

No. 33964-5-III
Consolidated with No. 34338-3-III

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Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JEFFREY HOWARD KELLER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-01229-1

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. A collateral review under RCW 10.73.090 is not appropriate.
- B. Trial counsel did not violate the defendant's Sixth Amendment right to effective counsel.
- C. The trial court did not err in considering whether or not prior adult felony convictions constitute the same criminal conduct before imposing sentence.
- D. The court should award appellate costs in the event the State substantially prevails on appeal.

II. STATEMENT OF FACTS

On July 9, 2011, the defendant was observed acting suspiciously in Wholesale Sports in Kennewick, Washington. 1RP¹ at 38-40. Loss Prevention Officer (LPO) Mike Hempstid observed the defendant selecting numerous fishing rods and attempting to peel the tags off less expensive rods and place them on more expensive rods. 1RP at 42-43. Mr. Hempstid contacted the police based upon this conduct. 1RP at 45.

Officer Reynolds contacted the defendant in the store and found the defendant in possession of a St. Croix fishing pole and reel valued at \$230.00 and a Shakespeare combination pole valued at \$29.99. 1RP at 39-

¹ There are two volumes of Verbatim Report of Proceedings referenced as follows: 1RP – 04/12/2012, 08/06/2012, 12/04/2012, and 12/10/2012; and 2RP – 12/17/2015.

40, 59. The St. Croix fishing pole had the bottom half of the manufacturer's sticker ripped off and the UPC sticker from a cheaper pole, a Celilo. 1RP at 61. This was all captured on video. 1RP at 49-50. Officer Reynolds and LPO Hempstid later recovered the hangtag that was ripped off. 1RP at 62.

On August 2, 2011, at approximately 12:10 p.m., LPO Jamison Swanson observed the defendant pushing a Dyson DC 25, valued at \$549.00, in a shopping cart at the Home Depot store where LPO Swanson was employed. 1RP at 78, 84-85. The defendant selected a shelving board and placed it on top of the vacuum. 1RP at 85. The defendant then went to a register and purchased the Dyson. 1RP at 85. The Dyson rung up as a \$79.96 Hoover vacuum, causing a loss of \$469.04 to Home Depot. 1RP at 85, 88. The defendant got into a vehicle and drove away before LPO Swanson could verify that the vacuum had the wrong UPC code attached. 1RP at 92. Upon researching this theft, LPO Swanson discovered that the defendant had come back to the store later that night. 1RP at 92. The defendant had selected a Dyson DC 24 vacuum valued at \$449.00, placed a UPC code for a \$79.96 Hoover vacuum on the Dyson, selected a shelving board, and placed it on the vacuum. 1RP at 92-94. The Dyson vacuum rang up as \$79.96, causing a loss of \$369.04. 1RP at 93-94.

On August 3, 2011, LPO Swanson was on duty at the Home Depot store, saw the defendant pushing a shopping cart in the store, and observed him select a Dyson DC 25 vacuum cleaner valued at \$549.00 and place it in his shopping cart. 1RP at 94-95. The defendant then went to the middle of the lighting aisle, where he placed a UPC code for a Hoover vacuum valued at \$79.96 on the Dyson DC 25 vacuum. 1RP at 95. The defendant then proceeded to the hardware department and selected a shelving board, and placed it on top of the vacuum cleaner. 1RP at 95. The defendant then approached the register to check out, and the \$549.00 vacuum rang up at \$79.96, causing a loss of \$469.04 to Home Depot. 1RP at 94-96.

As the defendant was attempting exit Home Depot, he was stopped by LPO Swanson who identified himself as Home Depot Security. 1RP at 96-97. Swanson asked the defendant to accompany him back to the office, and the defendant did so. 1RP at 97. Once in the office, the defendant told Swanson that he did steal the two Dyson vacuum cleaners from the previous day. 1RP at 97. The defendant stated he printed the UPC codes at home and brought them to the store to stick on the Dyson vacuums. 1RP at 98. The defendant stated he used *Google* to search for a way to make some quick money, and he found ticket switching as an option, so he decided to try it. *Id.*

At a bench trial on August 6, 2012, Benton County Superior Court found the defendant guilty of Attempted Theft in the Third Degree, Theft in the Second Degree, and Trafficking in Stolen Property, and on December 4, 2012, sentenced him to 84 months total confinement. CP 1, 4; IRP at 148-52, 171. At sentencing, the defendant's offender score was calculated using criminal convictions which included:

2.2 CRIMINAL HISTORY RCW 9.94A.525:

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1	Theft in the Second Degree	8-18-1999	BENTON	7-24-1999	A	NV
2	Theft in the First Degree	1-12-2001	BENTON	12-1-1999	A	NV
3	Burglary in the Second Degree	1-12-2001	BENTON	7-17-1999	A	NV
4	Burglary in the Second Degree	1-12-2001	BENTON	3-1-2000	A	NV
5	UIBC	11-30-2001	BENTON	10-24-2000	A	NV
6	Theft in the First Degree	11-15-2002	BENTON	5-21-2001	A	NV
7	Possession of Stolen Property in the Second Degree	11-15-2002	BENTON	1-30-2002	A	NV
8	Theft in the Second Degree	7-7-2005	BENTON	3-3-2005	A	NV
9	Possession of Stolen Property in the Second Degree	8-16-2006	BENTON	6-1-2005	A	NV
10	Possession with Intent to	8-16-2000	BENTON	4-13-2006	A	NV

Deliver Marijuana					
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CP 3.

The defendant did not stipulate to the offender score. 1RP at 166. The State provided a certified copy of the judgment and sentence for each conviction as an offer of proof. 1RP at 167-69. The defendant pointed out a scrivener's error on crime number one, Theft in the Second Degree, on the date of the crime. 1RP at 169. The defendant also pointed out a similar scrivener's error on crime number eight, Theft in the Second Degree, regarding the date of the judgment and sentence. 1RP at 169. The errors were corrected to reflect the appropriate dates. 1RP at 169.

The defendant appealed the convictions, arguing that the court erred when it sentenced him to 364 days for the gross misdemeanor, attempted third degree theft conviction because the standard sentencing range for that offender was zero to 90 days. *See* Br. of Appellant at 14-15, *State v. Keller*, Court of Appeals No. 31317-4-III. A commissioner affirmed the defendant's convictions and remanded the case to the trial court to re-sentence the defendant on the third degree theft conviction congruent with the statutory maximum of 90 days. CP 36-41.

A re-sentencing hearing was held on December 17, 2015, to amend the gross misdemeanor sentence range from zero to 364 days to zero to 90

days. 2RP at 2. The defendant raised an objection to his criminal history, asserting that the ten points previously calculated was incorrect. 2RP at 3. The court amended the judgment and sentence consistent with the Court of Appeals ruling and indicated to the defendant that he would need to file a formal motion challenging the offender score. 2RP at 4.

The defendant filed a motion to modify/correct his judgment and sentence, and the court denied his request. CP 29-44; RP at 4. The court amended the judgment and sentence according to the commissioner's ruling. CP 18-28.

III. ARGUMENT

A. **The defendant is not entitled to equitable tolling of limitations period.**

The defendant requests the one year time bar on collateral review under RCW 10.73.090 issues be tolled due to restraints placed on the defendant by the trial judge and due to misleading information given by trial lawyer failing to inform client of important appeal rights.

Under RCW 10.73.090, the time limit for collateral attack of a criminal judgment and sentence is one year after the judgment becomes final. *In re Bonds*, 165 Wn.2d 135, 139, 196 P.3d 672 (2008). Collateral attack includes the filing of a PRP. *Id.* at 140. Equitable tolling “permits a court to allow an action to proceed when justice requires it, even though a

statutory time period has nominally elapsed.” *State v. Robinson*, 104 Wn. App. 657, 667, 17 P.3d 653 (2001) (quoting *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997)). The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. *Finkelstein v. Security Properties, Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995).

The defendant’s reliance on *In re Hoisington*, 99 Wn. App. 423, 430, 993 P.2d 296 (2000), is misplaced. In that case, Hoisington pleaded guilty under an agreement that incorrectly stated that the charged crime was a class B felony rather than a class A. *Id.* at 425-26. Because of the mutual misunderstanding, the appropriate remedy was to grant Hoisington a choice between specifically enforcing the agreement or withdrawing the guilty plea. *Id.* at 428. Hoisington had raised the issue of specific enforcement on direct appeal, but the court failed to address the claims. *Id.* at 432-33. Because Hoisington acted with due diligence and the court was at fault for not addressing his claims on appeal, the court concluded that the one-year time bar should be equitably tolled. *Id.* In the present case, the defendant’s initial direct appeal was timely filed. The court did not fail to address any claims.

In *Robinson*, Robinson pleaded guilty on July 16, 1998. 104 Wn. App. at 660. Almost one year later, on July 13, 1999, she mailed a motion

to withdraw her plea to the court clerk. *Id.* at 661. The clerk received the motion on July 19, 1999. *Id.* The trial court denied the motion, ruling that the motion was untimely because it was filed more than one year after final judgment was entered. *Id.* Robinson appealed, arguing that RCW 10.73.090 should be equitably tolled because she “‘diligently pursued her cause and but for either the lateness of the mail or the failure of the clerk to stamp the motion as filed, she would have filed the motion before the expiration date.’” *Id.* at 667. The court held that Robinson’s situation does not support application of equitable tolling and that her motion was time barred. *Id.* at 668. The court reasoned that postal delay was the most likely explanation for Robinson’s tardiness and that

postal delay is such a common experience that any litigant who has a statute of limitations looming, as this one was, . . . should probably either file by facsimile transmission where permitted . . . or mail the document to be filed early enough to account for all but the most egregious postal delay.

Id. at 668-69.

The present case is analogous to *Robinson*. The defendant argues that the electronic home monitoring order and medical issues prevented the defendant from seeking the materials and legal remedies to obtain relief in the one-year timeframe. However, the defendant also asserts that trial counsel failed to inform him that a notice of appeal was being filed and that “‘until recently, I was unaware of my options.’” Defendant’s PRP

at 8. The defendant does nothing to support the allegation that he diligently pursued his case. Nothing in the record or the defendant's PRP evidences any "bad faith, deception, or false assurances" by the State or anyone else.

Thus, the defendant has not met the high burden of demonstrating that his PRP was untimely filed due to bad faith, deception, or false assurances or that he diligently pursued his case.

B. Trial counsel did not violate the defendant's right to effective assistance of counsel.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

The first prong requires a showing that "counsel's representation fell below an objective standard of reasonableness based on consideration

of all of the circumstances.” *Thomas*, 109 Wn.2d at 226. Courts will indulge in a strong presumption that counsel’s representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226. 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. *McFarland*, 127 Wn.2d at 336.

Under the second prong, prejudice is shown when the defendant can establish with reasonable probability that, but for counsel’s error, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

1. Trial counsel’s performance was not deficient because there was no actual conflict of interest.

The defendant first argues that trial counsel’s performance was deficient because there were actual conflicts of interest depriving the defendant of effective assistance of counsel. PRP at 7. However, he does not give any specific actual conflicts other than disagreements between his attorney and him, such as trial counsel proceeding with a new trial following a mistrial and failing to ask for a dismissal based on

prosecutorial misconduct to prevent double jeopardy. PRP at 7. The disagreements were not actual conflicts of interest.

The Sixth Amendment affords a criminal defendant the right to effective assistance of counsel, free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). An attorney's conflict of interest may create reversible error in two situations without a showing of actual prejudice. *In re Richardson*, 100 Wn.2d 669, 675 P.2d 209 (1983). First, "reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance." *Id.* at 677. Second, a trial court commits reversible error if it "knows or reasonably should know of a particular conflict into which it fails to inquire." *Id.* The defendant asserts that an actual conflict adversely affected his lawyer's performance, thus denying him effective assistance of counsel.

To determine whether an actual conflict of interest deprived a defendant of effective assistance of counsel, the court engages in a two-part inquiry: (1) was there an actual conflict of interest; and (2) if so, did the conflict adversely affect the performance of the defendant's attorney? *State v. White*, 80 Wn. App. 406, 907 P.2d 310 (1995). The rule in conflict cases is "not quite the per se rule of prejudice that exists for [other] Sixth Amendment claims" *Strickland*, 466 U.S. at 692. Possible or

theoretical conflicts of interest are “insufficient to impugn a criminal conviction.” *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

An actual conflict of interest exists if, “. . . during the course of the representation, the defendants’ interests diverge with respect to a material factual or legal issue or to a course of action.” *Sullivan v. Cuyler*, 723 F.2d 1077, 1086 (3d Cir. 1983). The actual conflict must be “readily apparent.” *State v. James*, 48 Wn. App. 353, 365, 739 P.2d 1161 (1987). “Prejudice is presumed only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” *State v. Davis*, 141 Wn.2d 798, 864, 10 P.3d 977 (2000) (quoting *Strickland*, 466 U.S. at 692 (citing *Cuyler*, 446 U.S. at 348-50)). Each of the two prongs must be met. *State v. Tjeerdsma*, 104 Wn. App. 878, 882, 17 P.3d 678 (2001). To demonstrate that counsel’s performance was “adversely affected” by the actual conflict, the defendant must show the conflict “hampered his defense.” *State v. Lingo*, 32 Wn. App. 638, 646, 649 P.2d 130 (1982). The conflict “must cause some lapse in representation contrary to the defendant’s interests,” *Sullivan*, 723 F.2d at 1086, or have “likely” affected counsel’s conduct of particular aspects of the trial counsel’s advocacy on behalf of the defendant. *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992).

In *Lockhart v. Terhune*, 250 F.3d 1223 (9th Cir. 2001), Lockhart was charged with murder and attempted murder. Prosecutors presented evidence that Lockhart had committed a second, earlier murder. *Id.* at 1226. The record showed that Lockhart's trial counsel was also representing another defendant, Galbert, in the earlier homicide. *Id.* The court found that an actual conflict of interest existed because, while Lockhart and Galbert were not co-defendants, it was in Galbert's interest to have Lockhart convicted because of the connection between both killings. *Id.* The court also found that the actual conflict adversely affected his defense and that likely could be attributed to trial counsel's conflict of interest. *Id.* at 1231. Lockhart had identified a number of actions and inactions that adversely affected his defense such as: trial counsel failing to interview or subpoena the identified tipster, failing to investigate the tipster, and failing to inform the jury that another defendant had actually been accused of shooting the victim. *Id.* at 1232. Since this actual conflict of interest impaired Lockhart's defense, the court reversed his conviction. *Id.* at 1233.

In contrast, in *State v. Graham*, 78 Wn. App. 44, 896 P.2d 704 (1995), Graham was tried jointly with three other co-defendants for delivery of marijuana and possession of marijuana with intent to deliver, all of whom were represented by the same appointed attorney. *Id.* at 46-

48. Graham was found guilty on both counts. *Id.* at 50. Graham appealed, claiming that the trial court erred in allowing trial counsel to jointly represent four co-defendants and that the record reflected an actual conflict of interest adversely affected his trial counsel's performance. *Id.* at 53-54. Graham argued that trial counsel failed to move for severance or object to joinder, and failed to object to the evidence on marijuana identification, scales, and cash. *Id.* at 56. The court found nothing in the record to "show an actual conflict of interest that adversely affected trial counsel's performance" resulting in prejudice. *Id.* at 56-57.

In the instant case, like *Graham*, the defendant cannot meet both prongs required to show prejudice. There is no indication whatsoever that trial counsel actively represented conflicting interests which adversely affected his lawyer's performance. As such, trial court's performance was not deficient.

2. **Trial counsel did not violate the defendant's right to effective assistance of counsel by failing to raise the issue of corpus delicti in a timely manner during trial.**
 - a. **Trial counsel's performance was not deficient because trial counsel's performance did not fall below an objective standard of reasonableness.**

The defendant asserts that trial counsel's trial preparation fell below an objective standard of reasonableness by failing to raise corpus

delicti during trial in a timely manner. PRP at 2-3. However, trial counsel was not deficient for stipulating to the admissibility of the confession because the stipulation was based on legitimate trial strategy, considering the State had ample evidence independent of the defendant's confession to satisfy the corpus delicti rule. Additionally, the defendant's corpus delicti argument has already been raised and rejected by the Court of Appeals in his first appeal. *See* CP 38-40.

“Corpus delicti” literally means “body of the crime.” *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). In Washington State, a confession, standing alone, is insufficient to establish the corpus delicti of a crime. *State v. Smith*, 115 Wn.2d 775, 801 P.2d 975 (1990). The rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone. *See Smith v. United States*, 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 192 (1954).

The corpus delicti rule is to ensure other evidence supports the defendant's statement and satisfies the crime's elements. *State v. Dow*, 168 Wn.2d 243, 249, 251, 227 P.3d 1278 (2010). It can be proved by either direct or circumstantial evidence. *Aten*, 130 Wn.2d at 655. The rule is described as follows: The confession of a person charged with the commission of a crime is not sufficient to establish the corpus delicti, but if there is independent corroborating evidence, such confession may then

be considered in connection therewith and the corpus delicti established by a combination of the independent proof and the confession. *Smith*, 115 Wn.2d at 781.

To determine the sufficiency of the independent evidence under corpus delicti, the truth of the State's evidence is assumed and all reasonable inferences are viewed in a light most favorable to the State. *Aten*, 130 Wn.2d at 656. The circumstantial evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Lunch*, 70 Wn.2d 365, 372, 423 P.2d 72 (1967). The independent evidence need not be of such a character as would establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the proof. *Smith*, 115 Wn.2d at 781. The independent evidence must only provide prima facie corroboration of the defendant's statement. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006).

Prima facie in this context means that there is "evidence of sufficient circumstances which would support a logical and reasonable inference" of the facts sought to be proved. *Aten*, 130 Wn.2d at 656. The evidence need not be enough to support a conviction or send the case to the jury. *Id.* However, if no such evidence exists, the defendant's confession or admission cannot be used to establish the corpus delicti and prove the defendant's guilt at trial. *Id.* Two elements are necessary to

establish the corpus delicti: (1) an injury or loss, and (2) someone's criminal act as the cause thereof. *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951).

In *State v. Dow*, defendant Dow was charged with Child Molestation in the First Degree. 168 Wn.2d at 247. At the time of the alleged offense, the child was three years old. *Id.* The State acknowledged that the victim was too young to testify. *Id.* The State conceded there was no evidence independent of Dow's statement to the police that the crime occurred. *Id.* The State nevertheless argued that Dow's statements were trustworthy and should be admitted under RCW 10.58.035. *Id.* Said statute allowed a defendant's statements into evidence even where independent evidence of the crime was absent, so long as certain statutory indication of trustworthiness of the statements was present. *Id.* at 253. The trial court declined to admit the statements and dismissed the case. *Id.* at 248. The Supreme Court affirmed the dismissal, holding that even if Dow's statements were trustworthy and should have been admitted, RCW 10.58.035 pertained "only to admissibility" and did not relieve the State of the burden of presenting sufficient evidence independent of a defendant's confession to support a conviction. *Id.* at 253-54. Given the State conceded there was no corroborating evidence independent of Dow's statement, the Court held the corpus delicti was not satisfied. *Id.* at 254. In

reaching this conclusion, the Supreme Court stated: “[T]he State must still prove every element of the crime charged by evidence independent of the defendant’s statement.” *Id.* at 254.

The thefts of the fishing rods and Dyson vacuum cleaners proves the first element of the *corpus delicti*—the fact of the loss. The next question is whether the independent evidence corroborating the defendant’s confessions or admissions supports a reasonable and logical inference the thefts were caused by a criminal act.

Looking at the evidence here, it is clear that the *corpus delicti* of trafficking in stolen property was established. The court cited three facts in particular that showed that the *corpus delicti* had been established. 1) The defendant, over a period of two days, acquired three high-end vacuum cleaners. 1RP at 150. This is strong circumstantial evidence that the defendant intended to sell at least some of these devices. The State is unaware of any legitimate reason to acquire three powerful, high-end vacuums in such a short time. This is certainly strong evidence that the defendant intended to dispose of them. 2) The defendant targeted items which are common targets of those intending to steal property with the intention of later selling it. 1RP at 150-51. In fact, he targeted one of the three items most commonly stolen by individuals with those intentions. 1RP at 80. The defendant intentionally stole three Dyson vacuum cleaners,

in the same fashion, repeating many of the same steps. 1RP at 151. It showed the defendant had developed a consistent scheme or plan, via which he intended to continue stealing vacuums. This plan involved a fairly complicated scheme, requiring an understanding of how the scanning system worked. The defendant's crime spree was stopped only by the intervention of the Loss Prevention Officer. This leads to the natural conclusion that the defendant was engaged in a criminal enterprise, and that he intended to continue it.

In the instant case, there is overwhelming evidence, independent of the defendant's confession, that leads to a reasonable and logical inference of the fact of the loss and a causal connection between the loss and a criminal act. The State's corroborating evidence consisted of physical evidence as well as witness testimony.

Thus, the State's evidence supports a prima facie showing of the corpus delicti. In considering all of the aforementioned factors, one can conclude trial counsel made a tactical decision to stipulate to the admission of the defendant's voluntary confession. As such, trial counsel's performance was not deficient.

- b. If this Court finds that trial counsel's performance was deficient for failing to raise corpus delicti, the defendant cannot show he suffered actual prejudice.**

If this Court determines that trial counsel's performance was deficient, the defendant has still failed to show he suffered actual prejudice to warrant setting aside the conviction. Trial counsel's stipulation to the admissibility of the defendant's voluntary confession did not prejudice the defendant because trial counsel's decision was a legitimate trial strategy. Additionally, because there was sufficient evidence of the corpus delicti, independent of the defendant's statements, to support a logical and reasonable inference that the fact of the loss occurred due to a criminal act, the defendant cannot show that he suffered actual prejudice.

Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to the defendant affirmatively proving prejudice. *Strickland*, 466 U.S. at 693. To make a showing of prejudice, the standard requires that the defendant show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 322.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. *Strickland*, 466 U.S. at 695. A verdict or conclusion only weakly supported by the record is more likely to have been affected by the errors than one with overwhelming record support. *Id.* at 697. Taking the unaffected findings as given, and taking due account of the effect of the

errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would likely have been different absent the errors. *Id.* at 696.

Because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. *Washington v. Strickland*, 693 F.2d 1243, 1254 (5th Cir.1982), *rev'd on other grounds*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel may still be effective even if counsel does not conduct a substantial investigation into every plausible line of defense. *Strickland*, 466 U.S. at 668. However, counsel may not exclude certain lines of defense for other than strategic reasons. *Strickland*, 693 F.2d at 1257-58. "Limitations of time and money, however, may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence." *Strickland*, 466 U.S. at 681. Strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. *Id.* Therefore, "when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Strickland*, 693 F.2d at

1255 (footnote omitted).

The defendant argues that trial counsel's failure to raise corpus delicti prejudiced him. Even if the defendant shows that the particular error of counsel was unreasonable, the defendant must show that it actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. It is not enough for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. *Id.* Virtually every act or omission of counsel would meet that test, *cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-67, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. *Strickland*, 466 U.S. at 693.

In *State v. Fisher*, trial counsel considered making a motion to suppress based on the warrantless arrest, but chose not to do so. *State v. Fisher*, 74 Wn. App. 804, 874 P.2d 1381 (1994). Whether this decision reflects a legitimate trial strategy or tactic cannot be determined from the record, but the existence of exigencies provides a plausible reason for trial counsel to have decided not to move for suppression. *Id.* at 811.

In the instant case, the defendant does not allege that his confession was unlawfully obtained, but rather the failure of trial counsel to move to suppress his voluntary confession precluded him from raising a

defense for lack of independent evidence. The defendant's assertion that trial counsel's decision relieved the State of proving the necessary elements is false. The State produced ample evidence, independent of the defendant's statements, to establish the necessary elements of Attempted Theft in the Third Degree, Theft in the Second Degree, and Trafficking in Stolen Property. The additional evidence presented at trial in this matter supported the defendant's guilt of Attempted Theft in the Third Degree, Theft in the Second Degree, and Trafficking in Stolen Property.

The trial record demonstrates that even if counsel had not stipulated to the admission of the confession, the outcome would not have been any different. Therefore, the defendant suffered no prejudice resulting from trial counsel's stipulation to the admissibility of the voluntary confession. While the defendant may disagree with trial counsel's tactical decision to stipulate to the confession, it is not a basis for an ineffective assistance of counsel claim. Additionally, the State presented sufficient evidence of the corpus delicti, independent of the defendant's statements, to support a logical and reasonable inference that the loss occurred due to the defendant's criminal acts.

The defendant failed to meet the two prongs required for a valid claim of ineffective assistance of counsel. First, the defendant failed to show that trial counsel made errors so serious that counsel was not

functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant failed to show that the alleged deficient performance prejudiced the defendant in such a way as to deprive him of a fair trial. Considering all of the circumstances, trial counsel’s performance was not deficient.

C. The trial court did not err in considering whether or not prior adult convictions constitute the same criminal conduct before imposing sentence.

1. The court did not have the duty to correct the defendant’s offender score at re-sentencing.

At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *In re Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). “The best evidence of a prior conviction is a certified copy of the judgment.” *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination. *Ford*, 137 Wn.2d at 480. This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing “some minimal indicium of reliability beyond mere allegation.” *Ford*, 137 Wn.2d at 481 (quoting *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984)); *State v. Mendoza*, 165

Wn.2d 913, 920, 205 P.3d 113 (2009). “This is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence.” *Mendoza*, 165 Wn.2d at 920; *see also State v. Ross*, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004); *Ford*, 137 Wn.2d at 480. “[T]he court may rely on the defendant’s stipulation or acknowledgement of prior convictions to calculate the offender score.” *State v. James*, 138 Wn. App. 628, 643, 158 P.3d 102 (2007).

Here, at the original sentencing, the State offered certified copies of the judgment and sentences for all ten prior convictions. 1RP at 167-69. Defense counsel had the opportunity to review a copy of each judgment and sentence. After review, the defendant had no objection to the calculation of the offender score. When asked if he had any further comments on this proof, defense counsel replied, “No, your Honor.” 1RP at 169.

Following the commissioner’s ruling, a re-sentencing hearing was held to amend the gross misdemeanor sentence range from zero to 364 days to zero to 90 days. 2RP at 2. The defendant disputed his criminal history, arguing that the ten points previously calculated was incorrect. 2RP at 3. The court amended the judgment and sentence consistent with the Court of Appeals ruling and indicated to the defendant that he may need to file a PRP to challenge the offender score. 2RP at 4.

The defendant asserts that the court abused its discretion by failing to correct the defendant's offender score at the re-sentencing hearing. *See* Br. of Appellant at 3-7. "Abuse of discretion occurs 'when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons.'" *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.2d 124 (2004) (quoting *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998)). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the required of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The court did not abuse its discretion or misapply the law by refusing to address the defendant's objection to his offender score. The State offered proof of each prior conviction, totaling an offender score of ten. At the original sentencing, defense counsel reviewed the judgment and sentence from each previous conviction and made no objection. The court did not enter a finding that some of his previous crimes constitute "same criminal conduct."

The defendant first raised his objection to the offender score during his re-sentencing. The defendant bears the burden of proving that the previous convictions constitute the “same criminal conduct.” *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). He failed to do so. Two crimes manifest the “same criminal conduct” only if they “require the same criminal intent, are committed at the same time and place, and involve the same victim. *Id.* at 540. The defendant fails to prove any of the elements required to prove “same criminal conduct.”

The court does not have a duty to correct an erroneous sentence based solely on the allegation of an error. The court did not abuse its discretion or misapply the law by refusing to address the defendant’s objection at re-sentencing because the defendant failed to establish that his crimes were the “same criminal conduct.”

D. Appellate costs are appropriate in this case if this Court affirms the conviction.

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). As the court pointed out in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court.

See RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the court can decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976,² the legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). In *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate or even “chill” the right to counsel. *Id.* at 818.

In 1995, the legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, the Supreme Court held this statute constitutional, affirming the court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-42, 910 P.2d 545 (1996). 131 Wn.2d at 239.

Nolan noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on

² Actually introduced in Laws of 1975, 2d Ex. Sess., ch. 96.

appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that “costs” did not include statutory attorney fees. *Nolan*, 141 Wn.2d at 623.

Nolan examined RCW 10.73.160 in detail. The court pointed out that under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The court also rejected the concept or belief espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, 141 Wn.2d at 624-25, 628.

Under RCW 10.73.160, the time to challenge the imposition of legal financial obligations (LFOs) is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant’s ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, 63 Wn. App. at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant’s indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings “is the point of collection and when sanctions are sought for nonpayment.” *Blank*, 131

Wn.2d at 241-42; *see also State v. Wright*, 97 Wn. App. 382, 985 P.2d 411 (1999).

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 indigency 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)).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts of late. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The court wrote that “[t]he legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the

individual defendant's circumstances." 182 Wn.2d at 834. The court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.* at 835-37. The court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.* at 838-39.

By enacting RCW 10.01.160 and RCW 10.73.160, the legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burdens of persons convicted of crimes, the legislature has yet to show any shift toward eliminating the imposition of financial obligation on indigent defendants.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, the legislature did not include such a provision in RCW 10.73.160. 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." See RCW 10.73.160(4).

Certainly, in fairness, an appellate court should also take into account the defendant's financial circumstances before exercising its discretion. Ideally, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determinations about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

During re-sentencing, the record reflects that the defendant is able to work upon release from confinement. 2RP at 5. The court found that the defendant had the [future] ability to pay the mandatory and discretionary LFOs. 2RP at 6. There is nothing in the record to support the assertion that the defendant will never be able to pay the appellate costs associated with this case.

In this case, the State submits that it has “substantially prevailed.” Any assertion that the defendant cannot and will never be able to pay appellate costs is belied by the record. This Court should exercise discretion to impose appellate costs.

IV. CONCLUSION

Based upon on the aforementioned facts and authorities, the defendant’s consolidated appeal should be denied and the conviction affirmed. The legal financial obligations were properly imposed because the court conducted an individualized inquiry into the defendant’s present and future ability to pay. The State respectfully requests that costs be taxed as requested by the State.

RESPECTFULLY SUBMITTED this 18th day of January, 2017.


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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:

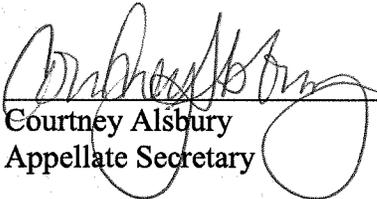
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Signed at Kennewick, Washington on January 18, 2017.


Courtney Alsbury
Appellate Secretary