

No. 34904-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID P. ALECK

Appellant.

---

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

The Honorable Judge Brian Altman

---

APPELLANT'S OPENING BRIEF

---

Kristina M. Nichols, WSBA #35918  
Nichols and Reuter, PLLC  
Eastern Washington Appellate Law  
PO Box 19203  
Spokane, WA 99219  
Phone: (509) 731-3279  
admin@ewalaw.com

**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT .....1

B. ASSIGNMENTS OF ERROR .....2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....2

D. STATEMENT OF THE CASE.....2

E. ARGUMENT.....7

Issue 1: Whether Mr. Aleck was denied his constitutional right to effective assistance of counsel when his attorney failed to request an affirmative defense jury instruction on the exercise of Indian treaty rights as to the charges of unlawful big game hunting and unlawful possession of a firearm.....7

Issue 2: Whether this Court must remand to correct a scrivener’s error that misstates the date of crime in the felony judgment and sentence. ....21

Issue 3: Whether, in the event Mr. Aleck is not the substantially prevailing party on appeal, this Court should refuse to impose appellate costs against this indigent appellant.....21

F. CONCLUSION.....27

**TABLE OF AUTHORITIES**

Washington Supreme Court

*State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008).....21

*State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997).....26

*State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).....22-25

*Staats v. Brown*, 139 Wn.2d 757, 991 P.2d 615 (2000).....26

*State v. Buchanan*, 138 Wn.2d 186, 205, 978 P.2d 1070,  
*as amended* (1999).....12, 13, 15, 21

*State v. Chambers*, 81 Wn.2d 929, 935-36, 506 P.2d 311 (1973).15, 17, 18

*State v. Jim*, 173 Wn.2d 672, 273 P.3d 434 (2012).....10, 20

*State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009).....8

*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) .....9

*State v. Moses*, 79 Wn.2d 104, 483 P.2d 832 (1971).....12

*State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957).....12, 16

*State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009).....8

*State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).....9

Washington Courts of Appeals

*State v. Abrahamson*, 157 Wn. App. 672, 238 P.3d 533 (2010).....10

*In re Pers. Rest. of Dove*, 196 Wn. App. 148, 381 P.3d 1280 (2016).....22

*In re Pers. Rest. of Hubert*, 138 Wn. App. 924, 158 P.2d 1282 (2007).9, 19

*State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (2013).....24

*State v. Moten*, 95 Wn. App. 927, 976 P.2d 1286 (1999).....21

<i>State v. Posenjak</i> , 127 Wn. App. 41, 111 P.3d 1206 (2005).....	10-12, 17
<i>State v. Powell</i> , 150 Wn. App. 139, 155, 206 P.3d 703 (2009).....	9, 19-21
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	22
<i>State v. Snyder</i> , No. 73893-3-I, 2017 WL 1314226, at *1-7 (Wash. Ct. App. Apr. 3, 2017).....	10, 11

Federal Authorities

Public Law 280, 83 <sup>rd</sup> Congress, 1 <sup>st</sup> Session .....	10
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	8
<u>Treaty with the Yakamas</u> , 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 29, 1859).....	13, 15
<i>U.S. v. Confederated Tribes of the Colville Indian Reservation</i> , 606 F.3d 698 (9 <sup>th</sup> Cir. 2010).....	2, 12
<i>United States v. Gallaher</i> , 275 F.3d 784 (9 <sup>th</sup> Cir. 2001).....	16
<i>United States v. Washington</i> , 384 F. Supp. 312 (W.D. Wash. 1974), <i>aff'd and remanded</i> , 520 F.2d 676 (9 <sup>th</sup> Cir. 1975).....	16

Washington Constitution, Statutes & Court Rules

Division III General Court Order issued on June 10, 2016.....	22
GR 14.1.....	10
GR 34.....	25
RAP 2.5(a)(3). .....	8
RAP 14.2 .....	22, 26
RAP 15.2.....	25, 26

RCW 37.12.010.....10

RCW 9.41.040.....11

RCW 10.01.160 .....24, 26

RCW 10.73.160.....23, 24

RCW 10.82.090 .....24

RCW 77.08.030 .....11

RCW 77.15.410(1).....11

Secondary Resources

Ceded Area and Reservation Boundary of the Confederated Tribes and Bands of the Yakama Nation, available at <http://www.yakamanation-nsn.gov/docs/CededMap0001.pdf> (last visited May 9, 2017).....3, 13, 14

## **A. SUMMARY OF ARGUMENT**

David Aleck is a member of the Yakama Nation Indian tribe. He was convicted of second-degree unlawful hunting of big game and second-degree unlawful possession of a firearm after shooting a deer on ceded tribal land. His convictions should now be reversed and the matter remanded for a new trial.

While defense counsel submitted evidence and argument as to Mr. Aleck's lawful exercise of his hunting tribal treaty rights, counsel neglected to request the affirmative defense jury instruction that corresponded with this argument. Had the instruction been requested, it would have been given by the trial court. Thus, Mr. Aleck was prejudiced by his attorney's ineffective assistance, which requires this matter be reversed and remanded for a new trial.

If this Court disagrees and affirms Mr. Aleck's convictions, the matter should nonetheless be remanded to the trial court for an amended judgment and sentence to correct a scrivener's error that misstates the date of crime.

Finally, if the State is the substantially prevailing party on appeal, Mr. Aleck requests this Court deny any award of appellate costs against this indigent appellant.

## **B. ASSIGNMENTS OF ERROR**

1. Defense counsel was ineffective for failing to request, and the court erred by failing to give, a jury instruction pertaining to the affirmative defense of exercising tribal hunting treaty rights.
2. The court erred by finding in a pretrial suppression hearing that Mr. Aleck committed the underlying offenses on private property. CP 166. Regardless, this was a decision for the jury to make at the time of trial, and Mr. Aleck presented substantial evidence to the contrary so that this issue should have been submitted to the jury with proper instruction.
3. The court erred by listing Mr. Aleck's date of crime on the felony judgment and sentence as January 15, 2015. CP 205.

## **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether Mr. Aleck was denied his constitutional right to effective assistance of counsel when his attorney failed to request an affirmative defense jury instruction on the exercise of Indian treaty rights as to the charges of unlawful big game hunting and unlawful possession of a firearm.

Issue 2: Whether this Court must remand to correct a scrivener's error that misstates the date of crime in the felony judgment and sentence.

Issue 3: Whether, in the event Mr. Aleck is not the substantially prevailing party on appeal, this Court should refuse to impose appellate costs against this indigent appellant.

## **D. STATEMENT OF THE CASE**

David Aleck is an enrolled member of the Yakama Nation<sup>1</sup>, a federally recognized tribe. 2RP<sup>2</sup> 8, 71. His particular band within the

---

<sup>1</sup> "The spelling of the name was changed from "Yakima" to "Yakama" in 1994 to reflect the native pronunciation." *United States v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698, 701n.2 (9<sup>th</sup> Cir. 2010).

Yakama Nation is the Klickitat River Indians. *Id.* Mr. Aleck maintains identification as an enrolled tribal member. 1RP 74.

On January 17, 2015, Mr. Aleck was hunting for deer on Fisher Hill Road in Klickitat County, Washington, because he and his wife were hungry. 1RP 70, 72-73. Mr. Aleck had hunted this area for decades, since he was about 10-years-old. 1RP 75. He grew up with his grandparents and great-grandparents having educated him that this was their tribal area to hunt because Fisher Hill Road is located on ceded tribal treaty land. 1RP 71-73, 75. That is, while Fisher Hill Road is not located on the Yakama Reservation itself or on an “in lieu of [reservation] site” (2RP 6; 1RP 79), it is located between Wenatchee and the Columbia River where the Yakama Nation reserved tribal hunting and fishing rights for tribal members on this otherwise ceded land. 1RP 72. There does not appear to be any dispute that Fisher Hill Road is, in fact, located outside the Yakama Reservation but on ceded tribal land.<sup>3</sup>

---

<sup>2</sup> “1RP” refers to the transcript of trial held November 9, 2016. “2RP” refers to the transcript of pretrial hearings, conclusion of trial on November 10, 2016, and sentencing on December 5, 2016.

<sup>3</sup> For clarity sake, this Court is asked to take judicial notice of the map of the Yakama reservation and ceded area as published by the Yakama Nation, which can easily be compared to the location of Fisher Hill Road to verify that Fisher Hill Road is outside the Yakama Reservation boundaries but within the tribal ceded area. *See Ceded Area and Reservation Boundary of the Confederated Tribes and Bands of the Yakama Nation*, available at <http://www.yakamanation-nsn.gov/docs/CededMap0001.pdf> (last visited May 9, 2017).

Mr. Aleck testified that, while hunting on Fisher Hill Road, he used a firearm and shot a deer on the west side of the road. 1RP 80-82, 84-85. The deer then crossed over a fence onto land that was marked with no trespassing signs and died on the other side of the fence. 1RP 84-85. When asked whether he thought the land was “open and unclaimed,” Mr. Aleck agreed the fenced property the deer jumped onto was privately owned, but he said the side of the road where he shot the deer did not appear to be private. 1RP 76, 78. Mr. Aleck said he was in a location on Fisher Hill Road between hillsides where he could not see any houses, barns or livestock. *Id.*

The owners of the property at 781 Fisher Hill Road where the deer died, Doug and Lori Ramsay, testified their property consists of 15,000 acres of privately owned land used for cattle and horse ranching. 1RP 24-25, 29, 30. Their property is fenced and marked with “Private Hunting / No Trespass” signs. 1RP 27; Exhibits P8, P9, P11. When they heard the shots and saw a vehicle, they called authorities with a description of the vehicle and license plate. 1RP 25-26, 32, 37. Mr. Aleck said he left the area without the deer because he became scared at the Ramsays’ approach and thought he would be trespassing if he retrieved the deer from the other side of the fence. 1RP 80-81.

Department of Fish and Wildlife (DFW) officers stopped the vehicle Mr. Aleck was riding in as a passenger. RP 37. Although Mr. Aleck initially denied hunting, Mr. Aleck ultimately told officers he had shot the deer with a rifle and helped them locate the firearm in the vehicle. 1RP 55-56. Officers then located the dead deer a couple hours later to the east side of the barbed wire fence on the Ramsays' private property. 1RP 42, 47, 51, 60, 63-64. While investigating the area, officers also noticed deep, hard rutting tracks of a deer in distress or a deer digging in prior to crossing the fence. 1RP 64-65. There were also mats of hair found on the fence where it appeared the deer had "piled" into the fence while crossing. *Id.* Shell casings from the firearm were located on the road and next to the deer. 1RP 42, 65-66; Exhibit P3.

Mr. Aleck acknowledged it was closed season for deer hunting, he did not have a State hunting license, and his prior felony generally made it unlawful to possess a firearm. 1RP 12, 54, 59, 68, 73; 2RP 101; CP 189. But Mr. Aleck, who offered his tribal identification to officers, maintained he nonetheless believed he was acting within his Indian treaty rights by hunting with a firearm on ceded tribal land along Fisher Hill Road. 1RP 60, 73, 79. Over several objections by the State, the defendant was permitted to testify to and argue this treaty rights theory of the case. 1RP 6-7, 72, 79, 88-90.

Defense counsel's closing argument focused on Mr. Aleck's testimony that he was on ceded land exercising his treating hunting rights, asking the jury to determine these treaty rights override State law and should lead to acquittal. 2RP 113, 115-16. But the jury was never instructed on any affirmative defense related to treaty hunting rights, and no such instruction was requested by defense counsel (*see* 2RP 90-106; CP 54-69), which was pointed out by the State during closing argument: "You will search in vein in the jury instructions for that." 2RP 111; CP 180-201.

The jury returned verdicts finding Mr. Aleck guilty as charged of second-degree unlawful hunting of big game and second-degree unlawful possession of a firearm. 2RP 119; CP 175, 202-03. A judgment and sentence was entered against Mr. Aleck, listing the date of the crime as January 15, 2015, rather than the date of January 17, 2015, as stated in the amended information and testified to at trial. 1RP 25, 32, 37, 70; CP 175, 205.

At sentencing, the trial court asked Mr. Aleck, "How much can you afford to pay per month not less than fifty dollars [toward legal financial obligations (LFOs)]?" 2RP 132. Mr. Aleck, who receives only \$122.97 per month in tribal per capita income (CP 232), responded he could pay \$100 per month. 2RP 132. No further inquiry was made into

Mr. Aleck's financial circumstances. *See* 2RP 124-35. The trial court imposed \$2,800 in LFOs, including a wildlife penalty of \$2,000. CP 210.

Mr. Aleck moved to proceed with an appeal at public expense, declaring his only assets were the "clothes on my back" and that he could not afford to contribute any amount towards review. CP 232. The trial court entered an order of indigency for Mr. Aleck to proceed with appeal at public expense. CP 233-34.

This appeal timely followed. CP 218.

#### **E. ARGUMENT**

**Issue 1: Whether Mr. Aleck was denied his constitutional right to effective assistance of counsel when his attorney failed to request an affirmative defense jury instruction on the exercise of Indian treaty rights as to the charges of unlawful big game hunting and unlawful possession of a firearm.**

Mr. Aleck's theory of the case was he had the right to hunt with a firearm on ceded tribal land, particularly land along Fisher Hill Road that was not within the fenced boundaries of private property. Although the deer he hunted had jumped through a fence onto the Ramsays' private property before dying, Mr. Aleck maintained he had hunted on ceded land that was protected by his tribal treaty rights. Unfortunately, despite the trial court permitting Mr. Aleck to testify in his own defense about his treaty rights, and for defense counsel to argue for acquittal based on the exercise of those treaty rights, the jury was never provided a

corresponding jury instruction for this affirmative defense. Given the evidence in this case and the trial court having permitted the defense argument about treaty rights, such a jury instruction would most assuredly have been given by the trial court had it been requested by defense counsel. Mr. Aleck was prejudiced by his attorney's failure to request the very instruction that correlated with the defense theory of the case.

As guaranteed by the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The proper standard for attorney performance is that of reasonably effective assistance. *Id.* at 687. "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a)(3). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test: (1) [D]efense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of

the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). “Generally, legitimate trial strategy cannot serve as the basis for a claim of infective assistance of counsel.” *State v. Powell*, 150 Wn. App. 139, 153, 155, 206 P.3d 703 (2009) (internal quotations omitted). However, there is no tactical basis for failing to request an affirmative defense instruction where the evidence supported such an instruction and counsel argued this defense theory. *Id.*

A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record to support it. *Powell*, 150 Wn. App. at 154. “For defense counsel’s failure to request [an...] instruction to amount to deficient performance, [the defendant] must show that had counsel requested this instruction, the trial court would have given it.” *Id.* In other words, the question is not whether the outcome would have been different upon weighing the State’s evidence against that of the defense; rather, the question is whether the defendant can demonstrate that, had counsel requested a particular jury instruction, the trial court would have given it. *See id.* (citing *In re Personal Restraint of Hubert*, 138 Wn. App. 924, 932, 158 P.2d 1282 (2007)) (approving affirmative defense instruction where, without the instruction, the jury

would have “no way to understand the legal significance of the evidence” presented in support of the defense theory).

Tribal members may raise affirmative defenses to charges brought against them for unlawful hunting off of their Indian reservation where doing so is protected by treaty rights. *State v. Posenjak*, 127 Wn. App. 41, 48-49, 111 P.3d 1206 (2005); *State v. Snyder*, No. 73893-3-I, 2017 WL 1314226, at \*1-7 (Wash. Ct. App. Apr. 3, 2017)<sup>4</sup>. As a threshold matter, Mr. Aleck is not making a jurisdictional challenge at this time,<sup>5</sup> as the charged crimes occurred off reservation land and not at an allotted trust site. *See Posenjak*, 127 Wn. App. at 48-49; 2RP 6. Rather, Mr. Aleck argues he was entitled to an affirmative defense instruction that would

---

<sup>4</sup> “Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.” GR 14.1. This case is cited as persuasive authority only.

<sup>5</sup> By way of background, in 1957, Washington State generally assumed criminal and civil jurisdiction from the federal government over Indians and lands within the State in accordance with the authority granted by Congress pursuant to Public Law 280, 83<sup>rd</sup> Congress, 1<sup>st</sup> Session. *See* RCW 37.12.010; *State v. Abrahamson*, 157 Wn. App. 672, 679-80, 238 P.3d 533 (2010). Subject to certain exceptions not pertinent here, the State’s assumption of jurisdiction does not apply to Indians without tribal consent when on their tribal lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States. *Id.*; *State v. Jim*, 173 Wn.2d 672, 680, 273 P.3d 434 (2012) (“the State does not have criminal jurisdiction over Yakama Indians on tribal lands that are within an established reservation and held in trust or subject to a restriction on alienation by the United States.”) Mr. Aleck acknowledges defense counsel made jurisdictional challenges below. *See* CP 44-47; 2RP 5-8, 115. But, because there was no dispute that Mr. Aleck was not within the boundaries of the reservation or on an “in lieu” of site that was held in trust by the United States for exclusive use of the tribe when he shot the deer (2RP 6) (*c.f.* *Jim*, 173 Wn.2d at 680-81, 685, discussing “in lieu” of site), Mr. Aleck is not renewing his jurisdictional challenge in this brief.

have given the opportunity for the jury to acquit him of unlawful big game hunting and unlawful firearm possession, because he was exercising his treaty rights in doing so. *See Posenjak*, 127 Wn. App. at 48-49; *Snyder*, 2017 WL 1314226, at \*1-3.

“A person is guilty of unlawful hunting of big game in the second degree if the person (a) Hunts for, takes, or possesses big game and the person does not have and possess all licenses, tags, or permits required under this title.” RCW 77.15.410(1); RCW 77.08.030 (defining “big game” to include deer). A person is “guilty of the crime of unlawful possession of a firearm in the second degree, if...the person...has in his or her possession, or has in his or her control any firearm...After having previously been convicted...of any felony...” RCW 9.41.040(2)(a)(i). Mr. Aleck testified to the facts supporting both offenses, including that he had a prior felony and used a firearm to kill a deer, without possessing a State hunting license. 1RP 79-82. The question now is whether the jury was able to properly consider, with supporting instructions, Mr. Aleck’s affirmative defense to the charged crimes pursuant to tribal hunting treaty rights.

“To establish the affirmative defense, the defendant must show by a preponderance of the evidence (1) the existence of the treaty, (2) of which he is a beneficiary, and (3) that, as a matter of law, the treaty bars

him from the operation and enforcement of the hunting laws and regulations.” *Posenjak*, 127 Wn. App. at 48 (citing *State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971)). Indians asserting treaty rights must first establish their group has preserved its tribal status, including by showing the group maintained an organized tribal structure and by showing a group of citizens of Indian ancestry is descended from a treaty signatory. *Id.* (internal citations omitted). There is no disputing in this case the Yakama Nation was and remains a federally recognized Indian tribe, and that Mr. Aleck is an enrolled member of this tribe. 1RP 74; 2RP 8, 71; *Confederated Tribes*, 606 F.3d at 701n.2.

Next, the existence of a treaty protecting Yakama tribal members’ rights to hunt in certain ceded areas of this state is also indisputable in this case. Historically, Indian tribes within the Territory of Washington entered treaties whereby the “signatory Indians relinquished their rights to aboriginal lands in exchange for money and confinement to a reservation with distinct boundaries.” *State v. Buchanan*, 138 Wn.2d 186, 199, 205, 978 P.2d 1070, *as amended* (1999). To mitigate the effect of the tribal members’ displacement from their traditional hunting grounds to a “small tract of land,<sup>6</sup>” the Indian treaties “preserved a portion of the aboriginal rights exercised by the signatory tribes...,” including “the privilege of

---

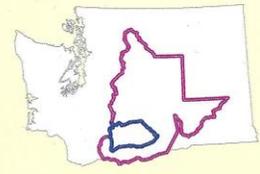
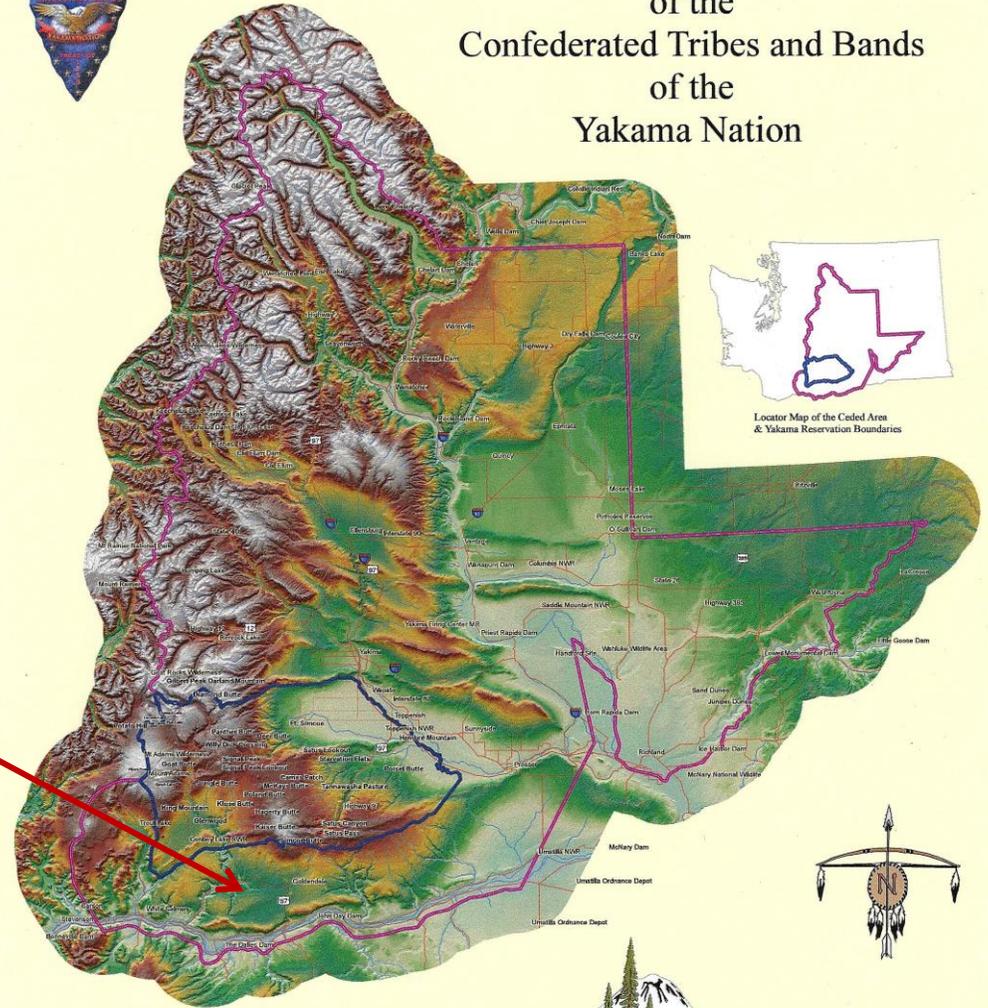
<sup>6</sup> *State v. Satiacum*, 50 Wn.2d 513, 515-16, 314 P.2d 400 (1957).

hunting...on open and unclaimed lands” that were outside the boundaries of the reservation to which Indians had been moved. *Id.* at 205-06 (“the treaty right is a reserved right ‘to hunt upon open and unclaimed land...at any time of the year in any of the lands ceded to the federal government though such lands are outside the boundary of [the Indian] reservation.’” (citations omitted)).

In other words, “[u]nder the reservation of rights doctrine, tribal members have possessed certain rights, such as hunting and fishing rights, from time immemorial.” *Buchanan*, 138 Wn.2d. at 203. The right to hunt on land ceded to the federal government was expressly reserved by the Yakamas in 1855. *Id.*; Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 29, 1859) (“Yakama Treaty”). Specifically, the Yakamas reserved the “privilege of hunting...upon open and unclaimed land” that they had ceded to the federal government in 1855. Yakama Treaty, Art. 3.

Fisher Hill Road is clearly within that area originally belonging to the Yakamas that was ceded to the federal government pursuant to the Yakama Treaty of 1855. 1RP 71-73. *See also* Ceded Area and Reservation Boundary of the Confederated Tribes and Bands of the Yakama Nation, available at <http://www.yakamanation-nsn.gov/docs/CededMap0001.pdf> (last visited May 9, 2017):

# Ceded Area and Reservation Boundary of the Confederated Tribes and Bands of the Yakama Nation

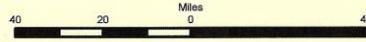


Locator Map of the Ceded Area & Yakama Reservation Boundaries

Approximate location of 781 Fisher Hill Road



This Map was produced by GIS staff from the BIA Branch of Forestry, DNR Water Resources and DNR Wildlife programs. The data for the map was derived from a 1:250,000 Digital Elevation Model. The forest vegetation was digitized from 7.5 minute USGS Quad sheets. A compiled list of Tribal names for various features was supplied by the Cultural Resources program. This list was derived from many sources, including Tribal elders and other participants.



Scale 1:700,000 in or 1:11mi

- Legend
- Yakama Nation Ceded & Reservation Boundaries
  - Yakama Nation Ceded Area
  - Yakama Nation Reservation
  - Lakes & Reservoirs
  - Rivers & Streams
  - Major Roads

Despite having ceded this area of land to the federal government, the Yakamas reserved the privilege of hunting upon open and unclaimed

lands within this ceded area. *Buchanan*, 138 Wn.2d. at 203; Yakama Treaty, Art. 3. “Open and unclaimed lands” has been interpreted to mean lands that are publicly-owned, including national forest service lands, and other lands not settled or privately owned. *Buchanan*, 138 Wn.2d at 209 (citing cases). In *State v. Chambers*, the Supreme Court approved of the following jury instruction:

You are instructed that the Treaty with the Yakima of 1855 was made between the United States Government and various Indian tribes. The treaty provided that members of said tribes possessed the privilege of Hunting on open and unclaimed lands. Open and unclaimed lands, within the meaning of the Treaty with the Yakima, is defined to mean Lands which are not in private ownership. If you find beyond a reasonable doubt that the defendant was engaged in a hunting activity On lands in private ownership with outward indications of such ownership observable to a reasonable man, as distinguished from governmental ownership, then you shall find the defendant guilty as charged.

*State v. Chambers*, 81 Wn.2d 929, 934, 935-36, 506 P.2d 311 (1973)

(emphases added).

Here, Mr. Aleck’s right to hunt on open and unclaimed ceded land, as a member of the Yakama Indian tribe, preempts the application of state hunting and firearm laws. “Like any treaty between the United States and another sovereign nation, a treaty with Indians is the supreme law of the land and is binding on the State until Congress limits or abrogates the treaty.” *Buchanan*, 138 Wn.2d at 201. The Yakama Treaty, like other federal laws, supersedes any conflicting provisions of state laws.

*Satiacum*, 50 Wn.2d at 516 (“The supreme court has consistently held that Indian treaties have the same force and effect as treaties with foreign nations, and consequently are the supreme law of the land and are binding upon state courts and state legislatures notwithstanding state laws to the contrary.”)

While Congress may be permitted to limit or abrogate treaty rights through its passing of laws, states lack similar authority to do so. In *United States v. Gallaher*, the Court held that a member of the Colville Confederated Tribes could be convicted under federal law of being a felon in possession of ammunition. *United States v. Gallaher*, 275 F.3d 784 (9<sup>th</sup> Cir. 2001). *Gallaher* does not, however, provide authority for a state to similarly trump treaty rights with its own criminal laws. *See id.* Until the United States Congress limits or abrogates the treaty, the State’s criminal laws remain superseded by the treaty rights where they are in conflict. *Buchanan*, 138 Wn.2d at 201; *Satiacum*, 50 Wn.2d at 516.

It should be noted that Indians are permitted to employ modern hunting aids, including the use of firearms, while exercising their hunting treaty rights. *See United States v. Washington*, 384 F. Supp. 312, 333 W.D. Wash. 1974), *aff’d and remanded*, 520 F.2d 676 (9<sup>th</sup> Cir. 1975) (non-discriminatory regulations by state on fishing were only permissible where reasonable and necessary for conservation purposes; otherwise,

decisions to regulate manner of fishing remained exclusively within the province of the tribe). Hunting with a firearm by Indians is a protected treaty action. While federal laws may preempt those firearm hunting treaty rights for Indians with a prior felony conviction, Washington State may not similarly do so since the treaty is considered the supreme law when compared against conflicting state provisions.

Ultimately, the question in this case is whether defense counsel was ineffective for failing to request an affirmative defense jury instruction on hunting treaty rights, similar to the instruction set forth above in *State v. Chambers*, 81 Wn.2d at 934. Mr. Aleck established the existence of the Yakama treaty, that he is a beneficiary of the treaty as an enrolled tribal member, and that the hunting treaty rights supersede state criminal laws where properly exercised. *Posenjak*, 127 Wn. App. at 48 (setting forth the three criteria to be satisfied for raising an affirmative defense). The only question remaining was one of fact that should have gone to the jury to determine whether Mr. Aleck was indeed hunting on “open and unclaimed land” so as to defeat the charges through proper exercise of hunting treaty rights.

To that end, while there was conflicting testimony about the nature of the land in question, there was at least substantial evidence to support the defendant’s theory of the case so as to warrant the jury instruction and

properly submitting the issue to the jury. Mr. Aleck had hunted in the Fisher Hill Road area for decades, since he was about 10-years-old. 1RP 75. He grew up with his grandparents and great-grandparents educating him that this area was ceded tribal treaty land where hunting was permitted by tribal members. 1RP 71-73, 75.

While the evidence is undisputed that the deer died on private land, the evidence is disputed as to whether it was hunted and shot while off of that private land. Mr. Aleck testified the deer was to the west of the road when he hunted it and, after being shot, the deer crossed a fence onto private property that was marked with no trespassing signs. 1RP 76, 78, 80-82, 84-85. Mr. Aleck testified he was hunting between hillsides where he could not see any livestock, homes or outbuildings. *Id.* The jury could have found, especially given that the Ramsays' property is a vast 15,000 acres in a heavily treed area (1RP 24-25, 29, 30; Exhibits P8 and P9), that the area where the deer was initially hunted was not private or sufficiently marked as private, and was instead open and unclaimed. *Chambers*, 81 Wn.2d at 934.

Even the State's evidence supported Mr. Aleck's argument that the deer may not have been on private property when it was hunted, and issue for the jury to determine. One DFW officer testified there were rutting tracks of a deer in distress or a deer digging in, prior to it crossing the

fence onto the Ramsays' property. 1RP 64-65. Also, there were mats of hair found on the fence where it appeared the deer ran into or through the fence before dying on the other side. *Id.* And, shell casings were found prior to crossing the fence onto the Ramsays' private property. 1RP 42, 65-66; Exhibit P3.

There was substantial evidence in the record to support an affirmative defense instruction on Mr. Aleck's tribal hunting treaty rights. The trial court admitted evidence in support of the defendant's treaty rights argument, and defense counsel focused his closing argument on the assertion of these treaty rights. 1RP 6-7, 72, 79, 88-90; 2RP 113, 115-16. Under these circumstances, the trial court would have given the affirmative defense jury instruction, had it been requested by defense counsel. Given the argument made by defense counsel, asking the jury to acquit Mr. Aleck of both charges due to the exercise of hunting treaty rights, counsel cannot be said to have made a tactical decision in foregoing the very instruction that corresponded to this argument. *Accord Powell*, 150 Wn. App. at 153.

Without the necessary affirmative defense instruction, the jury was left to wonder what significance, if any, all of the evidence and argument pertaining to Indian hunting treaty rights may have had in this case. *Powell*, 150 Wn. App. at 154 (citing *Hubert*, 138 Wn. App. at 932)

(approving affirmative defense instruction where, without the instruction, the jury would have “no way to understand the legal significance of the evidence” presented in support of the defense theory). The State informed the jury Mr. Aleck’s hunting treaty rights need not be considered in this case, pointing out the absence of any treaty right jury instruction. 2RP 111; CP 180-201. Defense counsel should have remedied this deficiency by requesting the appropriate instruction.

Mr. Aleck was deprived of his constitutional right to effective assistance of counsel by his attorney’s failure to request the only jury instruction that pertained to the defense theory of the case. Counsel’s failure to request the treaty right instruction prejudiced Mr. Aleck, because, had the instruction been requested, it would have been given. *Powell*, 150 Wn. App. at 154 (setting forth this prejudice standard where instruction was not requested by counsel). The only fair remedy at this time is to remand for a new trial so Mr. Aleck may present evidence and argument, and actually have the jury consider with proper instruction, his affirmative defense of Indian hunting treaty rights.

Finally, Mr. Aleck asks this Court to be mindful of the “canon that treaties and statutes passed for the benefit of Indian tribes are to be liberally construed in favor of tribes with ‘doubtful expressions being resolved in favor of the Indians.’” *Jim*, 173 Wn.2d at 686 (internal

quotations omitted). “Where there is ambiguity in the language of a treaty, it must not be construed to the prejudice of the Indians.”

*Buchanan*, 138 Wn.2d at 202 (internal citations omitted). Mr. Aleck asks this Court to reverse and remand this matter for a new trial. *Powell*, 150 Wn. App. at 158 (setting forth this remedy).

**Issue 2: Whether this Court must remand to correct a scrivener’s error that misstates the date of crime in the felony judgment and sentence.**

In the event this Court affirms, remand is necessary to correct a scrivener’s error on the judgment and sentence. Mr. Aleck’s judgment and sentence misstates the date of crime as January 15, 2015 (CP 205), even though the amended information, jury instructions and testimony set forth the date of crime as January 17, 2015. CP 175, 191, 197; 1RP 24-25, 30, 37, 52. Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Remand is also generally appropriate to correct scrivener’s errors. *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999). This matter should be remanded to correct the scrivener’s error on the judgment and sentence.

**Issue 3: Whether, in the event Mr. Aleck is not the substantially prevailing party on appeal, this Court should refuse to impose appellate costs against this indigent appellant.**

Mr. Aleck preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal,

pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court’s General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

At sentencing, the trial court made very limited inquiry into Mr. Aleck’s current and future ability to pay legal financial obligations (LFOs), asking only how much Mr. Aleck could afford to pay “not less than fifty dollars...” 2RP 124-35, 132. Mr. Aleck, who receives \$122.97 per month in tribal capital income (CP 232), responded he could pay \$100 per month. 2RP 132. The trial court imposed only mandatory costs and fines. CP 209-10. *See In re Personal Restraint of Dove*, 196 Wn. App. 148, 152, 381 P.3d 1280 (2016) (acknowledging \$500 crime victim assessment and a \$100 DNA collection fee are mandatory LFOs); RCW 77.15.420(1)(b), (4) (mandatory \$2,000 death of wildlife penalty).

Subsequently, the trial court entered an Order of Indigency. CP 233-34. Since the date of sentencing, there has been no known improvement to Mr. Aleck’s indigent status and he remains incarcerated as of this writing.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. *See State v. Blazina*, 182 Wn.2d 827, 832-39, 344 P.3d 680 (2015). In *Blazina*, our

Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3); *see also* CP 211 (language in Mr. Aleck’s Judgment and Sentence stating “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.”). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. *See* 2RP 133. Appellate costs negatively impact an indigent appellant’s ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Aleck has demonstrated his indigency and current and future inability to pay costs.

In addition, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Aleck would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same). The court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State’s collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That

comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. Mr. Aleck met this standard for indigency. CP 232-34; 2RP 132.

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 234. “The 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.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It is arguably not Mr. Aleck’s burden to demonstrate his continued indigency, given the newly amended RAP 15.2, because his indigency is presumed to continue during this appeal. Nonetheless, undersigned counsel anticipates filing a report as to continued indigency within the next 60 days, once it is received from Mr. Aleck.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the “supreme court . . . 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). *Blank*, too, recognized appellate courts have discretion to deny the State’s requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order finding the offender indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Aleck’s current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. To the contrary, given Mr. Aleck’s continued incarcerated status and the significant trial court LFOs imposed in this case of \$2,800 (CP 209-10), it is highly likely Mr. Aleck is and will

remain indigent for quite some time while he attempts to pay off these high interest-bearing burdens with only \$122.97 per month in income.

Appellate costs should not be imposed in this case.

F. **CONCLUSION**

Mr. Aleck was denied his constitutional right to effective assistance of counsel when his attorney failed to request the affirmative defense jury instruction that corresponded with his tribal treaty hunting rights. This matter should now be reversed and remanded for a new trial. If this Court rejects Mr. Aleck's arguments and affirms, the judgment and sentence must nonetheless be amended to reflect the correct date of crime. Finally, in the event the State is the substantially prevailing party on review, Mr. Aleck requests this Court deny any imposition of costs against him on appeal.

Respectfully submitted this 12<sup>th</sup> day of May, 2017.

/s/ Kristina M. Nichols  
Kristina M. Nichols, WSBA #35918  
Attorney for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 34904-7-III  
vs. ) Klickitat County No. 16-1-0026-8  
)  
DAVID PETE ALECK ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 12, 2017, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

David Aleck  
Klickitat County Jail  
205 S Columbus #108  
Goldendale, WA 98620

Having obtained prior permission, I also served the Respondent at  
paappeals@klickitatcounty.org by e-mail through Division III's e-filing service.

Dated this 12<sup>th</sup> day of May, 2017.

/s/ Kristina M. Nichols  
Kristina M. Nichols, WSBA #35918  
Nichols and Reuter, PLLC  
Eastern Washington Appellate Law  
PO Box 19203  
Spokane, WA 99219  
Phone: (509) 731-3279  
admin@ewalaw.com

**NICHOLS AND REUTER PLLC / EASTERN WASHINGTON APPELLATE LAW**

**May 12, 2017 - 11:47 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34904-7  
**Appellate Court Case Title:** State of Washington v. David Pete Aleck  
**Superior Court Case Number:** 16-1-00026-8

**The following documents have been uploaded:**

- 349047\_Briefs\_20170512114659D3193181\_5089.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was State v. Aleck 349047 Opening Brief.pdf*

**A copy of the uploaded files will be sent to:**

- davidq@klickitatcounty.org
- paapeals@klickitatcounty.org
- Admin@ewalaw.com

**Comments:**

---

Sender Name: Kristina Nichols - Email: admin@ewalaw.com  
Address:  
PO BOX 19203  
EASTERN WASHINGTON APPELLATE LAW  
SPOKANE, WA, 99219-9203  
Phone: 509-731-3279

**Note: The Filing Id is 20170512114659D3193181**