

34655-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DESHAWN ANDERSON,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
SHAWN P. SANT
Prosecuting Attorney



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

Franklin County Prosecuting Attorney's Office
1016 North 4th Avenue
Pasco, WA 99301
(509) 545-3543

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This is what happens when we decide
that our opponents are enemies.
There follows our ability in our minds
to do to them whatever we will.
RP 1589.

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County
Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and sentence
of the Appellant.

III. ISSUES

1. May the defendant challenge the court's discretion to impose an unappealable, standard-range sentence, rather than an exceptional sentence downward, where no argument for an exceptional sentence was made below?
2. In the face of the Defendant's multiple, serious, premeditated offenses and in the absence of any evidence that the Defendant's chronological age in fact diminished his culpability, did the Defendant receive ineffective assistance of

counsel where counsel did not seek an exceptional sentence downward for youth?

3. Is the community custody condition vague where the court is entitled to presume a defendant is familiar with his own gang paraphernalia?
4. Is the court's finding of ability to pay clearly erroneous where the Defendant is able to work? Or is a court categorically precluded from imposing LFO's on a criminal defendant based on the length of imprisonment where no hardship can be shown?
5. Did the Defendant receive ineffective assistance of counsel where counsel failed to argue that the court was categorically precluded from imposing LFO's on a criminal defendant facing a long prison term.?
6. Should the court remand for ministerial correction of scrivener's errors?
7. Should the court refuse to impose appellate costs if the State substantially prevails on appeal where the imposition will not cause the Defendant hardship?

IV. STATEMENT OF THE CASE

On November 18, 2014, the Defendant/Appellant Deshawn Anderson and a companion opened fire on a car occupied by four Florencia-13 gang members. CP 159. The next day, retaliation on the Defendant's associates resulted in the shooting of his cousin and killing of his friend. *Id.* On December 5, 2014, the Defendant posted on Twitter that people should watch the news for him. *Id.* Shortly thereafter, he ambushed and killed Lorenzo "Richie" Fernandez, an associate of his earlier victims. CP 159-60.

After his arrest, the Defendant confessed to police in a recorded interview that he was only person who shot at Mr. Fernandez. RP 21. He explained that his cousin went with him, but froze. RPE¹ 32-33.

"I let off eight bullets." "I shot four people, and one of them's dead." Regarding Kenyatta [his co-defendant in the murder] he said, "I told him to unload that 9 into Richie. I wanted to make a message back to my family that I'm not just going to let my cousin get shot for no reason. There was only clip one unloaded. I pressured him. 'Why did[n't] you do it?' That's not him. That's not what he wants to do. That's why there were only eight shells on the ground."

RP 395-96; *See also* RPE 33, 41, 48.

The Defendant was charged with murder in the first degree with a firearm enhancement, two counts of unlawful possession of a firearm in the first degree, and four counts of assault in the first degree with firearm enhancements. CP 27-28. During the trial a year and a half later, threats of inter-gang violence continued. CP 160. The jury convicted him on all charges and enhancements. CP 116-27. Although the Defendant challenges the conviction pro se in his Statement of Additional Grounds, defense counsel on appeal challenges the sentence only, assigning no error to the convictions.

The court ordered a presentencing investigation (PSI). CP 158-78. The Defendant was 18 at the time of his offenses, and already had a significant juvenile history spanning three years, with six felonies including a serious violent offense. CP 1, 134, 161. He declined to participate in the sentencing report. CP 161.

The Department of Corrections asked the court to consider the Fernandez family's loss, the nature of the offenses with their concerted premeditation and ambush tactics, the Defendant's lack of remorse, and his failure to accept responsibility. CP 166. The PSI recommended a mid-range sentence of 1126 months. CP 166-67.

¹ RPE refers to the transcription of Plaintiff's Exhibit 71, the police interview with

The prosecutor's sentencing memorandum explained the calculation of the sentencing ranges. CP 180-81, 184-86. The prosecutor recommended a sentence within that range "[b]ased on the facts of this case, the severity of the Defendant's actions, and the total lack of remorse from the Defendant." CP 181-82; RP 1575-76.

... I think there's a couple things that need to be said about the length of the sentence. And the first thing we want to point out is one of the reasons for the length of this sentence is the scope of the defendant's crimes.

This particular conviction didn't represent a single isolated incident. They represented two different incidents with five different victims. And the reason that that affected so many people, and ultimately, of course, your Honor heard it affected other people in other ways, too, is these groups retaliated against each other. That's part of the reason why this sentence is so extensive, because [it's] very rare that we have five victims [in] these types of cases.

It also reflects prior criminal history. The defendant had a pretty lengthy juvenile history. He had multiple felony convictions, including a prior violent felony offense of assault in the second degree, which added to his offender score substantially. So that also explains the length of the sentence in this case.

And also you had the illegal use of multiple firearms by a convicted felon, which again added two points to his offender score and ultimately added firearm enhancements to both charges. That again reflects the length of the sentence.

Lastly, of course, you have the most serious count, which is murder in the first degree, which is premeditated murder. And the legislature makes it very

the Defendant.

clear that it considers premeditated murder to be a step above a common murder. And I'd suggest to the Court the sentence is appropriate in particular in this case, because this is a particularly heinous premeditated murder. This involved a case where the defendant and several co-conspirators lured the victim to a specific location at a specific time, and then they specifically approached that location for an ambush-style attack on him. They carried out that attack successfully and executed him. And I would say to the Court that it takes a particularly cold-blooded type of individual to be able to carry out the murder in that manner, and I think that this lengthy sentence reflects that, the nature of that particular crime.

RP 1576-77.

The murder victim's family prepared a written statement, and his sister addressed the court, detailing the family's anguish and devastation in the aftermath. CP 177-78, 181, 188-89; RP 1577-78. Before his death, Mr. Fernandez had decided to leave the gang lifestyle and dedicate himself to his daughter. CP 177, 188.

The prosecutor had advised that if the Defendant asked to deviate from the standard range, the prosecutor would request additional time to respond. RP 182. So warned, defense counsel asked the court to consider her client's age.

Your Honor, these sentencings are always tough, because [there're] not many words that I can say to the Court. In this case the Court has a standard range as indicated on the Judgment and Sentence. We ask the

Court to recognize that Mr. Anderson was very young at the time, barely an adult in this matter. He's ultimately going to spend the rest of his life in prison. We ask the Court take that into consideration in sentencing him, and we hold full faith in the Court providing Mr. Anderson with a reasonable sentence.

RP 1579.

When the Defendant and his parents addressed the court, they continued to deny his guilt.

CHERYL LALICKER: ... in my heart I do not believe that he is the one who shot Richie, and I hope that justice will soon be found.

RP 1581.

MICHAEL ANDERSON: He was there, but he's not the one who shot him. And it'll come out ... but he didn't kill him.

RP 1582.

MR. ANDERSON: ... at the end of the day I know that I have never killed nobody. My hands have not killed anybody, and that's just what I would like to say to this Court today and to Richie's family. And that's all I got to say.

RP 1583.

The Honorable Judge Ekstrom, who had presided over the lengthy trial, explained the sentence.

The evidence in front of this jury showed that on each occasion the defendant came up to unarmed

people in cars and unloaded the magazine of that pistol into them, killing one of them, known to his family as Richie Fernandez.

The evidence presented to the jury showed that the first victims in this case, first in time, were selected because of a past grudge. The video footage from the Crazy Moose Casino showed that they did absolutely nothing to Mr. Anderson on November 18th, 2014. Yet he tracked them down and shot them.

On December 3rd he selected Mr. Fernandez because he was identified as part of a group, a group that had killed a member of his family, in retaliation for his earlier actions. Evidence showed that the victim here was tricked and that he was tricked into his own execution because he was part of a group labeled as an enemy, not because he was involved in the earlier retaliation, just because he was labeled part of a group seen as an enemy.

The Sentencing Reform Act defines the purpose of sentencing and indicates that it is to ensure punishment that's proportionate to the seriousness of the offense, and here the legislature has defined the ranges. **Absent a reason to depart, and here there is none**, the legislature determines what is the reasonable bounds. The purpose of sentencing is to promote a respect for the law and provide a punishment that's just. Here, any available sentence will promote a respect for the law. The issue is what sentence within those ranges is just in this circumstance. Punishment should be [commensurate] with that imposed by others similarly situated.

Here the ranges reflect the conduct of the conviction and the prior criminal history. The Court will take into account the specific facts of the offense themselves to address any disparity.

Here the ranges reflect the conduct of the conviction and the prior criminal history. The Court will take into account the specific facts of the offense themselves to address any disparity.

Must protect the public. Here again, any sentence within the range will sufficiently protect the public.

Offering an opportunity to improve [oneself] and making frugal use of the government resources. The sobering fact here is that any legal sentence this Court can impose will likely be a sentence for the rest of your natural life.

Reducing the risk of reoffense. Again any sentence here sufficiently addresses that.

The ranges are set out accurately, and the parties agree. The mandatory minimum sentence here is for -- and this is the absolute minimum before Mr. Anderson can begin accruing good time on his sentence, as the Court calculates it, is 780 months or 65 years. The combined ranges for the standard ranges here are 1,010 months to 1224 months, or 84 years and two months at the bottom, and 103 years and six months at the top.

The recommendation of the department is the middle of that range, a total sentence of 1,126 months or 93 years and ten months. The parties are asking for sentences within the range.

While any of these options are, as I indicated, are almost certainly life sentences, the Court still has an obligation to apply the Sentencing Reform Act. For Count I the range is, including the enhancement, 398 to 510 months.

Here the facts involve substantial planning: Acquiring a different firearm than the one that was used in the prior assault; working in concert with others over a period of time to lure the victim to his death; lying in wait at the scene; approaching from behind to avoid detection; and this wasn't a gunfight. It was an execution.

Given those facts, a sentence at the bottom of the range would be unjust. It wouldn't sufficiently take into account how this offense was committed. For those reasons the Court finds that the

department's recommendation in the middle of the range is reasonable.

The sentence will be 454 months.

Count II, the unlawful possession of a firearm or the same date of offense, carries a range of 77 to 102 months. There the weapon charged is the .45 caliber handgun used in December.

There is no information regarding the firearm itself. We have the spent casings. We know nothing about when it was acquired. And its use in Count I is encompassed by the sentence above. For that reason, the Court finds that a sentence at the bottom of the range there of 77 months concurrent with all other counts is appropriate, understanding that because that sentence is concurrent, it has functionally no effect on the overall sentence.

That takes us to Counts III through VI, those being the assaults in the first degree. The offender scores are zero by operation of statute, but they're to be served consecutively to Count I. Here as well, there was planning, shorter in duration, but it doesn't mitigate the severity of the offense. The defendant took steps to avoid detection by using the phone of another individual at the blackjack table to summon his ride, and again approached and emptied his weapon into a vehicle full of, the evidence showed, unarmed individuals. Here as well, **while I am free to reject the department's recommendation, I find that it is, as well, reasonable here.**

The sentence will be the middle of the range, 168 months, each count concurrent to each other and to Count I.

As to count VII, the possession of firearm, the .40 caliber firearm used in November, the range is the same, 77 to 102 months. Here there's evidence that this firearm was acquired right before the shooting. We know it was of no -- it was procured for and then almost immediately put into use to commit Counts II through VI. These circumstances here make the top of the of

range an appropriate sentence, understanding again that by operation of law these run concurrently, and they will not, and so both Count II and Count VII do not affect the final calculation of the range.

The end result is the middle of the range sentence: 1,126 months, or 93 years and 10 months.

RP 1584-88 (emphasis added).

The PSI writer recommended various community custody prohibitions, including a prohibition against possessing or displaying gang paraphernalia. CP 168-69. The recommendations were adopted by the court. CP 141-42.

The court inquired of defense counsel about her client's ability to pay LFO's.

MS. AJAX: ...my client has the ability to work at this point in time. I always tell the Court when we have these types of cases I don't know what his ability, his future ability will be, so we'll have to address that at some point in time. Obviously if he's going to prison, he won't be working per se.

RP 1583-84. The court found an ability to pay LFO's and imposed \$11,203.01, the bulk of which related to defense costs. CP 136-37; RP 1588. Restitution was entered at a later date, in the amount of \$75,430.49, for which the Defendant's two co-defendants are also jointly and severally liable. CP 138, 210-11.

V. ARGUMENT

A. THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A STANDARD RANGE SENTENCE.

The Defendant claims that the sentencing court “abused its discretion” by failing to depart downward from the standard range. Appellant’s Brief at 7. The claim is neither preserved for review, not permitted by law.

The court imposed a standard range sentence. RP 1585-86, 88. “When the sentence given is within the presumptive sentence range then as a matter of law there can be no abuse of discretion and there is no right to appeal that aspect.” *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 724 (1986), *amended*, 105 Wn.2d 175, 718 P.2d 796 (1986). A sentence within the standard sentence range “shall not be appealed.” RCW 9.94A.585(1). *See also State v. McGill*, 112 Wn. App. 95, 99, 47 P.3d 173 (2002) (the law precludes appellate review of a challenge to the amount of time imposed when the time is within the standard range).

Here the defense made no request for an exceptional sentence. On the contrary, counsel requested a sentence within the range. RP 1579, 1586, ll. 6-7. Therefore, it cannot be said that the

sentencing judge ruled on any objection or request. Absent a request or objection, no challenge or claim of error is preserved. “The appellate court may refuse to review any claim of error not raised for the first time in the appellate court.” RAP 2.5(a).

The Defendant’s claim also misrepresents the record. The Defendant claims the court found no legal basis to depart. In fact, the court found no mitigating factor of substantial and compelling import which would have provided a legal basis.

The record does not show that the judge “erroneously believe[] [he] had no discretion to depart from the standard range.” AB at 7. It does not show he failed to “consider an exceptional sentence,” “recognize applicable law,” or “recognize Mr. Anderson’s youth” as a basis for departure. AB at 8. The Defendant’s youth was before the court by defense counsel’s own plea.

The court simply did not find the Defendant’s youth to be a substantial and compelling basis for departure. A sentencing court may only depart from the standard range if it finds “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Here, having heard defense counsel’s comment about her client’s age, the court nevertheless found no reason to depart.

RP 1585, II. 1-3. If there is no aggravating or mitigating factor found beyond a reasonable doubt, the court must impose a standard range sentence. RP 1856 (court is obliged to apply the SRA).

The judge explained that in coming to his conclusion he considered:

- The vulnerability of the victims. RP 1584 (“unarmed people in cars”), RP 1587.
- The arbitrary motive. RP 1584 (the assault victims “did absolutely nothing” but “retaliat[e] for his earlier actions” “yet he tracked them down and shot them” and later killed Mr. Fernandez “not because he was involved in the earlier retaliation, just because he was labeled part of a group seen as an enemy”).
- Deceit and premeditation in the murder. RP 1584 (“tricked [Richie Fernandez] into his own execution”); RP 1586 (“working in concert with others over a period of time to lure the victim to his death; lying in wait at the scene; approaching from behind to avoid detection; and this wasn’t a gunfight. It was an execution.”).
- Premeditation in the assaults. RP 1587 (“there was planning, shorter in duration, but it doesn’t mitigate the severity of the offense,” he “took steps to avoid detection by using the phone of another individual”).
- Proportionality. RP 1584 (“proportionate to the seriousness of the offense”).
- Reasons to depart from the standard range. RP 1585 (“absent a reason to depart, and here there is none”).
- A just sentence is one that will promote a respect for the law, is commensurate with others similarly situated, sufficiently protects the public, reduces the risk of reoffense, takes into account the specific facts, offers the offender an opportunity for improvement, and makes frugal use of government resources. RP 1585.
- Criminal history. RP 1585.

- The firearm enhancements regarded different weapons in different incidences. RP 1586 (“acquiring a different firearm than the one that used in the prior assault”), 1588.
- Effective life sentence. RP 1586 (“any of these options are, as I indicated, are almost certainly life sentences”.)

The judge’s process demonstrates studied consideration. And his decision was that a mid-range sentence was fair.

Given those facts, a sentence at the bottom of the range would be unjust. It wouldn’t sufficiently take into account how this offense was committed.

RP 1586. There was no abuse of discretion in imposing the term of confinement.

B. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO HIS STANDARD RANGE SENTENCE.

Making the same claim under a different theory, the Defendant claims his counsel provided ineffective assistance in failing to request an exceptional downward sentence. AB at 8.

The Defendant has the burden of showing both (1) that his attorney’s performance was deficient and (2) that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Deficient performance is that which falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d at 334-35.

To demonstrate prejudice, the Defendant must show a reasonable probability that but for the deficient performance, the outcome would have been different. *In re Crace*, 174 Wn.2d 835, 843, 280 P.3d 1102 (2012). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

The analysis of any claim of ineffective performance begins with a “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The Defendant bears the burden of proving that “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689 (1984).

Here defense counsel drew the court's attention to the client's age, but did not request a downward departure from the standard range. There are legitimate tactics for this. First, the prosecutor had warned that if defense requested a departure, the prosecutor would want additional time to respond. The prosecution intended to spend even more time impressing on the court and the public the need for a more severe sentence. In other words, this may have worsened the Defendant's position. And second, the argument for a downward sentence was weak.

The sentencing judge had presided over the trial, had been pre-assigned in this murder trial, and would have been fully familiar with the file. That file includes the evaluations which resulted in the judge's 9/8/15 finding of competency. CP 5, 155-57, 170-76. The state's evaluation, attached to the PSI, described that the Defendant's child development had been normal. CP 171 ("met developmental milestones on time"). When he left school in the tenth grade, his grade level abilities were above average. CP 172 (Sentences = 12.5 grade level; Reading = 10.2; Spelling = 11.36; Arithmetic > 12.9).

As a minor, he had a history of independent living and little parental control. CP 173 ("if he was upset with [his mother] he would

just leave ... or sometimes not come home at all"). *State v. M.A.*, 106 Wn. App. 493, 497-98, 23 P.3d 508 (2001) (home and pattern of living relevant in determining sophistication and maturity in a juvenile declination hearing).

None of the Defendant's arguments show him to have been more immature than the average 18 year old or even the average offender. AB at 18 (unemployed, without a GED, consuming alcohol and marijuana). Antisocial behaviors and negative moods are not particular to youth. AB at 18 (summarizing psychological evaluation of defense expert). Nor does having a history of childhood abuse cause or demonstrate immaturity. CP 171 (the Defendant's conviction for second degree assault against his alleged abuser suggests a mutually combative relationship).

The Defendant had history with the criminal justice system. *State v. M.A.*, 106 Wn. App. at 498 (previous criminal history relevant in a declination hearing). This was not a single misstep. When he was about 17, the Defendant was incarcerated at Naselle for about eight months. CP 172.

The Defendant claims he was "young enough to feel pressure from his family." AB at 11. But a person never grows out of being

sensitive to the desires of their family.

He claims he killed Mr. Fernandez because of family pressure. AB at 11, citing RPE 42. A more likely interpretation of this record is that his family said, "You're not going to do s-," in response to the Defendant threats to retaliate. RPE 42. The Defendant was motivated by ego, not family pressure. RP 1516 ("He's worried that this family and friends don't think that he's the man because he hasn't done anything about Anthony being killed."). He announced on Twitter, "I'm still the man." RP 1517. And he is the one who pressured family to conspire with him to get his revenge, not the other way around. RP 1517.

The Defendant claims that he was manipulated by his girlfriend and the detective to confess and that this demonstrated his youth. AB at 11. But, on the contrary, taking responsibility for one's actions is an act of maturity. Recognizing his parental responsibility and the wisdom in seeking a reduced sentence demonstrates maturity.

The record actually shows that, even in the midst of an emotional maelstrom, the Defendant was assertive and clever, even calculated. He manipulated the detective into arranging a meeting between the Defendant and his girlfriend who was in jail for rendering

criminal assistance. RP 754, 756. The Defendant is a father. And like a mature partner and parent-to-be, “he was concerned for her and wanted to see how she was doing,” and he would not accept no for an answer. RP 754. Without being asked, the Defendant requested to sit down with the detective. RP 757. It was a mature, intelligent move. RPE 3, 19. A criminal defendant who cooperates, shows remorse, and arranges a plea deal can procure a shorter sentence. RPE 3, 19-20.

Before confessing to the murder, the Defendant learned the strength of the evidence against him. RP 760 (detective advised that a witness had identified the Defendant in a photo lineup and that the weapon and his footprint had been found); RPE 24-30. While confessing, he meticulously protected his loved ones. RPE 14-15 (claiming the people who drove him away from the first shooting had no knowledge of what he had done), 20, 21, 28, 31-33 (insisting his cousin was not the shooter). And he minimized or downplayed his actions. RPE 6, 9-12, 37 (laying the groundwork for self-defense); 15-16 (claiming he had no intent to kill).

Other than his chronological age, there is no evidence of youth. “[T]he trial court may not impose an exceptional sentence

automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant's culpability." *State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359, 363 (2015). "It remains true that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." *State v. O'Dell*, 183 Wn.2d at 695. "[I]n order to justify an exceptional sentence, a factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *State v. O'Dell*, 183 Wn.2d at 690.

Because an argument in support of an exceptional sentence downward on the basis of youth is unpersuasive, defense counsel's choice was reasonable and not prejudicial.

C. THE COURT SHOULD DECLINE REVIEW WHERE THE CHALLENGE TO THE COMMUNITY CUSTODY CONDITION WAS NOT RAISED BELOW, THE DEFENDANT IS UNLIKELY TO EVER SERVE COMMUNITY CUSTODY, AND THE COURT WAS ENTITLED TO PRESUME THE DEFENDANT WAS FAMILIAR WITH THE PARAPHERNALIA OF HIS OWN GANG.

The Defendant challenges the community custody condition prohibiting his possession of gang paraphernalia including insignia, medallions, etc. AB at 13. The Defendant claims that this prohibition is too vague to provide fair warning of what is proscribed conduct. AB

at 14.

The State provided documentation of the Defendant's gang involvement including numerous pictures of him throwing up gang signs and numerous incidents of him being involved in gang disputes. RP 365, 1321-22. It is not credible that the Defendant would be confused as to what items of clothing identify his own gang. In fact, this is the holding in the very case cited by the Defendant. In *United States v. Soltero*, 510 F.3d 858, 865-66 (9th Cir.2007), the court upheld the gang conditions, noting that they were not vague, because the district court is entitled to presume a defendant is familiar with his own gang members, its places of gathering, and its paraphernalia. Other cases have followed this reasoning. *United States v. Johnson*, 626 F.3d 1085, 1091 (9th Cir. 2010); *United States v. Vega*, 545 F.3d 743, 749-50 (9th Cir.2008).

The Defendant notes that while he did not challenge this condition below, there is precedent for challenging a sentencing condition for the first time on appeal. AB at. 14-15, citing *State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010); *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The problem with this logic is that defense counsel at the superior court reasonably waived

objection under the particular facts of this case.

The Defendant is not likely to be released on this sentence or ever be under community custody.² If he is released after serving his 93 year sentence, his gang's culture and its signature paraphernalia may well have evolved. In consideration of trial counsel's waiver and the unlikelihood that the Defendant will ever serve community custody, the Court may decline to address the issue.

In the alternative, the court may direct the lower court to specify that the prohibition regards paraphernalia of the Gangster Disciples, the gang to which the Defendant belongs.

D. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING AN ABILITY TO PAY.

The Defendant challenges the lower court's finding that he has an ability to pay LFO's. AB at 17. Again this is a challenge that is not preserved for review and does not amount to manifest error. RAP 2.5(a)(3). *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015) does not mandate review. *State v. Malone*, 193 Wn. App. 762, 765, 376 P.3d 443, 445 (2016).

² The Defendant cannot earn early release on weapon enhancements. RCW 9.94A.729(2). On the base of his sentence, he is only eligible to receive 10% off for good time. RCW 9.94A.729(3)(c).

The finding is supported in the record. In response to the court's question, defense counsel acknowledged the Defendant "has the ability to work." RP 1583-84. On this record, the court's finding is not clearly erroneous. *State v. Campbell*, 84 Wn. App. 596, 602, 929 P.2d 1175 (1997). See also *State v. Duncan*, 180 Wn. App. 246, 250, 327 P.3d 699 (2014) (burden of establishing ability to pay is a low one).

The Defendant's boilerplate challenge discusses matters of no relevance to his own particular situation. There is no record of public assistance and no likelihood that he will be released so as to be able to apply for public assistance. Because of the length of the Defendant's sentence, there is no likelihood that he will ever be subject to the problematic consequences of interest.³ AB at 17.

The Defendant suggests that the Division of Child Support may withdraw money from his inmate account. AB at 19. This is false. The Division of Child Support will not create or enforce a support order against a noncustodial parent in the Defendant's circumstance.

³ Under RCW 10.82.090, courts must waive interest which accrues during incarceration and may waive interest for hardship after payment of the principal. The Franklin County Clerk will waive interest upon motion for any defendant who has paid the principal. In this particular Defendant's case, because he claims he will never pay the principal, the interest is irrelevant.

WAC 388-14A-2081(3).

As his attorney represented and the records shows, the Defendant is a physically fit and intelligent young man who is capable of some income in prison. The court's finding is sufficiently supported in this record.

E. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE IMPOSITION OF LFO'S.

Making the same claim under a different theory, the Defendant claims his counsel provided ineffective assistance in failing "to oppose imposition of discretionary LFOs." AB at 21.

First, it is not accurate to say that counsel "failed to oppose." When the court inquired as to "ability to pay," counsel answered truthfully that the Defendant has the ability to work. RP 1583. She included, however, that if he is ever released, "his future ability" will have to be addressed at that time. RP 1584. This accurate and practical statement is not deficient performance. Nor can the Defendant show that the sentencing court would have refused to impose discretionary costs if defense counsel made a more strenuous objection.

While incarcerated, the Defendant cannot show hardship or

prejudice from the imposition of LFO's. In the unlikely circumstance that he is ever released, he can address the LFO's with a showing of manifest hardship. RCW 10.01.160(4).

Because the Defendant is incarcerated, he is not being collected upon. *State v. Wilson*, 198 Wn. App. 632, 634, 393 P.3d 892 (2017). Because it is likely he will always be incarcerated, he will never be collected upon. Accordingly, he cannot show that he is prejudiced by the imposition of LFO's of any kind.

In particular, he cannot show that he is prejudiced by the imposition of discretionary costs, which he acknowledges he is unlikely to pay. AB at 20 (arguing that discretionary LFO's will never be paid because they are "completely eclipsed" by restitution – which was imposed at a later date).

Under the care of the DOC, he will never be without food, shelter, clothing, education, or medical treatment. The Legislature has directed the DOC to disburse a portion of the funds in his personal prison account for LFO's. RCW 72.11.020. The DOC will not reduce the funds in an inmate account to less than the defined level of indigency as determined by the department. *Id.* From that reservoir, the department insures that inmates will be able to

purchase hygiene products and other supplies.

Inmates can and do pay off the LFO's while incarcerated. Through those payments, an inmate makes amends. This obligation also discourages inmates from filing frivolous legal actions (ABA Criminal Justice Standard 21-2.3⁴) and deters them from committing fraud intended to enrich their inmate accounts. When a court refuses to impose LFO's on a person because the term of incarceration will be long, power inequities between long-timers and short-timers are exacerbated and can contribute to discipline issues.

The Defendant cannot show that a more vigorous plea from his attorney would have swayed a judge against imposing LFO's where the Defendant will never be collected upon and their imposition is no hardship on the Defendant.

F. ERRANT SCRIVENER'S ERRORS MAY BE CORRECTED.

The Defendant notes that, while the prosecutor and court caught the scrivener's error, they missed a few instances which do not affect the sentence. These may be corrected.

The firearm enhancements were on the murder and assault

⁴ Unacceptable inducements and deterrents to taking appeals
https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_crimappeals_blkold.html

counts, i.e. counts I, III, IV, V, and VI. CP 27-28, 116-27. The judgment and sentence was printed with the charges out of order and corrected by hand. CP 133, 140; RP 1574-75 (“I think they mixed up Count II and Count VI”). A few printed scrivener’s errors related to the order of charges were not caught. CP 135, 140. It is proper to remand for this clerical correction.

G. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THE IMPOSITION OF COSTS IS APPROPRIATE.

The Defendant asks the court not to impose costs if the State substantially prevails in this appeal. AB at 25.

Under RAP 14.2, the commissioner’s actions are dictated. The commissioner “will” award costs to a substantially prevailing party unless this Court directs otherwise. The rule does not explain why the Court may direct otherwise. Presumably, the Court has unfettered discretion.

Absent direction from this Court, the commissioner would be required to impose costs. There is a valid finding of ability to pay. And indigency for purposes of appointment of counsel does not undermine this finding.

The question then is whether the Court chooses to exercise its

discretion. The Defendant argues generally that LFO's can be a hardship when returning to the community. But he will not be returning to the community. For an inmate serving a life sentence, it is not the imposition of LFO's which prevent a defendant from "mov[ing] on." AB at 26. And the imposition of costs does not cause hardship where the Defendant is fully supported by the State. There is no hardship concern justifying a departure from the rule.

The Defendant has argued that costs may never be collected. He has no standing in this regard. Whether costs are collectable or not is a concern for the creditor only. And it should have no relevance to the Court. The only questions should be whether costs are due and whether costs are an undue hardship on a criminal defendant. If the State substantially prevails, costs should be imposed.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: October 26, 2017.

Respectfully submitted:

SHAWN P. SANT
Prosecuting Attorney



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Lisa Tabbut
ltabbutlaw@gmail.com

A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED October 26, 2017, Pasco, WA



Original filed at the Court of Appeals, 500
N. Cedar Street, Spokane, WA 99201

FRANKLIN COUNTY PROSECUTOR'S OFFICE

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