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Court of Appeals
Division III
State of Washington

No. 34396-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

HAYDEN WALSH,

Appellant

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

NO. 16-1-00064-2

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. Defense counsel's performance was not deficient for failure to object to hearsay because such objection would not have been sustained due to the "excited utterance" exception and the defendant was not prejudiced.
- B. Admission of a hearsay statement was not reversible error because it was harmless in light of other overwhelming untainted evidence.
- C. The defendant has not presented a reviewable issue pursuant to RAP 2.5(a)(3) because the defendant fails to show any actual error in instructing the jury.
- D. The defendant was not denied a fair trial because there was no cumulative error.

II. STATEMENT OF FACTS

The State agrees with the recitation of "Procedural Facts" by the defendant, and substantially agrees with the recitation of "Substantive Facts" by the defendant. Corrected Br. of Appellant at 2-7. In addition, the State provides the following additional substantive facts:

When police officers contacted defendant Hayden Walsh outside of his apartment complex on January 19, 2016, he was detained and read

his Constitutional rights. RP¹ at 110. He waived his rights after initially invoking his right to silence. RP at 111. The defendant then told Officer Heid that he had prevented his girlfriend, Angela Saenz, from leaving their shared apartment by leaning up against the door. RP at 111. Officer Kelly testified that the defendant also made a statement to him that after wrestling with Saenz, the defendant “had put his finger into her throat and said, ‘I can choke you with one finger.’” RP at 129.

Officers also questioned Angela Saenz about the incidents leading up to them being called to the apartment. RP at 105. Saenz told officers that she had been moving out of the apartment and arguing with the defendant. RP at 32, 36. Saenz described that at some point she was wrestling with the defendant and she told police that the wrestling was not playful and was in fact painful. RP at 37, 40-41. She then described to officers that Walsh was putting his forehead against hers and blowing air into her face. RP at 43-44. She also told officers that during the argument, Walsh had held a screwdriver to her throat (RP at 51), and that he said, “fifty-eight times, twenty-eight times, or one in the back?” as he held the screwdriver to her throat. RP at 54-55. Saenz then told officers that she had heard her landlord’s loud truck outside and she ran out of the apartment to get help. RP at 60-61. Saenz told police that during the time

¹ Unless otherwise indicated, RP refers to the verbatim report of proceedings of the

she had been in the apartment with Walsh, she could not leave the apartment for 15-20 minutes, and that the whole incident lasted approximately 45 minutes. RP at 49, 65. When officers contacted Saenz, she was answering their questions coherently and with detail, per Officer Heid. RP at 107.

When officers contacted Walsh, he was noted to be standing “in an odd way” per Sgt. Olsen, with his feet pigeon-toed, off balance, and apparently flexing his pectoral muscles to counterbalance himself. RP at 120. Officer Heid testified that when questioning Walsh, his answers seemed “incoherent” in that they were responsive to Heid’s questions but they were not “necessarily consistent.” RP at 113. Walsh stated that Saenz had assaulted him by holding a screwdriver to his throat. RP at 111. Officer Kelly testified that Walsh stated that Saenz had hit him in the face and karate chopped him in the throat. RP at 129. At trial, Saenz denied assaulting the defendant in any way, or that the defendant poked her in the throat and said he could choke her. RP at 54, 56.

III. ARGUMENT

A. Defense counsel's performance was not deficient or ineffective.

1. Defense counsel's performance did not fall below an objective standard of reasonableness.

The defendant claims that his trial counsel was deficient for failing to object to testimony from witness Chris Schuler. Corrected Br. of Appellant at 7. However, it is clear from the record that trial counsel was not deficient in failing to object to these statements because they were excited utterances of the declarant. Because such an objection would not have been sustained, defense counsel may have had a legitimate trial strategy to avoid objecting to questions and responses which were clearly not objectionable.

To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of showing, based on the trial record only, that trial counsel's representation was deficient in that it fell below an objective standard of reasonableness based on the totality of circumstances, and that the defendant was prejudiced by the deficient performance. *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)). This is known as the two-pronged *Strickland* standard, for *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984). There is to be “a strong presumption counsel’s representation was effective.” *McFarland*, 127 Wn.2d at 335. When a claim for ineffective assistance is brought on direct appeal, the reviewing court cannot consider anything outside of the trial record. *Id.*

Due to the presumption of effective assistance of counsel, the defendant bears the burden of showing “in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336.

To show deficient performance based on counsel’s failure to challenge the admission of evidence,

the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995); (2) that an objection to the evidence would likely have been sustained, *McFarland*, 127 Wash.2d at 337 n.4, 899 P.2d 1251; [*State v.*] *Hendrickson*, 129 Wash.2d [61], 80, 917 P.2d 563 [(1996)]; and (3) that the result of the trial would have been different had the evidence not been admitted, *Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563.

State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In this case, the defendant cannot show that there was an absence of strategy in not objecting to hearsay-excepted testimony, nor can he show that if his counsel had objected to the questioning of witness Schuler

that it would have been sustained and that the result of the trial would have been different.

There is a legitimate trial strategy to not over-objecting, particularly when a trained lawyer knows that the objection is likely not to be sustained. Having objections repeatedly overruled raises the chance of undermining the jury's confidence in the competence and abilities of an attorney. Further, there is an ethical and procedural duty to the court not to object if counsel does not feel that there is a basis in rule or law to do so. In this case, the testimony at issue was excepted from hearsay rule ER 803 as an excited utterance, ER 803(a)(2), so even if counsel had objected at the time of trial, the objection would have been overruled and such testimony would have been admitted.

ER 803(a)(2) provides an exception to the hearsay rule of ER 801 when the hearsay is an "excited utterance." An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). Courts have interpreted this rule to encompass statements made by a declarant with some degree of spontaneity, or before a declarant has time to fabricate a story. *State v. Briscoeray*, 95 Wn. App. 167, 173-74, 974 P.2d 912 (1999). "In determining spontaneity, courts look to the amount of time that passed between the startling event and the

utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it.” *Id.* at 173-74. There are no specific requirements that a declarant have any particular emotional state at the time of making the declaration, or that they be in close physical proximity to where the startling event occurred, or that any particular amount of time pass or not pass between the event and the declaration. It is the determination of the trial court whether the declarant’s credibility shows that the statements were spontaneous and reliable, not the determination for the appellate court to later evaluate if a witness was lying or not. *Briscoeray*, 95 Wn. App. at 172-73.

In this case, the testimony from witness Schuler was that the victim, Angela Saenz, came up to his truck with her baby in her arms and told him that “he’d held her, he wasn’t letting her leave, took her keys from her, held a screwdriver. I think it was to her throat.” RP at 94. Schuler was referring to statements Saenz was making about the defendant. Schuler also stated that Saenz was telling him this as the defendant was also coming to his truck right behind Saenz, and that as Saenz was spilling out these statements, the defendant came up behind her and was acting belligerent and “a little loud.” RP at 94-95. Schuler also stated that he felt it was “clear that she was scared for, you know, what was happening.” RP at 97. Schuler also described the defendant ordering

Saenz back into the apartment and that Angela looked back at Schuler as she went with the defendant back into the apartment, and Schuler indicated to Angela that police were being called. RP at 95.

It is clear from this testimony that even if defense counsel had objected for hearsay reasons, such objection would have been overruled because Schuler was testifying to Saenz's excited utterances. Schuler had just seen Saenz come out of her apartment holding a baby and walking at a fast pace directly to his truck, followed closely by the defendant. Saenz was relaying information to Schuler about having been threatened, imprisoned, and having had a weapon held to her throat. She appeared scared, according to Schuler. She was also followed immediately by the defendant who was speaking loudly and using rude language directed at Saenz and telling her to get back inside the apartment. Saenz was clearly still under the stress of the ongoing situation with the defendant, and did not have time to fabricate any stories since she came directly from her apartment, where she described these events happening, to Schuler's truck.

The trial court would have easily been able to make the determination that these statements are excepted by ER 803(a)(2) as excited utterances, and so the defendant cannot now show that even if his trial counsel had objected, such objections would have been sustained.

2. The defendant was not prejudiced even if his counsel was deficient.

If the reviewing court agrees with the defendant that his trial counsel's performance was deficient for failing to object to the above-noted testimony of witness Schuler, the defendant still bears the burden of showing that his trial outcome was prejudiced and that the outcome would have been different but for that deficient performance. *McFarland*, 127 Wn.2d at 337 (quoting *Thomas*, 109 Wn.2d at 225-26).

In order to show that the defendant was prejudiced, the reviewing court must find that counsel was first deficient in failing to object to the complained-of statements, and that had he objected, such objections would have been sustained. *See Hendrickson*, 129 Wn.2d 61. Assuming for the purpose of argument that both of those findings are made, the defendant still could not show that the outcome of his trial would have been different based on the record herein. Because the victim, who was subject to cross-examination, testified that she ran or walked up to witness Schuler with the defendant right behind her (RP at 61); that she asked Schuler for help (RP at 60-61); and that Schuler "could tell that there was something going on, that we were arguing" (RP at 61); that Saenz told Schuler she wanted to leave and wanted her keys and that the defendant said, in front of Schuler, that "[y]ou're [Saenz] not going to leave with my son" (RP at

83), a reasonable jury could still conclude from this evidence and all other trial evidence that the defendant was guilty of assault in the second degree and unlawful imprisonment, both with the domestic violence allegation. There was physical evidence corroborating Saenz's story of an assault with the screwdriver and there was testimony from both Saenz and statements of the defendant of an unlawful imprisonment, so the defendant cannot show that these admitted excited utterances prejudiced him and affected the outcome of his trial, since they are substantially similar to statements with which he takes no exception.

Because the statements complained of by the defendant were excited utterances and any objection to their admission would not have been sustained, and there is no prejudice to the defendant, this assignment of error should be denied.

B. Error in allowing hearsay statement was harmless.

1. The State concedes it was error to allow hearsay statement through Officer Heid.

The State concedes that it was error for the court to have allowed Officer Heid to have testified that the victim told him she had been assaulted. RP at 108-09. Such testimony was hearsay and no exception applied. The State also concedes that such error was of a constitutional nature because it violated the defendant's right to confront Ms. Saenz on that particular statement. Such error of a constitutional nature is presumed

to be prejudicial and the State bears the burden of showing that such error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)).

2. Error was harmless in light of other overwhelming untainted evidence that assault took place.

The standard of review for a harmless error analysis when reviewing an error of a constitutional nature is that of “overwhelming untainted evidence.” *Guloy*, 104 Wn.2d at 426. That is, “the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *Id.* “The ‘overwhelming untainted evidence’ test allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.” *Id.*

The offending exchange at issue in this case is two lines long:

Question: Did she [Saenz] indicate that an assault had taken place?

Answer: Yes.

RP at 108-09. Because the elicited hearsay violated the defendant’s right to confront Saenz, the declarant, on the statement, it is a constitutional error. However, as is clear from the record, it was harmless because of

the overwhelming untainted evidence apart from this one question-and-answer, and the inadmissible testimony was not necessary for the jury to reach a verdict of guilty on the assault charge.

Testimony from Angela Saenz, Chris Schuler, and statements from officers made by the defendant to them indicated overwhelmingly that an assault took place between Saenz and the defendant. The defendant himself admitted to officers that he had assaulted Saenz, telling officers that he had put his finger in Saenz's throat and threatened to choke her with one finger. RP at 129. Further, the jury heard from Saenz herself that she had told officers on scene that she had been assaulted with a screwdriver being held to her throat by the defendant (RP at 52, 55), and that she said the same thing in a written affidavit she completed shortly after the incident (RP at 56), and that she repeated that she had been assaulted with the screwdriver held to her throat to the prosecution and defense in a recorded interview one month after the incident. RP at 56. She told the jury that it was not until a week before trial that she intended to recant and say that no assault happened at all. RP at 44. The jury was able to see her demeanor on the stand, and hear her trial recantation in light of all the other evidence, and determine that her recantation was simply not credible. The hearsay elicited through Officer Heid was extremely insignificant considering that the jury heard the same

testimony from the victim herself with much greater detail and heard that the defendant had admitted to a different assault on her. Therefore, it is clear that the State has shown that the untainted evidence overwhelmingly leads to a finding of guilt even if the complained-of statement were excluded, so any error was harmless and not grounds for reversal of the conviction.

C. The defendant raises no question of actual error in instructing the jury and so there is no error to review per RAP 2.5(a)(3).

RAP 2.5 instructs appellants as to what issues may be raised for the first time on appeal when there has not been any objection or error raised in the trial court. The defendant alleges that he was denied the constitutional right to a unanimous verdict because of potential or possible errors in instructing the jury, thus raising the possibility of RAP 2.5(a)(3) allowing review for “manifest error affecting a constitutional right.” Corrected Br. of Appellant at 13-22. However, the defendant does not raise any actual or specific instances of error in instructing the jury, and so his request for review of this issue should be denied.

The court in *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014), held

For a claim of error to qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected

his or her rights at trial. The defendant must make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial. “[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” “If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.”

(citations omitted). “RAP 2.5(a)(3) serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred.” *Id.*

In *Lamar*, a juror was replaced with an alternate after one day of deliberation had already taken place. *Lamar*, 180 Wn.2d at 580. When the reconstituted jury was brought back into court on Monday, the judge instructed the jury to review what had already taken place the prior Friday with the new juror and bring the new juror “up to speed.” *Id.* The jury was not instructed to begin deliberations anew with the new juror. *Id.* at 581. Neither party objected to the judge’s instructions or to the failure to give any further instruction. *Id.*

On appeal, the State agreed that it was error not to instruct the jury to begin deliberations anew, but claimed that the error could not be raised for the first time on appeal. *Id.* at 582. The Supreme Court noted that there

was a manifest error affecting a constitutional right in this case, and that it was clear from the record that there was a serious question as to whether the defendant received a unanimous jury verdict given the instructions to the reconstituted jury to bring one juror “up to speed.” *Id.* at 584.

Accordingly, the Supreme Court reversed the defendant’s conviction and remanded for a retrial. *Id.* at 589.

Conversely, in this case, the defendant has raised no actual issue with instructing the jury or any issue which affirmatively shows any reason to seriously doubt that the jury rendered a unanimous verdict on both counts. All of the defendant’s statements in addressing this assignment of error are hypothetical and potential, and would be present, hypothetically and potentially, in every case. However, he points to no facts in the record which show that his concerns about jury unanimity go beyond hypothetical and potential to realistic and actual. The jury was instructed with approved pattern instructions by the court, and the jury is presumed to follow the law as given to them in the absence of evidence that they did otherwise. *Lamar*, 180 Wn.2d at 586 (2014) (quoting *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013)). There is no evidence that the jury did not follow the court’s instructions and deliberate as a complete group, in the jury room, and only as a collective, and thus render a unanimous verdict on both counts.

Because the defendant cannot cite to any evidence in the record to support his assertion that the jury verdicts were not unanimous or that there was any manifest error affecting his constitutional right to a unanimous verdict, this Court should decline to consider this assignment of error pursuant to RAP 2.5(a)(3).

D. There was no cumulative error depriving the defendant of a fair trial.

The State concedes that there was one error in allowing in one hearsay statement about the victim indicating to a police officer that she had been assaulted. However, as noted above, that one error was not prejudicial and was harmless in light of the overwhelming evidence that an assault did take place. The other errors assigned by the defendant are not supported by the record or case law, so there was no cumulative error depriving the defendant of a fair trial.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

In *State v. Greiff*, the Washington State Supreme Court found that the cumulative error doctrine did not apply even where two errors were

found in the defendant's trial. 141 Wn.2d at 929. The *Greiff* court found that the State committed a discovery violation when it failed to notify defense counsel of an expected change in a witness's testimony following a mistrial and there was error in allowing in inadmissible hearsay from the victim, but regardless of these two errors, the cumulative error doctrine did not require reversal. *Greiff*, 141 Wn.2d at 917-19. The court noted that the two errors "had little or no effect on the outcome at trial" and there was no prejudicial cumulative effect of these errors warranting reversal. *Id.* at 929. The *Greiff* court noted references to multiple other cases where errors were cumulative and the doctrine was applied, such as *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963), where there were three instructional errors and improper remarks by the prosecutor during voir dire that required reversal under the doctrine; *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992), where a witness vouched for the truthfulness of the victim's story and the prosecutor made two different errors; and *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), where reversal was ordered because of a judge's severe rebuke of defense counsel in the presence of the jury, the court's refusal to hear testimony from the defendant's wife, and the jury listening to a tape recording of the lineup in the absence of court and counsel. *Greiff*, 141 Wn.2d at 929.

Similar to *Greiff*, this case has only one conceded error as noted above, and that error was harmless and not prejudicial in light of the other overwhelming untainted evidence that an assault and unlawful imprisonment took place. Because the error had no effect on the outcome of the trial, this Court should find that the cumulative error doctrine does not apply and there is no requirement for reversal.

E. Appellate costs are appropriate in this case if the 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 also* 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 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. *Nolan*, 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

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

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.” *Id.* 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, appellate courts 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.

In this case, the defendant is a 27-year-old, physically able-bodied male with a high school education, per his Report as to Continued Indigency dated November 22, 2016, and filed with this Court. He has experience in pouring concrete and was making over \$22.00 per hour in that capacity. He indicates he receives no federal or state assistance and has no disabilities. He indicated at sentencing that he was able to work. RP 04/28/2016 at 6. Based on his own assertions to the trial and appellate courts, he has not met his burden to show any future indigence.

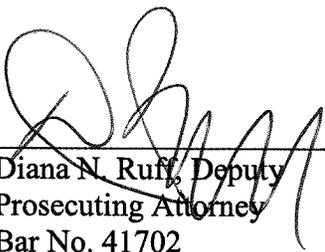
In this case, the State submits that it has "substantially prevailed." Any assertion that the defendant cannot and will never be able to pay appellate costs is belied by the record. This Court should exercise discretion to impose appellate costs.

IV. CONCLUSION

Based on the motion above, the State respectfully moves this Court to deny the defendant's request for a reversal of his judgment and sentence and deny his request for a remand for a new trial.

RESPECTFULLY SUBMITTED this 13th day of January, 2017.

ANDY MILLER
Prosecutor



Diana N. Ruff, Deputy
Prosecuting Attorney
Bar No. 41702
OFC ID NO. 91004

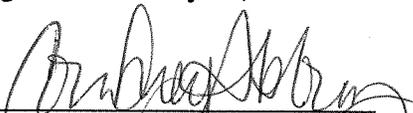
CERTIFICATE OF SERVICE

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:

Christopher H. Gibson
Nielsen, Broman & Koch, PLLC
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E-mail service by agreement
was made to the following
parties:
Sloanej@nwattorney.net

Signed at Kennewick, Washington on January 13, 2017.



Courtney Alsbury
Appellate Secretary