

No. 34934-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN BENTON HARRIS, JR.,

Appellant.

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

The Honorable Judge Raymond F. Clary

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Stephen Benton Harris, Jr. was convicted of one count of possession of a controlled substance. The charge arose following a search of his person incident to his arrest. During this search, a small bag with methamphetamine residue fell to the ground from his right front pocket. At the time of the search, Mr. Harris was at a laundromat with a woman named Angela Cline. In addition to the small bag with residue, Mr. Harris had property on his person belonging to Ms. Cline. Mr. Harris did not appear to the arresting officer to be under the influence of methamphetamine, and he told the arresting officer the small bag with residue did not belong to him. At trial, the jury was instructed on the defense of unwitting possession.

Mr. Harris' conviction should now be reversed, because he was denied his constitutional right to present a defense. Specifically, the trial court erred by prohibiting Mr. Harris from asking the arresting officer, on cross-examination, whether Ms. Cline was under the influence of methamphetamine, in order to support his defense of unwitting possession.

Mr. Harris also preemptively objects to the imposition of any appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by prohibiting the defendant from asking Officer Gately, on cross examination, whether Ms. Cline was under the influence of methamphetamine, in order to support his defense of unwitting possession.

2. An award of costs on appeal against Mr. Harris would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the defendant was denied his constitutional right to present a defense when he was prohibited from asking the Officer Gately, on cross examination, whether Ms. Cline was under the influence of methamphetamine, in order to support his defense of unwitting possession.

Issue 2: Whether this Court should deny costs against Mr. Harris on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

City of Spokane Police Officer Kellee Gately responded to a laundromat, following a report of a domestic violence assault. (CP 2-3, 12-13; RP¹ 72, 76-77, 86). The alleged victim was Angela Cline, and the alleged perpetrator was Stephen Benton Harris, Jr. (CP 2-3, 12-13; RP 76-77). After she arrived at the scene, Officer Gately arrested Mr. Harris. (CP 2-3, 12-13; RP 77).

Following his arrest, Officer Gately searched Mr. Harris. (RP 77-78). She found Ms. Cline's cell phone and payee card in Mr. Harris' pocket, and gave these two items to Ms. Cline. (RP 86, 89-90). Officer Gately removed a lighter and some change from Mr. Harris' right front pocket. (RP 77-78, 86-87). While removing these items, a small, clear plastic bag containing a white substance fell

¹ The Report of Proceedings consists of three separately paginated volumes: one containing the opening statements, reported by Rebecca J. Weeks; one containing the jury trial, reported by Ms. Weeks; and one containing the sentencing hearing, reported by Terri A. Cochran. The volume containing the trial, reported by Ms. Weeks, is referred to herein as "RP." References to other volumes include the date.

onto the ground from this same pocket. (RP 78-79, 87). The substance in the bag was later tested, and it contained methamphetamine. (RP 45-49, 52, 59-60, 68-71; Pl.'s Ex. 2). The quantity of the substance tested was measured as "residue." (RP 49, 51-52, 59-60, 68, 71; Pl.'s Ex. 2).

The State charged Mr. Harris with one count of unlawful possession of a controlled substance, in violation of RCW 69.50.4013(1). (CP 11). The case proceeded to a jury trial. (RP 6-196).

On the morning of the trial, Mr. Harris moved to exclude admission of evidence that he was arrested for a domestic violence offense, and any reference to the domestic violence allegations. (CP 94-95; RP 16-18). The trial court granted the motion, and entered written findings of fact and conclusions of law. (CP 94-95; RP 17-18). The trial court entered the following written findings, in relevant part:

The State has stipulated that the fact that Defendant was arrested for a domestic violence offense in particular is irrelevant to the issue of whether Defendant knowingly possessed a controlled substance. Accordingly, per ER 404, the jury shall only be informed, and the States witness [sic] shall be instructed to limit their testimony, to the fact that the defendant was lawfully arrested. Defendant stipulated that he was lawfully arrested.

....

Evidentiary prohibitions are subject to reconsideration as evidence comes forth, such as "opening the door."

(CP 94-95).

In his opening statement, Mr. Harris stated that Ms. Cline appeared to be under the influence of methamphetamine at the scene. (RP (Oct. 18, 2016) 10).

At the jury trial, witnesses testified consisted with the facts stated above. (RP 43-90). Officer Gately did not testify that Mr. Harris was arrested for a domestic violence offense, and did not reference to the domestic violence allegations. (RP 72-90).

Officer Gately testified she did not find any pipes, smoking devices, or anything to go with the lighter, in terms of smoking, on Mr. Harris' person. (RP 87). She acknowledged she contacted Mr. Harris and Ms. Cline at a laundromat, and that one of them had been inside the laundromat prior to her arrival. (RP 86).

Officer Gately testified that after the bag from Mr. Harris' right front pocket fell to the ground, "I advised the now defendant that if, in fact, it was [methamphetamine], that I would be charging him with that that would be a felony." (RP 80, 88). She testified Mr. Harris exclaimed "[t]hat's not mine . . . as if distancing himself from it." (RP 80, 88). When asked if Mr. Harris made this statement "[a]s if trying to tell you that he didn't expect to see that[.]" she testified "[t]hat could be." (RP 88).

On cross-examination of Officer Gately, Mr. Harris asked the following questions:

[Defense counsel:] Mr. Harris did not appear to be under the influence of methamphetamine that day; is that correct?

[Officer Gately:] I didn't believe there were physical signs that showed me he was high or loaded.

[Defense counsel:] You didn't?

[Officer Gately:] I did not not.

(RP 88-89).

Also on cross-examination of Officer Gately, Mr. Harris asked, “Ms. Cline appeared to be under the influence of methamphetamine that day, didn’t she?” (RP 88). The State objected, “based on the pretrial ruling.” (RP 88). The trial court sustained the objection, and took the matter up outside the presence of the jury. (RP 88, 90-145).

Mr. Harris presented an offer of proof by Officer Gately. (RP 103-113, 142-144). Officer Gately testified as follows:

[Defense counsel:] Officer Gately, do you recall the interview that we did at [the deputy prosecutor’s] office with my investigator . . . present?

[Officer Gately:] Some of it I do.

[Defense counsel:] And do you recall me asking you whether Ms. Cline appeared to be under the influence of methamphetamine?

[Officer Gately:] I do.

[Defense counsel:] And what was your answer to that question?

[Officer Gately:] I believed she was.

[Defense counsel:] And was that based on the fact that she was injured?

[Officer Gately:] That piece I can’t tell you.

. . . .

[Defense counsel:] Do you - - did you feel at the time of that interview that you were confusing her mannerisms associated with potentially being a victim of assault and her feelings about Mr. Harris with the symptoms of methamphetamine use?

[Officer Gately:] It was a combination of everything. That’s why I arrested him for the original charge of domestic violence.

. . . .

[Defense counsel:] Right. What I’m asking about is your conclusion that she appeared to be under the influence of methamphetamine. Do you feel strongly that that was a clear basis for you to make that conclusion?

[Officer Gately:] It was one of my deciding factors for the jumping around in her story

. . . .

[Defense counsel:] . . . [D]o you stand by your conclusion that she appeared to be under the influence of methamphetamine based on your training and experience?

[Officer Gately:] Yes.

. . . .

[Defense counsel:] Is your opinion that Ms. Cline was under the influence of methamphetamine separate and distinct from her symptoms of having been a victim of an assault?

. . . .

[Officer Gately:] I believe in my honest opinion that is a totality of the circumstances. It's not just meth. I was there for a different purpose.

[Defense counsel:] I understand you have a different focus and it's hard to separate out the two.

[Officer Gately:] Impossible, I would say. I can't tell you if there were head injuries onboard. It appeared she had a broken nose.

[Defense counsel:] And I'm not asking for a medical diagnosis. But it is your opinion, based on your training and experience, that she was under the influence of methamphetamine; is that correct?

[Officer Gately:] That was one drug, yes.

(RP 103, 105-106, 112-113).

The trial court also questioned Officer Gately:

[Trial court:] You deduced that Ms. Cline was affected by methamphetamine based on what?

[Officer Gately:] Based on some of her behaviors, and she admitted to me that she had used. . . .

[Trial court:] What behaviors?

[Officer Gately:] She was nervous. . . . She was distraught. She was unkept or dirty. She declined further medical attention. I struggle with half symptoms.

[Trial court:] Medical attention for what?

[Officer Gately:] Yes, well, her face was bleeding. She had a bloody nose.

. . . .

And on this particular event, I called the paramedics. I had them come and look at her behavior because I was concerned for the totality of her behavior.

(RP 142-144).

The State argued that if Officer Gately was allowed to testify that Ms. Cline appeared to be under the influence of methamphetamine, then the State should be allowed to present evidence that Ms. Cline was allegedly assaulted, including photographs. (RP 90-91, 95, 130-132, 140). The State argued Mr. Harris had “opened the door” to this evidence in his opening statement. (RP 90-91, 95; RP (Oct. 18, 2016) 7-10).

The State also argued that Officer Gately’s testimony that Ms. Cline appeared to be under the influence of methamphetamine was not relevant because the issue for the jury was possession, rather than the question of who the methamphetamine belonged to. (RP 118, 131-132).

Mr. Harris argued Officer Gately’s testimony was proper opinion testimony under ER 701, 702, and 703. (RP 126-127). He argued that Officer Gately’s testimony that Ms. Cline appeared to be under the influence of methamphetamine was relevant to his defense of unwitting possession. (RP 116, 122-123, 128-130). He argued:

[W]e believe it is relevant because we believe, and it’s our theory of the case, these two were doing laundry together; that items were moved from pockets to pockets. The State has already elicited testimony that my client said “that’s not mine.” We already elicited testimony from the officer that my client was in possession of other items of Ms. Cline’s, which they returned to Ms. Cline. So we already have a factual basis to believe he is in possession of some of Ms. Cline’s items. The fact that Ms. Cline was under the influence of methamphetamine and the methamphetamine my client is accused of possessing is a used up relatively empty bag of methamphetamine with some residue left in it. I believe it is

relevant to show that he unwittingly possessed it along with the other items of hers pursuant to our theory of the case.

....

[O]ur theory is that it was her methamphetamine bag that was in his pocket along with other items of her property that were in his pockets.

....

[W]e believe it's relevant to show it was not his methamphetamine bag; that it was hers. That he had multiple items of property of hers on his person and that that makes it more likely . . . that he unwittingly possessed this used methamphetamine bag.

(RP 128-130).

Mr. Harris further argued he did not open the door to any evidence regarding the alleged assault, and that evidence of the alleged assault was not relevant. (RP 120, 122, 127-128; RP (Oct. 18, 2016) 7-10).

The trial court ruled Mr. Harris would not be permitted to ask Officer Gately, on cross examination, whether Ms. Cline was under the influence of methamphetamine, stating:

I'm going to limit the defense from attributing the observation that she was under the influence of meth because, as this hearing has demonstrated, it really turns it into a mini-trial about what should or shouldn't come in along with it and it's just too murky for me. It's too difficult to parse it out. For example, when you get to the factor that one of the behaviors that Officer Gately based her opinion on about whether she was or wasn't under the effect of meth, that she declined medical attention. And when I asked what that was, "her face was bleeding," we just get too far and I'm not comfortable with that. So I'm issuing, if you will, an order in limine that we're not going to introduce the officer's opinion that the witness appeared to be under the influence of meth.

(RP 144-145).

Mr. Harris requested the trial court instruct the jury on the defense of unwitting possession. (CP 101-103; RP 146-155). The State objected, and the trial court overruled the objection and granted Mr. Harris' request. (CP 118; RP 146-155, 167). The trial court instructed the jury:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

(CP 118; RP 167).

The jury found Mr. Harris guilty as charged. (CP 122, 169-182; RP 194-196).

At sentencing, the trial court imposed the following legal financial obligations: \$500 victim assessment; \$200 criminal filing fee; and \$100 DNA collection fee. (CP 176-177; RP (Nov. 10, 2016) 23-24). Defense counsel requested the trial court set a monthly payment of \$25 per month, starting approximately three months after the sentencing hearing. (RP (Nov. 10, 2016) 23-24). Defense counsel told the trial court "[t]hat will give Mr. Harris enough time. He does work for a living, so he'll be able to get out and get started on that." (RP (Nov. 10, 2016) 24).

The Judgment and Sentence contains the following boilerplate language:

2.5 Legal Financial Obligations/Restitution: The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

(CP 173).

The Judgment and Sentence also contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 178).

Mr. Harris timely appealed. (CP 189-206). The trial court entered an Order of Indigency, granting Mr. Harris a right to review at public expense. (CP 207-212).

E. ARGUMENT

Issue 1: Whether the defendant was denied his constitutional right to present a defense when he was prohibited from asking the Officer Gately, on cross examination, whether Ms. Cline was under the influence of methamphetamine, in order to support his defense of unwitting possession.

The trial court erred by prohibiting Mr. Harris from asking Officer Gately whether Ms. Cline was under the influence of methamphetamine. Mr. Harris' theory of the case was that the possession of the methamphetamine in his right front pocket was unwitting. This testimony by Officer Gately was relevant to Mr. Harris' defense of unwitting possession, to show that he did not know the methamphetamine was in his

possession. By excluding this cross-examination of Officer Gately, Mr. Harris' constitutional right to present a defense was violated, requiring a new trial in this matter.

Both the United States and Washington Constitutions guarantee the right to present a defense. U.S. Const. amend. VI; Wash. Const. art. I, §22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "At a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

The constitutional right to present a defense "does not extend to the introduction of otherwise inadmissible evidence." *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). "Evidence that a defendant seeks to introduce 'must be of at least minimal relevance.'" *Jones*, 168 Wn.2d at 720 (citing *Darden*, 145 Wn.2d at 622). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt

the fairness of the fact-finding process at trial.” *Id.* (quoting *Darden*, 145 Wn.2d at 622) (alteration in original). “The State’s interest in excluding prejudicial evidence must also ‘be balanced against the defendant’s need for information sought,’ and relevant information can be withheld only ‘if the State’s interest outweighs the defendant’s need.’” *Id.* (quoting *Darden*, 145 Wn.2d at 622).

Claims that the constitutional right to present a defense has been violated are reviewed de novo. *Jones*, 168 Wn.2d at 719. A trial court’s decision to exclude evidence is reviewed for an abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). “An abuse of discretion occurs if ‘discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Id.* (quoting *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 446 (1999)). To review whether a trial court’s ruling violated the constitutional right to present a defense, this Court reviews “whether the evidence satisfied evidence rule strictures.” *State v. Farnworth*, No. 33673-5-III, 2017 WL 2378168, at *8 (Wash. Ct. App. June 1, 2017); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence.” ER 401. “The threshold to admit relevant evidence is very low.” *Darden*, 145 Wn.2d at 622 (internal citations omitted). “Even minimally relevant evidence is admissible.” *Id.* On the other hand, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Darden*, 145 Wn.2d at 625 (quoting ER 403).

Here, Mr. Harris was charged with unlawful possession of a controlled substance, in violation of RCW 69.50.4013(1). (CP 11). This statute provides:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

RCW 69.50.4013(1).

“This statute sets forth a strict liability crime in that knowledge of the possession is not an element of the offense that the State has to prove.” *State v. Sundberg*, 185 Wn.2d 147, 149, 370 P.3d 1 (2016). “To reduce the harshness of this offense, courts have created an unwitting possession

defense and placed the burden on the defendant to establish the defense by a preponderance of the evidence.” *Id.*

“‘If the defendant can affirmatively establish that his ‘possession’ was unwitting, then he had no possession for which the law will convict[.]’” *Day*, 142 Wn.2d at 11 (quoting *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981)). In order to establish the defense of unwitting possession, the defendant can make one of two showings: “(1) that the defendant did not know he was in possession of the controlled substance . . . or (2) that the defendant did not know the nature of the substance possessed.” *Id.* (internal citations omitted).

Here, Mr. Harris asserted an unwitting possession defense, and the jury was instructed on the first alternative showing of this defense, that “[p]ossession of a controlled substance is unwitting if a person did not know that the substance was in his possession.” (CP 118; RP 167).

In *Day*, the defendant was charged with, in relevant part, possession of marijuana. *Day*, 142 Wn.2d at 3. He asserted an unwitting possession defense, and the trial court prohibited testimony regarding his reputation for sobriety from drugs and alcohol. *Id.* On appeal, our Supreme Court held the trial court abused its discretion in excluding this evidence, and reversed and remanded for a new trial. *Id.* at 3, 8-15.

The Court reasoned that “[w]hen the defense of unwitting possession is raised, the defendant’s knowledge is directly relevant to the defense of unwitting possession. Accordingly, the universe of relevant evidence expands.” *Id.* at 11. The Court further reasoned “[c]haracter evidence may assist a defendant in meeting his or her burden of proving by a preponderance of the evidence a lack of knowledge under the unwitting possession defense.” *Id.* at 12. The Court then gave the following example: “if a defendant claims to have been unaware of the presence of a controlled substance at all, the defendant’s nonuse of drugs lends support to this claim.” *Id.* The Court also found that the defendant had presented other evidence to support his claim of unwitting possession, and therefore, his “presentation of third party testimony regarding his reputation for abstention from the use of drugs was important to his defense.” *Id.* at 4, 15.

Here, the trial court erred in excluding Officer Gately’s opinion that Ms. Cline was under the influence of methamphetamine. The fact that Ms. Cline was under the influence of methamphetamine was relevant to Mr. Harris’ unwitting possession defense. The fact that Ms. Cline was under the influence of methamphetamine met the low bar for admitting relevant evidence; this evidence had “any tendency” to make it more

probable that Mr. Harris did not know that methamphetamine was in his possession. *See* ER 401; *Darden*, 145 Wn.2d at 622.

Like in *Day*, Mr. Harris presented other evidence to support his claim of unwitting possession. *See Day*, 142 Wn.2d at 4, 15. Ms. Cline and Mr. Harris were contacted by the police at a laundromat, where Mr. Harris had some of Ms. Cline's property on him. (RP 72, 76-77, 86). Two items of property belonging to Ms. Cline were found in Mr. Harris' pocket. (RP 86, 89-90). Although a lighter was removed from Mr. Harris' right front pocket, no pipes, or anything else related to smoking was found on Mr. Harris' person. (RP 87). When the small bag with residue fell to the ground from Mr. Harris' right front pocket, he exclaimed "[t]hat's not mine[,]" which Officer Gately testified was stated as if distancing himself from the bag, and also that Mr. Harris could have been telling her he didn't expect to see the bag. (RP 80, 88). Mr. Harris was not under the influence of methamphetamine. (RP 88-89). Because of this other evidence supporting Mr. Harris' claim of unwitting possession, Officer Gately's opinion that Ms. Cline was under the influence of methamphetamine was important to his defense. *See Day*, 142 Wn.2d at 4, 15.

Also, like the defendant's reputation for sobriety in *Day*, Ms. Cline's drug use lends support to Mr. Harris' claim that he did not know

that methamphetamine was on his person. *See Day*, 142 Wn.2d at 3, 8-15. Because of the other evidence, specifically, that Mr. Harris was not under the influence of methamphetamine, his statement that the bag was not his, and the fact that he had other property belonging to Ms. Cline on his person, Ms. Cline's drug use lends support to the claim that Mr. Harris was not aware of the small bag with residue on his person. Her drug use lends support to the claim that the small bag with residue ended up on Mr. Harris' person without his knowledge, for example, by being mixed in with Ms. Cline's other property found on Mr. Harris' person.

The trial court abused its discretion by excluding Officer Gately from testifying that Ms. Cline was under the influence of methamphetamine, based on the premise that the trial court could not separate out this opinion from the effects of the alleged assault on Ms. Cline. (RP 144-145). As explained above, Ms. Cline's use of methamphetamine was relevant to Mr. Harris' defense of unwitting possession. However, the alleged assault was not relevant. Although Officer Gately testified, in her offer of proof, that Ms. Cline's mannerisms were based on the "totality of the circumstances," she stood by her conclusion that Ms. Cline appeared to be under the influence of methamphetamine, based upon her training and experience. (RP 106, 112). The relevant evidence (that Ms. Cline was under the influence of

methamphetamine) could be separated from the irrelevant evidence (the alleged assault).

In addition, Mr. Harris did not “open the door” during his opening statement to the admission of evidence regarding the alleged assault. (RP (Oct. 18, 2016) 7-10). Mr. Harris merely stated that Ms. Cline appeared to be under the influence of methamphetamine at the scene, as he anticipated the evidence to show during the trial. (RP (Oct. 18, 2016) 10).

Mr. Harris sought to offer Officer Gately’s opinion that Ms. Cline was under the influence of methamphetamine under ER 701, 702, and 703. (RP 126-127). ER 701 governs opinion testimony by lay witnesses, and ER 702 and 703 govern opinion testimony by experts. *See* ER 701, 702, 703. Officer Gately could testify to her opinion that Ms. Cline was under the influence of methamphetamine, based upon her familiarity with the characteristics of persons under the influence of drugs. A lay witness who is familiar with the characteristics of persons under the influence of drugs or alcohol can give an opinion as to whether a particular person was so affected. *See State v. Brett*, 126 Wn.2d 136, 161-62, 892 P.2d 29 (1995) (the trial court did not err in allowing a former police officer to testify, under ER 701, that the defendant did not appear to be under the influence of alcohol, drugs, or any other substance).

“An erroneous evidentiary ruling that violates the defendant's constitutional rights . . . is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt.” *State v. Franklin*, 180 Wn. 2d 371, 377 n.2, 325 P.3d 159, 162 (2014). The trial court’s ruling that Mr. Harris would not be permitted to ask Officer Gately, on cross examination, whether Ms. Cline was under the influence of methamphetamine, was not harmless beyond a reasonable doubt. There was other evidence supporting Mr. Harris’ claim of unwitting possession. Ms. Cline and Mr. Harris were contacted by the police at a laundromat, where Mr. Harris had some of Ms. Cline’s property on him. (RP 72, 76-77, 86). Two items of property belonging to Ms. Cline were found in Mr. Harris’ pocket. (RP 86, 89-90). Although a lighter was removed from Mr. Harris’ right front pocket, no pipes, or anything else related to smoking was found on Mr. Harris’ person. (RP 87). When the small bag with residue fell to the ground from Mr. Harris’ right front pocket, he exclaimed “[t]hat’s not mine[,]” which Officer Gately testified was stated as if distancing himself from the bag, and also that Mr. Harris could have been telling her he didn’t expect to see the bag. (RP 80, 88). Mr. Harris was not under the influence of methamphetamine. (RP 88-89). Officer Gately’s opinion that Ms. Cline was under the influence of methamphetamine was an additional piece of evidence supporting Mr.

Harris' unwitting possession defense and it was not harmless beyond a reasonable doubt to prohibit the jury from considering it.

Mr. Harris respectfully requests this matter be reversed and remanded for a new trial so he can experience his constitutionally protected right to fully present his defense.

Issue 2: Whether this Court should deny costs against Mr. Harris on appeal in the event the State is the substantially prevailing party.

Mr. Harris 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, 618 (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 only imposed mandatory legal financial obligations (LFOs). (CP 176-177; RP (Nov. 10, 2016) 23-24); *see also In re Personal Restraint of Dove*, 196 Wn. App. 148, 152, 381 P.3d 1280 (2016) (acknowledging that a \$500 crime victim assessment, a \$200 criminal filing fee, and a \$100 DNA fee are mandatory LFOs). The trial court did not consider Mr. Harris' present or likely future ability to pay, presumably because no discretionary legal financial obligations were imposed. (RP (Nov. 10, 2016) 23-24); *see also State v. Lundy*, 176 Wn.

App. 96, 103, 308 P.3d 755 (2013) (stating “[u]nlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay.)” (emphasis in original). Defense counsel did inform the trial court that Mr. Harris would be able to get started on the monthly payment of \$25 per month towards his LFOs, starting approximately three months after the sentencing hearing, stating “[h]e does work for a living” (RP (Nov. 10, 2016) 23-24). However, subsequently, the trial court entered an Order of Indigency, granting Mr. Harris a right to review at public expense. (CP 207-212).

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, 835, 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). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ 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. Harris has demonstrated his indigency. (CP 207-212).

In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs, as suggested by the trial court in this case. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Harris 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); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State’s collection efforts. *See Lundy*, 176 Wn. App. 96; 103 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. Harris met this standard for indigency. (CP 207-212).

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); (CP 207-212). "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 does not appear to be the burden of Mr. Harris to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal.

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). *State v. 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 that 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 that the offender is 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. Harris' current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case.

Mr. Harris also requests this Court review any subsequently filed report as to his continued indigency and likely inability to pay an award of costs, as evidence of his inability to pay costs on appeal.

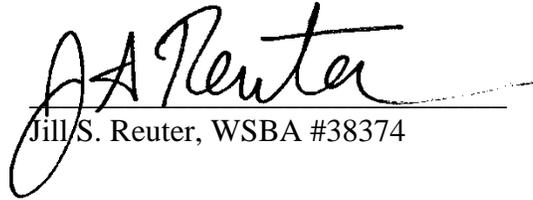
Appellate costs should not be imposed in this case.

F. CONCLUSION

Based on the foregoing, Mr. Harris respectfully requests that his conviction be reversed and the matter remanded for a new trial so that he has the opportunity to present a full defense.

Mr. Harris also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 9th day of August, 2017.



Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

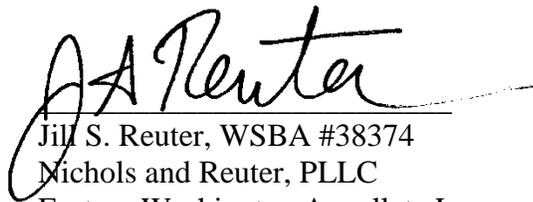
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34934-9-III
vs.)
)
STEPHEN BENTON HARRIS, JR.)
) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 9, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's supplemental opening brief to:

Stephen B. Harris, Jr.
608 E. 7th Avenue
Spokane, WA 99201

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 9th day of August, 2017.



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