

**FILED**

APR 24 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

---

STATE OF WASHINGTON,	)	NO. 347761
	)	
Respondent,	)	
	)	
v.	)	
	)	
LONNIE LEE PRZESPOLEWSKI,	)	Douglas County Superior
	)	Court No. 161001282
Appellant	)	

---

BRIEF OF RESPONDENT

---

W. GORDON EDGAR, WSBA #20799  
Deputy Prosecuting Attorney

STEVEN M. CLEM  
Douglas County Prosecutor  
P. O. Box 360  
Waterville, WA 98858  
(509) 745-8535

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
A. ASSIGNMENT OF ERROR.....	1
B. STATEMENT OF THE CASE.....	1
C. FACTS.....	1
1. Testimony.....	1
2. Closing Arguments.....	4
3. Sentencing.....	5
D. AUTHORITY AND DISCUSSION.....	6
1. Prosecutor's statement were a permissible comment on the evidence.....	6
2. Judicial comments at sentencing were not improper.....	8
3. Discretionary Legal Financial Obligations (LFO).....	10
4. Appellate Costs.....	12
E. CONCLUSION.....	14

## TABLE OF AUTHORITIES

### Washington State Supreme Court

City of Richland v. Wakefield, 186 Wn.2d 596 (2016).....	11
State v. Adams, 76 Wash.2d 650 (1971).....	6
State v. Blank, 131 Wash.2d 230 (1997).....	12
State v. Blazina, 182 Wash. 2d 827.....	10
State v. Copeland, 130 Wash.2d 244 (1996).....	6, 7
State v. Davis, 175 Wash.2d 287 (2012).....	10

### Washington Courts of Appeals

State v. Devlin, 164 Wash.App. 516 (2011).....	12
State v. Grant, 196 Wash.App. 644 (2016).....	12
State v. Howard, 196 Wash.App. 1008 (2016).....	9
State v. Lewis, 156 Wash.App. 230, 240 (2010).....	6
State v. Papadopoulos, 34 Wash.App. 397, 400 (1983).....	7
State v. Sinclair, 192 Wash.App. 380 (2016).....	12, 13
State v. Stoddard, 192 Wash.App. 222 (2016).....	11

### Washington Statutes and Court Rules

GR 14.1(a).....	9
RCW 9.94A.729.....	13

A. ASSIGNMENT OF ERROR

Respondent, State of Washington, assigns no errors to this matter and responds only to the issues presented by defendant.

B. STATEMENT OF THE CASE

Following a jury trial, defendant was convicted of Unlawful Possession of a Firearm Second and Driving While License Suspended First. It is not contested in this appeal that defendant was ineligible to possess a firearm because of prior felony convictions or that his driver's license was revoked in the first degree. This timely appeal alleges prosecutorial misconduct during closing arguments, judicial misconduct at sentencing, and the improper imposition of discretionary legal financial obligations.

C. FACTS

1. Testimony.

The state presented two witnesses who observed defendant in possession of a firearm while he was visiting a car dealership.

Sergio Avila, a dealership salesperson, assisted defendant in looking at a truck. RP 75 – 82. Avila saw defendant walking with a wallet in his hand with something in the middle of it before getting

into the truck. RP 76-77. When the defendant got out of the truck he left the wallet on the seat and that's when Avila saw the gun in the wallet. RP 78. Avila saw enough of the gun to identify its caliber, noted it was a real gun and not a fake, and noted it had a rubber band wrapped around it. RP 79. Mr. Valdez was not concerned about the gun because he assumed defendant had a permit to carry because defendant claimed to be in the military and had just deployed two days prior. RP 77. Mr. Valdez picked up the wallet with the gun inside and returned it to the defendant who had returned to his own car. RP 79.

Kristy Taylor also saw Mr. Avila returning to the defendant his wallet with the gun barrel sticking out. RP 64-66.

Sgt. Marshall testified defendant, after being arrested and without being questioned about any gun, told Sgt. Marshall there was a gun in the back area of the vehicle. RP 96. Defendant admitted to Marshall he knew the gun was in the car and that he carried it out of the car because it was unsafe to leave it in the car. RP 97. And while being transported to the jail defendant told Sgt. James Marshall he possessed the gun for protection. RP 98. After obtaining a search warrant, the firearm was indeed located in the vehicle defendant was driving. RP 103.

The jury also heard part of a jail house telephone conversation between defendant and his mother wherein the gun was discussed. RP 121-122, 152. Specifically, defendant tells his mother, in part, "I didn't even pick that fucking gun up out of the fucking pick-up to bring it back to the car, he did." RP 152.

At trial defendant offered a version of events to show he inadvertently and therefore did not knowingly possess the firearm. Defendant claimed he grabbed a shirt out his car's glovebox to wear while he was test driving the truck, and didn't know there was a gun in the shirt. RP 135-136. Defendant testified he did not see Avila put a gun back into his vehicle. RP 137-138. Defendant testified the first he knew of a gun in his car was later when his wife got into the passenger seat and threw things into the back of the car – when he heard the firearm hit something in the back. RP 142-143.

Defendant denied telling Sgt. Marshall he carried the gun for protection. RP 142.

Defendant testified he had several felony and misdemeanor convictions for theft and possession of stolen property. RP 143. Defendant testified he knew he was not supposed to be in

possession of a firearm. Id. Defendant testified he was currently on DOC supervision. RP 132, 143.

Defendant claimed not to remember quite everything about this incident because he was not taking his prescribed medications. RP 145-146.

2. Closing Arguments.

During the rebuttal portion of his closing arguments, the prosecutor stated:

Ladies and gentlemen, frankly, the Defendant's story is pretty much -- well, there's not really words for it other than it's a complete lie. First, you have to take into fact that the Defendant where he testified -- one, his testimony has a number of crimes of dishonesty which considerably factor and weigh on his credibility of both felony convictions -- Taking a Motor Vehicle Without Permission in the 2nd Degree, Theft in the 2nd Degree, two counts of Possession of Stolen Property in the 2nd Degree, a Theft in the 3rd Degree. We need to take all those criminal convictions into account when you're weighing his credibility. But you really don't need those prior convictions to determine that everything, pretty much everything the Defendant said up on the stand was a lie.

Essentially, Defendant's argument is still difficult to grasp how, how he could make this right, but that -- his argument is that unbeknownst to him, he grabbed his shirt out of the glovebox and just happened to pick up a firearm without knowing it. You should be allowed to take back the gun that was admitted into evidence and you should be allowed to feel the gun, feel how heavy it is. This gun is certainly not light. So, the fact that he's saying that he just picked up a shirt and oops, I didn't know there was a gun in there when I picked the shirt up. It's just, it's just not realistic.

The Defendant's completely -- and the other, the other thing that you need to consider when you're discussing is that he completely contradicts every single other witness that you heard today. It's shocking that every other person who sees the Defendant knows the Defendant was running around with a firearm. Kristy Taylor is concerned. I was scared he had a gun. Let's get Sergio back in here. I don't think he's safe out there. Sergio Avila knows he's got a gun, he's like, yeah, I was just returned the guy's wallet and gun to him. Officer Marshall knows he's got a gun because the Defendant admits to Officer Marshall that he has a gun in the vehicle and that he was just taking it out because he didn't want to leave it in the vehicle. And finally, the Defendant himself again and finally admits that he was possessing a gun on that audio call.

So, the Defendant's entire defense and the entire testimony should be completely disregarded. And again, I would ask that you find the Defendant guilty of both of these charges. Thank you.

PR 175-177.

3. Sentencing.

At sentencing the court stated, in part, the following:

Mr. Przespolewski, I just don't understand all of it, to be honest with you. I mean, you're, you're pleasant enough in Court and I understand that you're not overly pleasant to your mother sometimes from the telephone calls, but you're pleasant enough in Court. I mean, this is just silly. This is absolutely silly. And I hate sending you back to prison since that's something that's so silly for almost five years. It's just absolutely amazing to me. And I also can't believe and it's amazing to me that you went to trial and to a 3.5 Hearing on circumstances where you had no chance. And I'm assuming that your attorney told you had no chance, but you took 12 people out of (indiscernible) and missed their job because they had to come up here and you had no defense. I don't understand your thought process.

RP 186. The court then imposed a 55 months sentence, which was the mid-point of the standard range. RP 184, 186.

As for financial obligations the court asked defendant how much he could afford to pay, whereupon defendant stated he had just received an SSI settlement and could pay \$25.00 per month. RP 187.

#### D. AUTHORITY AND DISCUSSION

1. Prosecutor's statements were a permissible comment on the evidence.

A prosecutor enjoys wide latitude in closing arguments to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. State v. Lewis, 156 Wash.App. 230, 240 (2010).

“[P]rosecutors may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another. The same rule has been applied as to credibility of a defendant. In State v. Adams, 76 Wash.2d 650, 660, 458 P.2d 558, rev'd on other grounds by, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971), the prosecutor called the defendant a liar several times during closing argument. Each time, the prosecutor referred to specific evidence, including the defendant's own testimony, which “clearly demonstrated that in fact [the] defendant had lied.” The court held that the argument fell within the rule allowing counsel to draw and express reasonable inferences from the evidence. Adams, 76 Wash.2d at 660, 458 P.2d 558.”

State v. Copeland, 130 Wash.2d 244, 290-91 (1996)(some citations omitted).

In *State v. Copeland*, supra, the prosecutor argued in closing that the defendant had lied to the police and to the jury. The court found it significant that the prosecutor “did not simply call [the defendant] a liar.” *Id.* at 291. Rather, the prosecutor’s comments “were related to the evidence and drew inferences that [the defendant] lied because his testimony conflicted with that of the other witnesses.” *Id.* at 291–92.

Prejudice is not established unless “it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.” *State v. Papadopoulos*, 34 Wash.App. 397, 400 (1983).

In the case at hand, the prosecutor did not call the defendant a liar. Instead, the prosecutor said the defendant’s *story* was a lie. The prosecutor reminded the jury of the defendant’s crimes of dishonesty, which could be considered when determining credibility. The prosecutor drew the jury’s attention to the size and weight of the handgun as reason to disbelieve defendant’s story that he did not know he had a handgun when he supposedly pulled the shirt out of the glovebox. And the prosecutor invited the jury to compare and contrast the defendant’s testimony against the other witnesses’ stories.

The record shows that the prosecutor's statements were a permissible comment on the evidence, and not merely an expression of his opinion, and, as such, the comments were not improper or prejudicial.

2. Judicial comments at sentencing were not improper.

The State agrees with the legal standards set forth in Defendant's brief, but disagrees the sentencing court violated those standards. While the court certainly mentioned the defendant had taken this matter to trial and inconvenienced a jury where he had no defense - that particular reference is taken out of context of the court's entire statement found at RP 187:

Mr. Przespolewski, I just don't understand all of it, to be honest with you. I mean, you're, you're pleasant enough in Court and I understand that you're not overly pleasant to your mother sometimes from the telephone calls, but you're pleasant enough in Court. I mean, this is just silly. This is absolutely silly. And I hate sending you back to prison since that's something that's so silly for almost five years. It's just absolutely amazing to me.

**And** I also can't believe and it's amazing to me that you went to trial and to a 3.5 Hearing on circumstances where you had no chance. And I'm assuming that your attorney told you had no chance, but you took 12 people out of (indiscernible) and missed their job because they had to come up here and you had no defense.

*I don't understand your thought process.* (emphasis added).

It is clear the judge was commenting primarily on the defendant's thought process in getting in trouble in the first place. The court noted it was "silly" for the defendant to have gotten himself into this predicament in the first place, and "silly" to have to go back to prison for five years. The inference from the court's "all of it" comment is that the court could not understand why a career criminal who knew he was not supposed to have a firearm, who had been previously convicted of the same exact charge, who had just recently gotten out of prison, and who was currently under DOC supervision, would carry around in his hand a firearm stuffed in a wallet while shopping for a truck.

The silliness of committing the crime is an independent reason by the court supporting a non-vindictive reason for imposing a sentence within the standard range that is higher than the minimum range requested by the defense.

The court's comments that defendant had "no chance" was a permissible comment on the defendant's presentation of an unbelievable defense. *See State v. Howard*, 196 Wash.App. 1008 (2016) (sentencing court's comments that imposition of the state's recommended mid-range sentence was "a reasonable one. It's not to punish you for choosing to go to trial. But it is to recognize that

the defense not only failed but wasn't very believable" were not improper)(not reported but citable under GR 14.1(a); this decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate).

3. Discretionary Legal Financial Obligations (LFO).

The record shows the judge inquired about the defendant's ability to pay "once he got out", and the defendant responded that, although he was disabled and recently received a SSI settlement, he could afford to pay \$25.00 per month. RP 187. The court imposed the LFOs, and ordered they be paid at \$25.00 per month. Defendant did not object to the imposition of the discretionary LFOs.

The State has not yet sought to collect any LFOs.

A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. It is well settled that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond. *State v. Davis*, 175 Wash.2d 287, 344, 290 P.3d 43 (2012), cert. denied, — U.S. —, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013).

*State v. Blazina*, 182 Wash. 2d 827, 832–33, 344 P.3d 680, 682 (2015).

The record is clear the court made an inquiry and the defendant volunteered an amount he could pay. This is not a situation where the court simply signed a boilerplate judgment and sentence without conducting an inquiry. There was an inquiry by the court, the defendant had an opportunity to be heard on the matter, the court imposed the LFOs, and the defendant did not object. There was no error. If there was error, it was unpreserved for appeal and this court should deny review. *State v. Stoddard*, 192 Wash.App. 222 (2016).

And despite the defendant's contention, the court did not order defendant to pay his LFOs from any Federal disability assistance. Although defendant stated he was disabled and had recently received an SSI settlement, unlike in *City of Richland v. Wakefield*, 186 Wn.2d 596 (2016), decided after sentencing in this matter, defendant here offered no support for his statements. In *Wakefield*, the defendant provided expert testimony and plenty of evidence to support her contention that she was permanently and wholly disabled and had no other source of income besides her Federal disability assistance.

Should this court determine the trial court's inquiry was insufficient, given the defendant's propensity towards dishonesty,

and given that the judicial guidance announce in *Wakefield* was not handed down until after this sentencing, the sentencing court, as well as the state, should be given an opportunity to further examine defendant's claims of indigency and disability if this matter is remanded.

4. Appellate Costs.

Whether appellate costs should be awarded if the state is the prevailing party is certainly within the discretion of the appellate court at the time such request is made. *State v. Sinclair*, 192 Wash.App. 380 (2016); *State v. Grant*, 196 Wash.App. 644 (2016). But the appellate court does not have to exercise that discretion, and may, instead, order costs and make a determination about remission of costs at a later date. *State v. Blank*, 131 Wash.2d 230 (1997). "It is not unconstitutional to recoup court costs (including costs of appointed counsel) from an indigent who later becomes able to pay." *Id.* at 246.

The defendant bears the burden of proving qualification for an order of indigency. *State v. Devlin*, 164 Wash.App. 516 (2011). Although the trial court made a determination of indigency at the outset of the appeal, that decision is based on a cursory determination by that court on the information provided in a

financial declaration. The information in the financial declaration is not vetted, and the state is not given the opportunity to challenge that information.

Defendant is not in the same situation as the defendant in *Sinclair*. It was obvious that the 66 year old Sinclair would likely die in prison while serving a 280 months sentence and would never be able to pay appellate costs. In this matter, other than his unsubstantiated claim, defendant has not provided any credible evidence that he is disabled. Additionally, defendant was sentenced to 55 months, which means he will be approximately 54<sup>1</sup> years old when he is released, if, that is, he serves his maximum sentence and does not earn early release under RCW 9.94A.729.

Although indigency is presumed to follow the defendant to prison, the appellate court retains discretion to make an independent determination of indigency. The state invites this court to require the defendant to provide something more than simply his word on the matter. For example, if defendant has truly

---

<sup>1</sup> Defendant's date of birth is September 12, 1966 (CP 10); he was arrested on June 25, 2016 (CP 1), and did not post bail prior to trial. Defendant is entitled to credit for time served since the date of his incarceration. The maximum release date would then be 55 months from that date, which would be January 25, 2021.

been deemed permanently and wholly disabled by the Social Security Administration, then providing such documentation should be relatively easy and doing so would not be overly burdensome, and it would be conclusive to this issue. Otherwise, if the defendant cannot produce credible evidence of his complete and permanent disability, then this court should exercise its discretion and wait until a later time to see if the defendant becomes able to pay.

E. CONCLUSION

Based on the foregoing facts and authorities, the State respectfully requests this court to uphold the jury's verdict and dismiss this appeal. Further, this court should abide its decision on the imposition of appellate costs.

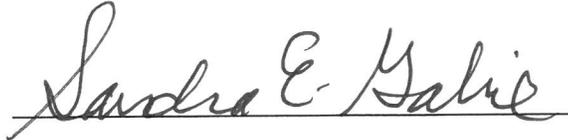
Respectfully submitted this  
18<sup>th</sup> days of April, 2017



W. Gordon Edgar WSBA No. 20799  
Deputy Prosecuting Attorney



Lonnie Prezespolewski #936710  
Washington State Penitentiary  
1313 North 13<sup>th</sup> Avenue  
Walla Walla, WA 99362

  
Sandra E. Galie

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of April,  
2017.

  
Jen Schlar

NOTARY PUBLIC in and for the State  
of Washington, residing at East  
Wenatchee; my commission expires  
02/26/2019.