "defense" was that she had seen the location of the damaged train, lived near the train but she had not been there and that her confession as repeated by the officer was not something that she had actually stated, it was apparently made up by the officer. To justify the presence of her ID card she made yet another outlandish statement. She testified that she had lost an extraordinary number of ID cards "...how many ID cards have you lost?... I - - I would say more than 15." RP 189 This statement continues the outlandish and unbelievable story the Torres was attempting to convince the jury was true.

Apparently Dep. Reyna, forced his way into her home, roused her from her sleep forced her, by touching her elbow, out of her own home all the while in the presence of her aunt, boyfriend and cousin. He then lied about reading her her rights per Miranda and made up a confession implicating Torres in this crime.

Torres argues that the officer should have made an attempt to

obtain her consent to enter this residence before he entered the residence. This was an invitation to enter made by a cotenant, not consent to search. The only thing this record reflects is that this deputy was escorted through Mrs. Batista's home to the basement where Torres was sleeping in a bed in a portion of that basement that was separated from other portions of the home with a blanket. Mrs. Batista stated to the officer that this person was Amanda Torres. The officer then knocked and asked to speak to Amanda Torres, so the officer did in fact contact Torres, at her room and requested that she speak with him.

The would be analogous to one person in an apartment complex escorting the deputy past the main entrance to the entrance of another tenant's residence. And at the entrance, the door, to that apartment/room he knocked and asked to speak to the occupant who came out and then went to the exterior of the complex to speak to the officer.

Appellant cites State v. Williams, 148 Wn.App. 678, 201 P.3d 371 (2009), Williams is a case where there was a search of the hotel room occupied by two cotenants and the analysis done by the Williams court addressed "...the three factors necessary to allow warrantless entry under the community caretaking/emergency aid exception." Williams is clearly distinguishable. The court does go on to address "another potential means to legalize the entry" and that was to find that the initial contact by the

cotenant resulted in that cotenant consenting to the search, that did not occur in Williams, however it did occur in the matter before this court. Id at 688-9.

Appellant compares the actions of this officer to that actions of an officer involved in a “Terry” stop, Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) Torres would compare the factual setting in this case to Terry, and State v. Harrington , 167 Wn.2d 656, 222 P.3d 92 (2009) yet another encounter on the streets between an officer and the citizen or State v. Young , 135 Wn.2d 498, 957 P.2d 681 (Wash. 1998); Was Young "disturbed in his private affairs ... without authority of law" under article I, section 7 of the Washington Constitution when the police approached him at night in a patrol car while he was on a public street, shining a spotlight on him?”

Torres first argues that a Terry stop is not applicable to a situation such as exists here. Apps brief at 13. However, she then states “[t]he Terry stop was unconstitutional...” Torres would appear to argue that this court should expand the reason and basis of a Terry stop to a factual setting within a home. That is an enormous expansion of the standards set out in the Terry line of cases that is completely and totally uncalled for and unneeded in this case.

Response to allegation “e.”

There was no illegal search or seizure of Torres. Therefore, Torres argument that the exclusionary rule set forth in State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002) mandates the exclusion of all evidence illegally seized is inapplicable.

Response to allegation “f”. Alleged ineffective assistance of counsel, failure to “make a suppression motion.”

In order to establish that counsel was ineffective, Appellant must show that counsel’s conduct was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (adopting test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show deficient representation, Torres must show that counsel's performance fell below an objective standard of reasonableness based on all of the circumstances. Nichols, 161 Wn.2d at 8 (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Prejudice is established if there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. Nichols, 161 Wn.2d at 8.

The claimed deficiency here is the failure to challenge an allegedly unlawful entry into Appellant’s residence. A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. Nichols, 161 Wn.2d at 9. However,

Torres first must establish that the claimed error is a "manifest error affecting a constitutional right." McFarland, 127 Wn.2d at 333 (quoting RAP 2.5(a)(3)). In order to be "manifest," an alleged error must have "practical and identifiable consequences in the trial." State v. Barr, 123 Wn. App. 373, 381, 98 P.3d 518 (2004) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown, and the error is not manifest. McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

Here Torres did not make a record that this was in fact her residence at the time the officer was given permission to enter. Certainly this address was listed on an "ID" card but there is no testimony that this was a domicile for Torres. Nor did Torres definitively indicate on the record that Mrs. Isabel Batista did not in fact have the same rights as Torres had. It would appear from the record that Torres was sleeping in a room in the basement that did not even have a door. Mrs. Batista apparently resided upstairs, she did answer the door when the Deputy Sheriff knocked, she did escort this officer to the basement where thirty-year-old Torres was sleeping with her boyfriend. Therefore, the only conclusion that can be drawn from these facts is that Mrs. Isabel Batista had at least co-equal rights in this residence.

Here trial counsel for Torres clearly understood that there was doubt that could be cast by trying to set out for the court the fact that Mrs. Batista was young, just as clearly counsel did not believe that the issue of the consent to enter was a valid issue or he would have had that witness present and/or he would have had the aunt who was present in the courtroom testify, neither of which happened. (RP 29)

Failure to bring a motion to suppress is not per se deficient;

We will not presume a CrR 3.6 hearing is required in every case in which there is a question as to the validity of a search and seizure, so that failure to move for a suppression hearing in such cases is per se deficient representation. Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. There may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial. See State v. Garrett, 124 Wash.2d 504, 520, 881 P.2d 185 (1994) (defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel); State v. Mak, 105 Wash.2d 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), sentence vacated on writ of habeas corpus sub nom. Mak v. Blodgett, 754 F.Supp. 1490 (W.D.Wash.1991), aff'd, 970 F.2d 614 (9th Cir.1992), cert. denied, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993). The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below. McFarland, 127 Wn.2d at 336.

Counsel can legitimately decline to seek suppression if there is no viable ground for such a motion. Nichols, 161 Wn.2d at 14. Here there was no viable ground for to move for suppression. There was no search, there was a consensual entry were one cotenant led the officer to the “room” that Torres was sleeping in. At which time the officer knocked on the “door” of that room and requested that Torres come out. She did and all that flowed from that acquiescence was and is admissible.

Response to Allegation 2 – Jury instruction and prosecutorial misconduct.

The statute in question here is RCW 81.60.080 - Sabotaging rolling stock, the statute reads, in pertinent part, as follows:

(1) Any person or persons who shall willfully or maliciously, with intent to injure or deprive **the owner** thereof, take, steal, remove, change, add to, alter, or in any manner interfere with any journal bearing, brass, waste, packing, triple valve, pressure cock, brake, air hose, or any other part of the operating mechanism of any locomotive, engine, tender, coach, car, caboose, or motor car **used or capable of being used by any railroad or railway company** in this state, is guilty of a class C felony, and upon conviction thereof shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

The ruling from the trial court judge was correct, there is no definition of what a “operating mechanism” is within this statute.

Torres stressed in trial that if ordered to this machine could be

operated without the windows in it that had been damaged. But of the two witnesses from the railroad that owned this engine one stated that it would be possible to move the engine, the other even after continuous badgering from defense counsel stated he would not move the engine. While the term “operate” clearly means that this machine could be made to move, it is as clearly means that operation in a manner that allows it to be used for the benefit of the owner.

The statute is clearly applicable only to “any locomotive, engine, tender, coach, car, caboose, or motor car **used** or **capable of being used** by any railroad or railway company” as this statute separates out usable and unusable rolling stock and is then not applicable to non-usable rolling stock and the destruction of the windows of this engine that had been “capable of being used” was rendered unusable by the criminal acts of Torres therefore the windows and the windows alone having been destroyed are a device, a mechanism, that allows this asset to operate.

To operate does not just mean movement, it means that the asset is being used to or can be used for the benefit of the owner.

The testimony from the operators of this company and this engine stated that the could not and would not operate this engine in the condition that it was in. They stated that it would be a violation of federal law, that is true:

CFR § 229.7 Prohibited acts and penalties.

Link to an amendment published at 81 FR 43111, July 1, 2016.

(a) Federal Rail Safety Laws (49 U.S.C. 20701-20703) make it unlawful for any carrier to use or permit to be used on its line any locomotive unless the entire locomotive and its appurtenances -

(1) Are in proper condition and safe to operate in the service to which they are put, without unnecessary peril to life or limb; and

(2) Have been inspected and tested as required by this part.

(b) Any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or of the Federal Rail Safety Laws or causes the violation of any such requirement is subject to a civil penalty of at least \$650, but not more than \$25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$105,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Appendix B of this part contains a statement of

agency civil penalty policy.

(c) Any person who knowingly and willfully falsifies a record or report required by this part is subject to criminal penalties under 49 U.S.C. 21311.

Appellant is using a very limited definition of the term operate, as shown in Merriam-Webster's Learner's;

Simple Definition of operating

: relating to the way a machine, vehicle, device, etc., functions or is used and controlled

: relating to the way a business, department, program, etc., functions or is controlled

Full Definition of operating

1. : of, relating to, or used for or in operations <operating expenses> <a hospital operating room>

Full Definition of operating

1. : of, relating to, or used for or in operations <operating expenses> <a hospital operating room>

Legal Definition of operating

1. engaged in active business
2. arising out of or relating to the current daily operations of a concern (as in transportation or manufacturing) as distinct from its financial transactions and permanent improvements <operating expenses> <operating personnel>

Synonyms and Antonyms of operating

1. being in effective operation <the only operating nuclear power plant in the state>
2. Synonyms alive, functional, functioning, going, live, living, on, active, operational, operative, running, working
3. Related Words effective, effectual; employable, operable, usable (also useable), viable, workable; performing, producing, productive, serving, useful, yielding; astir, bustling, busy, dynamic, flourishing, humming, roaring, thriving
4. Near Antonyms deactivated, decommissioned; ineffective, ineffectual, useless; inoperable, unusable, unworkable; arrested, asleep, dormant, fallow, idle, inert, latent, lifeless, nonproductive, quiescent, sleepy, stagnating, unproductive, vegetating
5. Antonyms broken, dead, inactive, inoperative, kaput (also kaputt), nonactivated, nonfunctional, nonfunctioning, nonoperating,

nonoperational, non-operative.

The reference dictionary used by appellant in her opening brief is listed as having been published in 1922, the reality of the operation and use of this type of machine have clearly changed in the nearly 100 years since that reference was published. (Apps Brief at 27 Locomotive Cyclopedia of American Practice, 91 (6th Ed. 1922).)

This change can be seen in the comparable statute relating to automobiles RCW 46.37.410. Windshields required, exception-Must be unobstructed and equipped with wipers

- (1) All motor vehicles operated on the public highways of this state shall be equipped with a front windshield manufactured of safety glazing materials for use in motor vehicles in accordance with RCW 46.37.430, except, however, on such vehicles not so equipped or where windshields are not in use, the operators of such vehicles shall wear glasses, goggles, or face shields pursuant to RCW 46.37.530(1)(b).

Appellant's trial counsel argued that the windshield in a car is certainly not a portion of the "operating mechanism" of that vehicle, this is patently wrong. As can be seen from this site the structural integrity of a vehicle is for the unit, it cannot be separated in to pieces

<http://www.safewindshields.org/> What role does my windshield play to ensure my safety in an accident?

The windshield provides a significant amount of strength to the structural support in the cabin of the

vehicle. For instance, in a front end collision the windshield provides up to 45% of the structural integrity of the cabin of the vehicle and in a rollover, up to 60%.

This is the closing by Torres' counsel regarding this:

Now, I honestly don't think that windows like your windshield is an operating mechanism. I don't know why the windshield on your car does - -the windshield wipers are an operating mechanism, perhaps, but the windshield sure as the devil is not an operating mechanism. I honestly don't believe that the State, in good faith, can argue that that's an operating mechanism. I think that is just malarkey. I don't think they read the instructions.

This damaged railroad train engine was literally less than useless to this company, not only could it not be used as a functioning, operating mechanism, which it is when considered in totality, until money and time was expended to bring this unit back into compliance with the federal regulations but while in non-compliance it was not able to generate revenue for this company.

As testified to these operators would literally not move this engine until repaired. So this company had both the expense of repair and the loss of work because of the damage, to the window, the gauges or any other portion that was in non-compliance. If that engine was not moving it was not generating income.

The trial court and counsel addressed this as follows when this issue came up:

THE COURT: Shreves or Shreves, who was asked if the gages were an operating mechanism. I don't - - I don't - - there's no definition, that I'm aware of. If we get something from the - - if we get a question from the jury, I guess we'll have to address that issue. But there certainly isn't anything in the statute that just defines it.

MR. DOLD: They do provide a list of what operating mechanisms are in the statute.

THE COURT: Well, they provide a list of things.

...

THE COURT: I think you are reading it too broadly. I think that the statute contemplates damaging some component part of the locomotive and not disabling it - - or not getting to the point where it can't be operated.

MR. DOLD: Had they, in fact, intended that, then it would have been damaging a locomotive rather than sabotaging it.

THE COURT: That's just the name of it, of the statute.

MR. DOLD: Yes.

THE COURT: That's not - - that's not relevant to the issue of what it says.

...

THE COURT: It's the same - - the stat - - I mean; the case law is clear that what the legislature decides the name is going to be is really irrelevant to the issue of what the statute within its legislative intent is. And it's the plain - - the plain meaning of the statute operating mechanism. Something that is, you know - - you know, the argument, I guess, could be made that the windows aren't an operating mechanism, but the gages are.

MR. DOLD: And how is the jury - - okay, how is the jury going to be advised of the fact that the windows don't help it (sic) motivate, although they do operate to go up and down? Some guidance, I think, is necessary.

THE COURT: I don't think so.

MR. DOLD: Okay.

THE COURT: I think that the term operating mechanism is testimony as to the gages being operating mechanism. There' s also testimony that the windows are in a - - a necessary part of the RP 214 locomotive and - - and I think you are right, I don ' t think the jury ' s going to decide this case on the basis of whether the windows are an operating mechanism or not. But - - all right, do you have other exceptions?
MR. DOLD: No.
RP 215

The law in this area is well settled. Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. State v. Dana, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court also is granted broad discretion in determining the wording and number of jury instructions. Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). State v. Portrey, 102 Wn. App. 898, 10 P.3d 481 (2000) “A trial court has considerable discretion in the wording of a jury instruction so long as the instruction correctly states the law and allows each party to argue its theory of the case. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998); State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). A specific instruction is not necessary when a

more general instruction adequately explains the law. Brown, 132 Wn.2d at 605.”

The instruction given here were sufficient to allow the parties to argue their case. The defense argued, strongly, in closing that the window was not an operating mechanism. The trial court was correct when it stated that the name of the statute was just that and that the verbiage in the statute was directional not a complete list.

Therefore, based on the testimony of the owner and the employee of the railroad that owned the engine that was damaged it is clear that without these windows, these operating mechanisms, this train engine was in effect a very large, very expensive and very useless piece of steel.

Response to alleged prosecutorial misconduct.

As stated by the court there was no definition of what an operating mechanism is in the statute that was the basis for this charge. It is clear from the discussion set forth above that the court was in agreement with the State regarding this issue. The court stated that it did not believe the definition was so restrictive that the “operating mechanism” would only be defined as such if it physically prevented the train engine from moving. It was the State’s theory throughout this trial, there was direct evidence submitted to support the fact that these very specialize windows had been removed or broken in the railroad train engine. The State is allowed to

argue its theory of the case and it is not error to do so within the structure and edicts of the trial court.

The allegation here is that the State simply argued the evidence as presented. That the state argued that the windows and gauges that had been damaged were in fact “operating mechanisms” under the statute.

In order to establish that he is entitled to a new trial due to prosecutorial misconduct, Torres must show that the prosecutor’s conduct was improper and prejudiced his right to a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996)).

Torres never objected to the States, arguments in closing, a defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it caused enduring and resulting prejudice that a curative instruction could not have remedied. Boehning, 127 Wn. App. at 518 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)). A prosecutor’s closing argument is reviewed in the context of the total argument, the issues in the case, the

evidence, and the jury instructions. *Id.* at 519. “A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” *Id.*

Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). In fact, the absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

“[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” Russell, 125 Wn.2d at 87 (citing United States v. Hiatt, 581 F.2d 1199, 1204 (5th Cir. 1978)). It is not misconduct for a prosecutor to merely argue that the evidence supports the State’s theory or that the evidence does not support the defense theory. *Id.* The court also instructed the jury that the attorneys’ remarks were not evidence and that they must disregard any remark, statement, or argument that was not supported by the law or the evidence. CP 10.

Community custody.

The State believes that the record supports this condition of community custody, however in the interest of judicial economy the State agrees that the most expeditious method to address this question is to remand this to the trial court for clarification.

Scriveners Errors – Judgment and Sentence.

“Remand is appropriate to correct a scrivener's error.” State v. Naillieux, 158 Wn. App. 630, 646-47, 241 P.3d 1280 (2010). The State concedes that the total legal financial obligations reflected in the original Judgment and Sentence (J&S) are incorrect. As stated by appellant the restitution amount should have been deducted from the total in the J&S. There was a separate order entered on March 18, 2016 which indicates the actual amount of restitution that was ordered by the court, \$9,943.01. (CP 62) The State would request that this court remand solely on this issue with an order to the trial court that no other matters shall be addressed at this hearing, and that this court further indicate that this hearing is **not** a “resentencing” but merely a hearing to allow the entry of the amended/corrected judgment and sentence.

Further, it is the State’s position that this type of ministerial action can be taken by the trial court without the presence of the defendant, thereby negating the cost, both time and monetary, to return the defendant

to the trial court for correction of this scrivener's error.

This court should therefore order the trial court enter an order amending the original judgment and sentence. This court should order that this action be allowed without the necessity of returning the Defendant to Yakima County.

Appellate costs.

This defendant requested the trial court impose a "first time offender" sentence. Appellant is not a person who from the records before this court has amassed a substantial burden of costs and legal financial obligations from her previous criminal acts.

Ms. Torres is only 31 years old and there is no indication in this record that she is unable to work. (RP 284-5, 295-6) The record does reflect that she apparently wanted to become a nurse and that this conviction had negated that possibility, however this clearly indicates that Ms. Torres is able to be gainfully employed.

State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) "The commissioner or clerk "will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review. "... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are

appropriate.... We base our decision on factors the parties set forth in their briefs rather than remanding to the trial court.”

This case clearly is not Sinclair. This is an individual who was shown to be a person who will not be indigent in the future. It would appear from the age and minimal prior contact with the judicial system that unlike Sinclair, there is a "realistic possibility" that Appellant will be able to pay costs in the future. *Id* at 393 Accordingly, this court should at this time decline to deny the State costs if the State is the prevailing party on appeal. RAP 14.2.

IV. CONCLUSION

The facts set forth by the state clearly supported its theory that the parts that on this railroad engine that were damaged where in fact “operating mechanisms” and therefore the actions of the State throughout this case are supported by statute and case law. Further, the rulings of the trial court were also supported by the facts and the case law and were such that any other reasonable judge presented with the same facts and evidence would have ruled in a similar manner.

This court should deny this appeal, however remand should be granted to correct the community custody condition and the restitution numbers entered on the judgment and sentence.

The record is sufficient for this court to determine that Appellant

may have the future ability to pay appellate costs therefore it is premature to deny this cost at this time.

For the reasons set forth above this court should deny this appeal.

Respectfully submitted this 13th day of October 2016,

By: s/ David B. Trefry

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DECLARATION OF SERVICE

I, David B. Trefry, state that on October 13, 2016, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Mr. Casey Grannis at John Sloane Sloanej@nwattorney.net.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of October, 2016 at Spokane, Washington.

s/ David B. Trefry
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