

**FILED**

DEC 28, 2016

Court of Appeals

Division III

State of Washington

NO. 34576-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ERIC ANDERSON,

Appellant.

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

The Honorable Douglas Federspiel, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to object to previously excluded testimony about appellant's outstanding warrant.

2. Defense counsel was ineffective in proposing a jury instruction referencing appellant's prior conviction when appellant did not testify and no evidence of a prior conviction was admitted.

Issues Pertaining to Assignments of Error

1. Was defense counsel deficient for failing to object or move for a mistrial when a police officer violated a ruling in limine and referred to appellant's outstanding warrant?

2. Was defense counsel deficient for proposing a jury instruction discussing appellant's prior conviction, where appellant did not testify and no prior conviction was admitted at trial?

3. Did defense counsel's deficient performance in allowing the jury to hear evidence of appellant's criminal history prejudice the outcome of appellant's trial, where appellant's defense was identity and his criminal history suggested a propensity for crime?

B. STATEMENT OF THE CASE

On June 13, 2016, the State charged Eric Anderson by amended information with one count of possession of a stolen vehicle, one count of making a false or misleading statement to a public servant, and two counts of

second degree vehicle prowling. CP 37-38. The case proceeded to a jury trial in June 2016.

Around 1:37 a.m. on December 25, 2015, Officer Philip Amici saw a dark colored Toyota Highlander roll through a stop sign in Yakima, Washington. RP 72-74. Amici noticed the vehicle did not have properly functioning taillights, so he decided to conduct a traffic stop. RP 72. Before activating his lights or sirens, however, the vehicle pulled away at a high rate of speed, despite icy, snowy conditions. RP 72-73. Amici attempted to follow, but soon lost sight of the vehicle. RP 74-75. Amici never saw the driver of the Toyota. RP 88.

Officer Adam Schilperoort heard over the police radio that Amici was following a vehicle nearby, so he joined behind them. RP 52-54. After losing the vehicle briefly, Schilperoort found it abandoned in the middle of the road, still running, with the lights on and driver's door open. RP 55. No one was inside and Amici never saw the driver. RP 56-57. Schilperoort radioed dispatch that he found the vehicle and dispatch advised the vehicle had been reported stolen. RP 56-57, 74.

Officer Casey Gillette also heard over the radio that Schilperoort found the vehicle. RP 58-60. When he got close to the scene, he noticed a man walking in a parking lot near some duplexes. RP 60-61. Gillette contacted a tenant, who heard somebody run behind their apartment, where

Gillette found a set of footprints in the fresh snow. RP 61-62. Gillette then heard over the radio that Sergeant Ira Cavin had observed someone nearby, so Gillette went to assist. RP 61-62.

Also responding to the radio traffic, Cavin parked nearby to set up a perimeter. RP 97-100, 132. From his patrol car, Cavin saw a man, later identified as Anderson, exit a carport between two duplexes, look left and right, and then go back into the carport. RP 101-02. Cavin got out on foot and approached. RP 101. Anderson exited the carport again, saw Cavin, and walked back towards the carport. RP 101.

Anderson eventually came out to the roadway to talk to Cavin. RP 102. Anderson identified himself as Michael Anderson. RP 104. He said he had heard a noise and pointed to the fence behind the duplex. RP 102. When asked what he was doing in the area, Anderson said he was there to visit a woman named Jennifer who lived in the duplex. RP 64, 103-04. Gillette then joined Cavin, who asked Gillette to remain with Anderson while he investigated behind the duplex. RP 104.

Cavin found a single set of footprints in the snow leading back to the fence. RP 105. The prints had a distinctive honeycomb tread. RP 106. Cavin followed the footprints over the fence behind the duplex, through the backyard of the house, and alongside that house to another fence. RP 106-09. When he looked over the top of the second fence, Cavin could see the

Toyota and Schilperoort standing next to it. RP 109. Officers found a few tracks on the other side of the fence, but there were no footprints within eight to ten feet of the Toyota. RP 75-76, 89-90, 109-110.

Gillette arrested Anderson for possession of stolen vehicle after confirming Anderson's shoes had a similar honeycomb tread. RP 65-66. Anderson also told Gillette his name was Michael Anderson and his date of birth was February 3, 1986. RP 65. Gillette looked up Michael Anderson in the police database and saw his photo did not match the man he had arrested. RP 67. Gillette testified, however, when he ran Michael Anderson's name, "it came back with a near hit of a warrant for an Eric Anderson, 12-21-1987," whose photo matched Anderson. RP 67. When Gillette told Anderson he knew he was actually Eric Anderson, Anderson admitted he had given a false name. RP 67.

Inside the Toyota, police found numerous items, including tools, compact discs (CDs), ammunition, a magazine to handgun and a rifle, a purse, women's cosmetics, and other items. RP 75-77. Officers called the registered owner of the vehicle, Gloria Morales Silva, to the scene, who confirmed the items did not belong to her. RP 76-78, 169-74. Officers released the vehicle to Silva that night without collecting any forensic evidence. RP 69, 89, 126.

Cavin and Amici then went to the location where Amici first saw the Toyota roll through the stop sign. RP 19, 126-27. They found a black sedan with its doors open and contacted the owner. RP 79-86, 127-29. The owner confirmed the items found in the Toyota belonged to him. RP 83-84, 140-41. On the ground near the black sedan, the officers also found a remote control for a CD player. RP 82. Down the road was a white van also with a door open. RP 86-87. The van owner confirmed the remote came from his vehicle. RP 87-88, 144-45. Footprints in the snow near both vehicles had the same honeycomb tread. RP 79-86, 127-30.

The defense was identity. RP 214-16. In closing, defense counsel pointed out no one saw the driver of the Toyota. RP 214. Anderson was a block and a half away from the scene. RP 215. No one saw him near the Toyota, or the prowled vehicles. RP 214. Nor did Silva see the person who stole her Toyota. RP 170-71, 215. And no forensics were done linking Anderson to the stolen or prowled vehicles. RP 214-15.

The jury found Anderson guilty as charged. CP 67-70. The trial court sentenced Anderson to 55 months on the possession of a stolen vehicle conviction and 364 days on the remaining convictions, to run concurrently to one another. CP 72; RP 240. Anderson timely appealed. CP 84.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR ALLOWING PREJUDICIAL EVIDENCE OF ANDERSON'S CRIMINAL HISTORY TO BE ADMITTED AT TRIAL.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) defense counsel's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

"A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v.

Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

- a. Defense counsel was deficient in failing to object or move for a mistrial after an officer testified Anderson had a warrant, violating a ruling in limine.

The trial court held a pretrial CrR 3.5 hearing to consider the admissibility of Anderson's custodial statements to Officer Gillette that he lied about giving a false name. At the hearing, Gillette testified he found Anderson in the police database as a near match to Michael Anderson. RP 15-16. Anderson had two active warrants, so Gillette informed him he was also under arrest for those warrants and for making a false statement. RP 15-16. Gillette said Anderson admitted he lied about his name because he knew he had outstanding warrants and did not want to go to jail. RP 10-11, 17.

The trial court admitted Anderson's statement that he lied because he knew he had outstanding warrants, because it was not made in response to interrogation. RP 26-27. The court noted, however:

The question then becomes whether or not the fact of a warrant would be admissible is too prejudicial under a 401, 403 balancing. As opposed to dealing with that in front of a jury, what are counsel's thoughts on him saying that there are warrants out there and that's the reason he provided false information? I know it's relevant. The question is is it too prejudicial balanced with the relevance?

RP 29. The State believed it cut both ways because Anderson might have lied because he had been driving a stolen vehicle, or he might have lied because he knew he had warrants. RP 29.

Defense counsel responded, “I think it’s highly prejudicial to have that information come in, Your Honor.” RP 30. The court then asked counsel, “So you’d prefer that I rule that it’s unduly prejudicial and allow the officer to testify that your client provided a false name but leave it at that and not reference the other warrants?” RP 30. Defense counsel agreed. RP 30. The court accordingly excluded any reference to Anderson’s outstanding warrants, because “it’s unduly prejudicial balanced against the relative relevance.” RP 31. The prosecutor confirmed, “I’ve instructed my witness not to make mention of the warrants.” RP 31.

Despite this clear ruling, Officer Gillette testified on direct exam, “When I ran Michael Anderson’s name, it came back with a near hit of a warrant for an Eric Anderson, 12-21-1987. I ran his name, and I was able to observe a photo. It matched the gentleman that was seated in the back seat of my car.” RP 67 (emphasis added). Defense counsel did not object or move for a mistrial. RP 67.

There was no strategic reason for defense counsel’s failure to object Gillette’s reference to Anderson’s outstanding warrant. Defense counsel believed the evidence was “highly prejudicial,” and the trial court agreed,

excluding it. RP 30-31. Defense counsel did not argue that knowledge of his outstanding warrants was the real reason Anderson lied about his name, rather than knowing he possessed a stolen vehicle. RP 30-31, 214-16. Rather, the defense focused exclusively on identity and the lack of forensic evidence. RP 214-16. Thus, defense counsel was clearly not pursuing the only potentially legitimate reason for allowing the jury to hear evidence of Anderson's outstanding warrants.

Moreover, the trial court would have—or should have—sustained an objection, given its prior ruling. See State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996) (recognizing evidence of prior convictions “would not have been admissible because its prejudicial effect would have outweighed its probative value”); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (noting appellant must show an objection “would likely have been sustained” to establish ineffective assistance for failing to object to admission of evidence). Even a lay member of the jury would know a warrant meant Anderson was suspected of other criminal activity, suggesting his propensity for crime and making it more likely that he possessed the stolen Toyota.

It has long been the law in Washington that a party who wins a motion in limine must still object to preserve an appeal of any violation. State v. Sullivan, 69 Wn. App. 167, 172, 847 P.2d 953 (1993). This gives

the trial court an opportunity to cure potential prejudice. Id. Anderson's counsel had a duty to know this law and lodge a contemporaneous objection to the excluded evidence. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law).

Even if defense counsel did not want to draw attention to the fact that Anderson had outstanding warrants, there was no basis for his failure to move for a mistrial once Gillette finished testifying. A mistrial is warranted when a trial irregularity so prejudiced the jury that the accused was denied the right to a fair trial. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In determining whether a trial irregularity influenced the jury, courts consider (1) the seriousness of the irregularity, (2) whether it was cumulative of other properly admitted evidence, and (3) whether it could be cured by an instruction to disregard the irregularity. Id.

"[A] violation of a pretrial order is a serious irregularity." State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). The fact that a witness is a "professional," like a police officer, "also indicates a serious irregularity." Id. Furthermore, admission of prior bad acts in violation of a ruling in limine can be grounds for a mistrial. Id. Under ER 404(b), evidence of prior bad acts is presumptively inadmissible to prove character and show action in conformity therewith. State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). Such evidence is "inherently prejudicial." Id.

For instance, in a trial for second degree assault with a deadly weapon, a witness testified Escalona “already has a record and had stabbed someone.” Escalona, 49 Wn. App. at 253. The trial court orally instructed the jury to disregard the statement. Id. This Court held, “despite the court’s admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact.” Id. at 256. The jury “undoubtedly” used this evidence “for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.” Id. The seriousness of this irregularity required a new trial. Id.

Officer Gillette’s violation of the pretrial order was a serious irregularity. His reference to Anderson’s outstanding warrant served no legitimate purpose except to suggest Anderson’s propensity for crime. And, unlike Escalona, the trial court gave no curative instruction because defense counsel failed to object or move for a mistrial. Even when prior bad acts are properly admitted under ER 404(b), the trial court must give a limiting instruction upon request.<sup>1</sup> State v. Gresham, 173 Wn.2d 405, 423-24, 269

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<sup>1</sup> See 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 5.30 (4th ed. Oct. 2016 update) (WPIC) (“Certain evidence has been admitted in this case for only a limited purpose. This evidence [consists of \_\_\_\_\_ and] may be considered by you only for the purpose of \_\_\_\_\_. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.”).

P.3d 207 (2012). Defense counsel's inexplicable failure to act left the jury able to consider the evidence for propensity.

Hendrickson provides a useful analogy. Hendrickson was charged with delivery of and possession with intent to deliver a controlled substance. 129 Wn.2d at 68. The charges were subject to an additional enhancement because of Hendrickson's prior drug-related convictions. Id. At trial, the State introduced two of Hendrickson's prior drug convictions, without any objection from defense counsel. Id. The jury found Hendrickson guilty as charged. Id.

On appeal, Hendrickson argued his trial counsel was ineffective for failing to object to the evidence of his prior convictions. Id. at 77. The supreme court held defense counsel was deficient for failing to object. Id. at 78-79. The court reasoned the convictions would not be admissible under any evidence rule and prior convictions that may enhance a current sentence need be presented only to the judge, not the jury. Id. at 78. The court concluded, "we cannot discern a reason why Hendrickson's counsel would not have objected to such damaging and prejudicial evidence." Id.

Like Hendrickson, there was no legitimate strategic reason for defense counsel's failure to object or move for a mistrial following admission of, in counsel's own words, "highly prejudicial" evidence of

Anderson's outstanding warrant. RP 30. Defense counsel's failure fell below an objective standard of reasonableness and was therefore deficient.

- b. Defense counsel was deficient in proposing a jury instruction establishing Anderson had a prior conviction.

ER 609(a) provides that prior convictions are admissible “[f]or the purpose of attacking the credibility of a witness in a criminal or civil case.” (Emphasis added.) This includes prior crimes of dishonesty, as well as felony convictions where “the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered.” ER 609(a).

Anderson did not testify at trial. RP 180. Nor was any evidence of his criminal history or prior convictions admitted, except for Gillette's reference to the warrant. Nevertheless, defense counsel proposed the following instruction: “You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give the defendant's testimony, and for no other purpose.” CP 15 (defense instruction); see also CP 101 (State-proposed instruction). The trial court gave the instruction, without any objection or exception from defense counsel. CP 46; RP 155-60, 181, 188.

The instruction established Anderson had previously been convicted of a crime. There is no perceptible reason why defense counsel proposed

such an instruction where Anderson did not testify and no evidence of a prior conviction was admitted. The instruction comes from WPIC 5.05. The WPIC 5.05 note on use specifies to give it “only when a defendant is a witness and the defendant’s own prior conviction is admitted for the sole purpose of impeaching the defendant.” Neither circumstances were present in Anderson’s case.

Defense counsel’s obvious mistake is analogous to Saunders. There, Saunders was charged with possession of controlled substances. 91 Wn. App. at 577. During Saunders’s testimony at trial, defense counsel asked if he had any prior convictions for similar offenses. Id. at 578. Saunders answered he had previously been convicted of methamphetamine possession. Id.

On appeal, Saunders argued his defense attorney was ineffective for eliciting his prior possession conviction on direct examination. Id. at 577. The court of appeals agreed. Id. at 580-81. There was no indication the State intended to introduce Saunders’s prior conviction at trial. Id. at 578-79. It was also likely the trial court would have ruled the conviction inadmissible under ER 609(a) if challenged. Id. at 579. Defense counsel’s introduction of the conviction was therefore deficient “because it shift[ed] the jury focus from the merits of the charge to the defendant’s general

propensity for criminality.” Id. at 580. The evidence was prejudicial given Saunders’s defense of unwitting possession. Id. at 580-81.

Like Saunders, defense counsel introduced evidence of Anderson’s criminal history where it would otherwise be inadmissible because Anderson did not testify. Anderson struggled with his choice not to testify, explaining, “It’s hard not saying anything, but I think it might hurt me more than benefit me, your Honor.” RP 180. This was likely because Anderson has prior convictions for crimes of dishonesty, which would have been admissible had he testified. CP 74; ER 609(a)(2). But Anderson’s choice not to testify was for naught, given his attorney’s blunder.

To the extent defense counsel thought he was required to propose an entire set of jury instructions, he was mistaken. CrR 6.15(a) sets forth the timing and procedure for proposing instructions. However, the rule “does not impose an obligation to propose jury instructions.” State v. Hood, 196 Wn. App. 127, 382 P.3d 710, 713 (2016). Such is the case because “a defendant has no duty to propose the instructions that will enable the State to convict him.” Id.; see also State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987) (noting court would not sustain interpretation of court rule that contravened the constitution).

There is no reasonable defense tactic in foreclosing a client’s future appellate arguments by proposing an entire, duplicative set of jury

instructions. The only effect of doing so is to burden or foreclose a client's future claims under the invited error doctrine. No reasonable defense attorney would or could ever reasonably wish to harm his or her client in this way. See State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007) (recognizing the invited error doctrine generally forecloses review of an instructional error created by defense counsel, "but does not bar review of a claim of ineffective assistance of counsel based on such instruction").

There was no legitimate strategic decision for proposing an instruction not supported by the facts or circumstances of Anderson's case that informed the jury Anderson had a prior conviction. See State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct); Woods, 138 Wn. App. at 199-202 (counsel ineffective for offering a faulty self-defense instruction). Anderson's counsel was plainly deficient for doing so.

- c. Counsel's deficient performance resulted in repeated references to Anderson's criminal history, prejudicing the outcome of his trial.

Defense counsel's failure to object to evidence of Anderson's outstanding warrant and proposal of an instruction establishing Anderson had a prior conviction was highly prejudicial. This inadmissible evidence established Anderson had a criminal history, suggesting a propensity to

commit crimes and making it more likely that he knowingly possessed the stolen vehicle. Washington courts recognize evidence of prior convictions is “inherently prejudicial” because it suggests the accused’s propensity for crime. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996); accord State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995) (“Evidence of prior misconduct is likely to be highly prejudicial.”).

Furthermore, defense counsel did not request a limiting instruction to prevent the jury from considering the evidence for propensity. The Washington Supreme Court has recognized:

An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Gresham, 173 Wn.2d at 423-24. Because no such instruction was given, the jury could very well have considered the evidence for its forbidden purpose. This is precisely why prior misconduct is so prejudicial.

The evidence was particularly harmful given Anderson’s identity defense. No one saw the driver of the stolen vehicle. RP 56-57, 88, 173. No forensics were done on the vehicle to establish the driver’s identity. RP 69, 89. The closest footprints were eight to ten feet from the vehicle. RP 75-76, 89-90, 109-110. Anderson’s defense was essentially that he had the bad

luck of being in the wrong place at the wrong time, given the lack of identification. RP 214-16 (defense closing argument).

However, this defense was significantly undercut by the jury's knowledge that Anderson had a criminal history. Without any limiting instruction to guide them, this was likely very impactful evidence for the jurors. For a lay juror, the fact that Anderson had an outstanding warrant *and* a prior conviction significantly diminished the likelihood that he was simply an innocence bystander getting blamed for a crime he did not commit. The jury could not likely ignore or forget such probative evidence. State v. Slocum, 183 Wn. App. 438, 333 P.3d 541 (2014) (recognizing evidence of prior misconduct is probative but inadmissible because "it is said to weigh too much with the jury and to so overpersuade them" (quoting Michelson v. United States, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168 (1948))).

The jury instruction that Anderson had been convicted of a crime was further prejudicial because it came from the judge's mouth. Our state constitution forbids judicial comment on the evidence: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." CONST. art. IV, § 16. When a judge comments on the evidence in a jury instruction, prejudice is presumed. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). The purpose of this rule "is to

prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Once the defense-proposed instruction was given by the trial court, it established beyond a doubt that Anderson had a prior criminal conviction.

Defense counsel's multiple mistakes resulted in the jury being able to consider Anderson's criminal history for his propensity to commit crimes. There is a reasonable probability that had this otherwise inadmissible and highly prejudicial evidence been excluded, the result of Anderson's trial would have been different. This Court should reverse Anderson's convictions and remand for a new trial because Anderson was denied effective assistance of counsel. Saunders, 91 Wn. App. at 581.

## 2. APPELLATE COSTS SHOULD NOT BE IMPOSED.

If Anderson does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) provides that appellate courts "may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State's request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State's request for costs).

Anderson's ability to pay must be determined before discretionary legal financial obligations (LFOs) are imposed. State v. Duncan, 185 Wn.2d 430, 436, 374 P.3d 83 (2016). Anderson informed the trial court he made only about \$18,000 a year, and he has no assets or savings. RP 237-38. The trial court determined Anderson had the ability to pay a small amount and accordingly limited the amount of discretionary LFOs. RP 237-41. Saddling Anderson with thousands of dollars of additional debt would be a significant financial burden for him, and make it difficult for him to get back on his feet after his 55-month prison sentence.

The trial court also found Anderson indigent for purposes of the appeal. CP 82-83. There has been no order finding Anderson's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court must therefore presume Anderson remains indigent and give him the benefits of that indigency. RAP 15.2(f).

For these reasons, this Court should not assess appellate costs against Anderson in the event he does not substantially prevail on appeal.

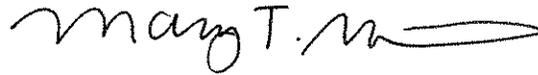
D. CONCLUSION

This Court should reverse Anderson's convictions and remand for a new trial because Anderson was denied effective assistance of counsel.

DATED this 28<sup>th</sup> day of December, 2016.

Respectfully submitted,

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State V. Eric Anderson

No. 34576-9-III

Certificate of Service

On December 28, 2016, I filed and e-served the brief of appellant directed to:

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Cause No., 34576-9-III in the Court of Appeals, Division III, for the state of Washington.

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



John Sloane  
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12-28-2016

Date  
Done in Seattle, Washington