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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

PEDRO CADENAS, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. COUNTERSTATEMENT OF ISSUES

- (1) Did the trial court act within its discretion in denying a challenge for cause to Juror Number 6?
- (2) Is a defendant prejudiced by the denial of a challenge to a juror for cause where he has the ability to have a jury seated that is composed entirely of jurors that he does not consider to be biased?
- (3) Does RCW 9.94A.585(1) preclude appeal of a standard range sentence where the defendant did not ask for an exceptional sentence below the range and there is nothing to indicate the trial court had any misunderstanding of the law?
- (4) Was it a legitimate tactical choice for defendant's counsel to ask for a sentence at the bottom of the standard range?

- (5) Does the failure of counsel to cite authority result in any prejudice where the trial court fully understands and considers the applicable law?
- (6) Do community custody supervision fees constitute costs of the prosecution?
- (7) Does a defendant's indigence at time of sentencing have any relevance to his ability to pay fees at a later time when he is on community custody?

II. COUNTERSTATEMENT OF THE CASE

Pedro Cadenas (hereinafter defendant) was convicted of Murder in the First Degree, Unlawful Possession of a Firearm in the Second Degree and Attempted Theft of a Motor Vehicle in Franklin County Superior Court Cause No. 17-1-50358-11. CP 107-118. He now appeals. CP 105.

Defendant's Statement of the Case is substantially correct.

The State will develop additional facts from the record as they relate to individual issues.

III. RESPONSE TO ARGUMENT

- (a) The trial court acted within its discretion in denying a challenge for cause to Juror Number 6. Even if the trial court erred, defendant suffered no prejudice as he had the ability to have a jury seated composed entirely of jurors that he did not consider to be biased.**

Defendant first argues that the trial court erred in denying his challenge for cause to Juror Number 6. However, the record shows that the trial court acted within its discretion in denying the challenge.

Bias on the part of a juror may be actual or implied. "A challenge for implied bias may be taken for any of the following causes: consanguinity or affinity within the fourth degree of any party; standing in a fiduciary, employer-employee, landlord-tenant, or surety relationship to any party; having served as a juror in a previous trial in the same action, or another action involving the same parties; or a special interest in the outcome of the action."

Royce Ferguson, Wash. Prac., *Criminal Practice and Procedure* § 4109. As defendant identifies none of these causes, his challenge to Juror Number 6 must be viewed as based on alleged actual bias.

“Actual bias” means “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” *State v. Munzanreder*, 199 Wn. App. 162, 176, 398 P.3d 1160 (2017) (quoting RCW 4.44.170(2)). A party claiming actual bias must establish it by proof. *Munzanreder*, 199 Wn. App. at 176; *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). To prevail, a party must show more than a possibility of prejudice. *Munzanreder*, 199 Wn. App. at 176; *Noltie*, 116 Wn.2d at 840.

“The trial court is in the best position to determine whether a juror can be fair and impartial because the trial court is able to observe the juror’s demeanor and evaluate the juror’s answers to determine whether the juror would be fair and impartial.” *Munzanreder*, 199 Wn. App. at 176 (citing *State v. Birch*, 151 Wn. App. 504, 512, 213 P.3d 63 (2009)). Moreover:

Considerable light will be thrown on the fairness of a juror by the juror's character, mental habits, demeanor, under questioning and all other data which may be disclosed by the examination. A judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror. The supreme court, which has not had the benefit of this evidence, recognizes the advantageous position of the trial court, and gives it weight in considering any appeal from its decision. Unless it very clearly appears to be erroneous, or an abuse of discretion, the trial court's decision on the fitness of the juror will be sustained.

Nolte, 116 Wn.2d at 839 (quoting 14 L. Orland & K. Tegland, Wash. Prac., *Trial Practice* § 202, at 332 (4th ed. 1986)). The *Nolte* court continued:

For the very reason that reasonable minds can well differ on this issue, we defer to the judgment of the trial court in this case. The trial court was in the best position to judge whether the juror's answers merely reflected honest caution on her lack of prior jury experience or whether they manifested a likelihood of actual bias.

Nolte, 116 Wn.2d at 839-40. See also *Munzanreder*, 199 Wn. App. at 176 (“[T]his court reviews a trial court’s denial of a challenge for cause

for a manifest abuse of discretion”). *Id.* at 175 (“Abuse of discretion occurs when a trial court bases its decision on untenable grounds or untenable reasons”).

In the instant case, the mother of Juror Number 6 had been raped and murdered in 1980 (38 years before the current trial). RP 42-43. He was asked, “We’re just wondering how that affected you, and would it affect you to go through a murder-type trial?” RP 42. He responded:

Well, you know, that was something - - I don’t know for sure. You know, since yesterday certainly have been reflecting on that period in my life. But, you know, I don’t know how emotional or whatever I’d get about it, *but I think I’ll be relatively stable.* (Emphasis added).

RP 42. He said if he found it distracted him, he would bring it to the attention of the judge. RP 42. Juror Number 6 was also asked:

And then you also indicated in your questionnaire that you feel like could not be fair and impartial in this case regarding your history with your mother’s trauma and those types of things. So to balance that out obviously you thought about that last night. Has your opinion changed?

RP 43. Juror Number 6 explained he had put that down on the questionnaire “just as a flag.” RP 43. He elaborated:

Well, I can’t say it’s changed. It’s basically - - *I put that down just as a flag,* if nothing else, because *I think it*

would be OK, but, you know, I don't want to go with the pretense that - - I'll definitely, you know, be fine and wouldn't have some, you know, it wouldn't affect me. / *don't think it would*, but, you know, I don't know for sure. (Emphasis added).

RP 43. Juror Number 6 had served as a juror in a criminal case involving a charge of driving under the influence in 1992. RP 43-44. Nothing about his traumatic experience in 1980 had any effect on his jury service in 1992. RP 44. Juror Number 6 is a friend of Superior Court Judge Bruce Spanner, who was not presiding in the trial; he said that would not influence his decision on the outcome. RP 42. He had read some newspaper articles about the instant case, but he said, "I don't know enough about it that that would weigh my decision one way or the other." RP 44. The examination of Juror Number 6 concluded with the following exchange with the court:

THE COURT: So you would be able to listen to the facts in the course of the trial and make a decision based on those facts?
[JUROR NUMBER 6]: Correct.

RP 44.

After Juror Number 6 had been excused from the courtroom, defense counsel stated as follows:

Your Honor, I think we're going to make the motion to strike juror number 6. And I guess my concern is the

risk involved in losing a juror in the middle of a trial if something were to happen. Obviously this trial and knowing what he knows so far caused him great thought last night. I also have concerns about the fact that he answered the question on the juror questionnaire differently than he did on the stand but still was wavering.

RP 45. The State opposed removing Juror Number 6 from the panel, noting his prior jury service and his answers showing an ability to serve on the current trial. RP 45. The trial court then ruled:

Listening to the statements, the testimony of the prospective juror this morning, the Court does not believe it's been established that he could not be fair and impartial in this case. The Court is going to deny the motion to excuse juror number 6.

RP 45-46.

Juror Number 6 had an opportunity to elaborate on his prior

jury service during general voir dire:

[MR. SANT (PROSECUTOR)]: Can I get a quick showing, raise of hands, those who had served on a jury before? Start in the back. Number 6. What kind of jury did you sit on?

JUROR 6: It was a DUI in a six-person jury DUI case.

MR. SANT: Going through that process basically did you think that was kind of a similar process as today? Although there might be a few more people in the courtroom than you had then?

JUROR 6: It was similar process.

MR. SANT: Were you actually selected to serve on that jury?

JUROR 6: Yes.

MR. SANT: Did you feel that process was fair?

JUROR 6: It was fair, you know. It was a hung jury, frustrating for those who did not agree with me, but it was a hung jury.

MR. SANT: Were you able to communicate, though, among your fellow jurors and share your ideas?

JUROR 6: Sure.

MR. SANT: And hold to it? That something you're going to be instructed I believe as well through the process that if you have feelings, you're asked to share those with your fellow jurors, examine the evidence, be willing to look at and consider, but not necessarily just go because, you know, say all 11 of you decide one way and one person the other, you're basically expected to follow the information that you have and discuss the case.

RP 241-42. The court asked during general voir dire, "Do any of you have any concerns about your ability to follow the Court's instructions on the law, regardless of what you personally think the law is or what you personally think it should be? Does anyone think that would be a problem for them?" RP 226. There was no response from Juror Number 6 or any other juror. RP 226. The court further asked, "Do any of you have any concerns that you have not yet had a chance to

discuss regarding your ability to sit as a fair and impartial juror on this particular case?” RP 226. Once again, there was no affirmative response from any juror including Juror Number 6. RP 226.

Defense counsel acknowledged Juror Number 6 (after an evening’s reflection) had answered differently on the witness stand than he had on the questionnaire (where he initially said he did not believe he could be fair and impartial), but said Juror Number 6 “still was wavering.” RP 45. In this appeal, defendant continues to argue the Juror Number 6’s answers were equivocal. However, Washington courts have consistently held over the years that equivocal answers alone do not require a juror to be removed when challenged for cause. *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987); *Noltie*, 116 Wn.2d at 839; *Munzanreder*, 199 Wn. App. at 176. The trial court is best positioned to determine whether equivocal answers manifested a likelihood of actual bias or merely reflected honest caution on the part of the juror. *Noltie*, 116 Wn.2d at 839-40. For example, in *Noltie* a juror said there was a possibility she might start out favoring the State and she had a fear that she might not be fair. *Id.* at 837. Nonetheless, the trial court did not abuse its discretion in denying a challenge for cause. *Id.* 839-40. Similarly,

Juror Number 6 said he didn't think his prior experiences would affect him, but he didn't know for sure. RP 43. As in *Noltie*, the mere possibility of prejudice did not justify removal of the juror for cause. *Nolte*, 116 Wn.2d at 840. See also *Munzanreder*, 199 Wn. App. at 176.

In *State v. Latham*, 100 Wn.2d 59, 64, 667 P.2d 56 (1983) and *State v. Bernson*, 40 Wn. App. 729, 741, 700 P.2d 758 (1985), challenges for cause were properly denied because the jurors agreed to lay aside opinions, had no specific knowledge about the crime charged or defendant's case, and they promised to base the verdict solely on the evidence presented at trial. Here, Juror Number 6 had seen some newspaper articles about the case, but he did not know enough about it that it would weigh his decision one way or the other, RP 44; thus, he had no opinions to set aside. He also answered affirmatively when the court asked, "So you would be able to listen to the facts in the course of the trial and make a decision based upon those facts?" RP 44.

Defendant argues that Juror Number 6 was only referring to news media coverage and not his prior experiences when he said he would listen to the facts presented in court and base his decision on

those facts. First, as previously mentioned, the trial court is best positioned to ascertain the actual meaning of a juror's responses. *Noltie*, 116 Wn.2d at 839. Second, there was never anything more than a mere possibility that Juror Number 6 might be prejudiced. Juror Number 6 stated that while he was not sure, he did not believe his prior experiences would affect him. RP 43. As noted above, a mere possibility of prejudice does not justify removal of a juror for cause. *Nolte*, 116 Wn.2d at 840; *Munzanreder*, 199 Wn. App. at 176.

State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), cited by defendant, is easily distinguishable. In *Gonzales*, "Juror 11 unequivocally admitted a bias regarding a class of persons (here, a bias in favor of police witnesses) and indicated the bias would likely affect her deliberations." *Id.* at 281. In contrast, Juror Number 6 in our case endeavored to assist the court and the parties by bringing his background to everyone's attention. RP 43. He did not unequivocally state that he had a bias; while he was not sure, he did not believe his prior experiences would affect him. RP 43. As explained above, this at best showed a mere possibility of prejudice. Unlike the juror at issue in *Gonzales*, Juror number 6, who had prior jury experience, also stated that he "would listen the facts in the

course of the trial and make a decision based on those facts.” RP 44.

Finally, to the extent any doubts remain, they must be resolved by upholding the discretionary ruling of the trial court. As our Supreme Court said in *Noltie*, “For the very reason that reasonable minds can well differ on this issue, we defer to the judgment of the trial court in this case.” *Noltie*, 116 Wn.2d at 839.

Even if the trial court erred in denying the challenge for cause to Juror Number 6, defendant suffered no prejudice. Other than Juror Number 6, defendant’s only unsuccessful challenges for cause were of Jurors Numbered 2, 49 and 63. RP 119-20, 133-35, 144-45. Defendant removed Juror Number 2 with his first peremptory challenge. CP 122. Jurors Numbered 49 and 63 were not reached by the court during the jury selection process and did not make it into the jury box. RP 268-69. Defendant exercised only four of his eight available preemptory challenges. CP 122. Directly on point is *Munzanreder*, 199 Wn. App. 162, an opinion authored by Judge Lawrence-Berrey and concurred in by Chief Judge Fearing and Judge Pennell. The court explained:

. . . Munzanreder had six preemptory challenges, and there were only two venire jurors he had unsuccessfully challenged for cause who could have been empaneled

as jurors. Therefore, Munzanreder was able to have an empaneled jury composed entirely of jurors he did not consider biased.

...
Here, Munzanreder used one challenge to remove venire juror 49, but elected not to use any of his several other peremptory challenges to remove venire juror 51. He also elected not to request additional peremptory challenges. If the trial court erred in denying Munzanreder's for cause challenge of venire juror 51, because Munzanreder elected not to remove venire juror 51 with his allotted peremptory challenges or by requesting additional challenges, Munzanreder waived that error.

Munzanreder, 199 Wn. App. at 179-80 (citation and footnote omitted).

Similarly, the defendant in our case could have used one of his remaining peremptory challenges to remove Juror Number 6. Defendant was able to have an empaneled jury composed entirely of jurors he did not consider biased.

More important than any question of waiver, however, is the simple fact that the defense attorneys obviously became satisfied with Juror Number 6 in their private conversations between themselves. They undoubtedly recognized that Juror Number 6 had the characteristics to make an excellent juror. He had the standing in the community to be a friend of a superior court judge. RP 42. He had prior jury experience. RP 43-44. The defense attorneys had an

opportunity to observe Juror Number 6 comfortably discussing his prior jury service during general voir dire, in the presence of the entire jury panel. RP 241-42. He had previously held firm to his convictions in a trial resulting in a deadlocked jury. RP 241. In addition, there was no reason to think his life experiences would make him want to see someone *wrongfully* convicted. The fact that a peremptory challenge was not used to remove Juror Number 6 shows that the defense had resolved any remaining doubt they had concerning his fitness to serve as a juror.

(b) Defendant received a standard range sentence that is not subject to appeal under RCW 9.94A.585(1), as he did not seek a downward exceptional sentence and the trial court had no misunderstanding of the law. Defendant received effective assistance of counsel at sentencing, as there was neither deficient performance nor resulting prejudice.

Defendant also challenges his sentence. However, the sentence imposed was within the standard sentencing range. CP 109, 111. RCW 9.94A.585(1) provides: "A sentence within the standard range . . . for an offense shall not be appealed." There is an exception to this general rule in cases in which a defendant requested an exceptional sentence, but the trial court imposed a standard range

sentence based on its belief that it did not have authority to grant an exceptional sentence. *State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015). Conversely, where a defendant “did not ask the trial court to impose an exceptional sentence downward at sentencing . . . [the defendant] has failed to demonstrate that his standard range sentence is appealable.” *State v. George*, 197 Wn. App. 1077, 2017 WL 700786, No. 46705-4-II (2017) (unpublished opinion cited as persuasive authority pursuant to GR 14.1).

In the instant case, any appeal of the sentence is barred by RCW 9.94A.585(1). First defendant did not ask the trial court to impose an exceptional sentence downward at sentencing. Defense counsel argued to the trial court in pertinent part:

Any time there is a homicide it is tragic. Any time a family loses a father it is tragic. And the standard range in this case takes that into account. I believe that the court should look at the bottom end of that range because of Mr. Cardenas’s age and because of his upbringing.

He was 17 when this happened. 17 year-olds have not fully formed their brain in a very literal way. I’m sure the court’s aware of the ongoing research into the ability for teenagers to make decisions in the way that adults can make decisions. I would like, at sometime in the very near future, for Pedro to have a chance to be an adult again and be out in the world, having had more structure. And it’s terrible to say, but I think the

structure of DOC is significantly better than the structure he had as a small child. And I do hope that he finds some help there and that he will eventually be able to re-enter society.

Again, I'd ask the court to enter the bottom of the range, 341 months, which again, equals 28.4 years. And this was an individual who was 17 at the time the crime was committed. Thank you.

03/19/2019 RP, at 39-40. When defendant was asked if he wished to say anything, he stated simply: "Just want to say I'm sorry for their loss; and that's it." 03/19/2019 RP, at 40.

Second, the trial court showed no lack of understanding of its sentencing authority, and in fact showed great insight on the issue of juvenile brain development, stating in pertinent part:

I have had a chance to consider this matter with some length from the time the verdict was initially rendered and off and on until today's date. I have, during that time, certainly taken into consideration Mr. Cadenas's youth where these things, and this tragedy occurred. I also was present throughout the entire trial and observed Mr. Cadenas's behavior and demeanor throughout the course of the trial, which, quite frankly to me, was concerning.

Again as [defense counsel] pointed out there is a great deal of research regarding adolescent brain development, and the lack thereof, and how that impacts an individual's abilities to make decisions and impulse control, things of that nature. So that's given me a great deal of pause as to what is the appropriate sentence this in case.

So after considering this for a substantial period of time, this court does believe the top of the standard range is the appropriate sentence in this case. Unfortunately, as I said, I haven't seen anything or heard anything that suggests to me that Mr. Cardenas is more likely to ready to be back in the community after 341 months, which is a very long time, which (defense counsel) indicated. But again, considering the youth, the court finds that the appropriate sentence is (the top of the standard range). . . .

And again, this is not a sentence that the court imposes lightly. It's a very, very long time. It's a very difficult, painful and disturbing case. And taking into consideration all the factors, the court does believe the top of the standard range is an appropriate amount of time . . .

03/19/2019 RP, at 41-42.

Defendant attempts to avoid the bar of RCW 9.94A.585(1) by couching his argument in terms of ineffective assistance of counsel. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all of the circumstances, and (2) defense counsel's 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). Courts engage in a strong presumption that counsel's representation was effective. *Id.* at 335. "Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct of counsel." *Id.* at 366. To presume deficient representation absent contrary evidence in the record would stand the presumption of effective representation "on its head." *Id.* Moreover, a defense attorney's failure to take a particular action does not violate the defendant's constitutional right to counsel if the action would not have benefited the defendant. *State v. Gonzalez*, 51 Wn. App. 242, 246-47, 752 P.2d 939 (1988). A reviewing court need not address both deficient performance and resulting prejudice if a defendant make an insufficient showing on either prong. *State v. Gomez Cervantes*, 169 Wn. App. 428, 434-35, 282 P.3d 98 (2012).

First, defendant candidly acknowledges that "it may have been a strategic decision to request a low-end sentence rather than an exceptional down." Brief of Appellant, at 40. Matters of strategy cannot form the basis for a claim of ineffective assistance of counsel, unless lawyers of ordinary skill and training in the criminal law would

consider such choice to be incompetent. *State v. Woo Won Choi*, 55 Wn. App. 895, 905, 781 P.2d 505 (1989). An argument for a sentence at the bottom of the standard range would certainly be more realistic in a first degree murder case than one for an exceptional sentence below the range. It was indeed a sound tactical choice on the part of defense counsel to present a reasonable argument that would be taken seriously by all concerned.

Defendant's principal complaint appears to be that his counsel did not cite by name to *O'Dell*, 183 Wn.2d 680. First, *O'Dell* involved an exceptional sentence below the range, which defendant was not seeking. Second, some cases are so well known to the courts that it is unnecessary to cite them. It is no more necessary to cite *O'Dell* when discussing juvenile brain development than it would be to cite *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) when considering custodial interrogation or *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 884 (1954) regarding school desegregation. Defense counsel justifiably assumed the trial court was familiar with the topic. 03/19/2019 RP, at 39 ("I'm sure the court's aware of the ongoing research"). The assumption proved accurate. 03/19/2019 RP, at Thus, RP 41 ("Again

as [defense counsel] pointed out, there is a great deal of research regarding adolescent brain development, and the lack thereof, and how that impacts an individual's abilities to make decisions and impulse control, things of that nature"). There was neither deficient performance nor resulting prejudice.

In *State v. Birdsall*, 10 Wn. App. 2d 1005, 2019 WL 4034477, No. 51389-7-II (2019) (an unpublished opinion cited as persuasive authority pursuant to GR 14.1), the defendant argued he received ineffective assistance of counsel at sentencing when his attorney failed to invoke *O'Dell* and argue for an exceptional downward sentence based on his youth. The court noted that in *O'Dell*, the court reversed a defendant's sentence because the trial court erroneously believed it could not consider youth as a mitigating factor when the defendant was 18 years old at the time of the crime. 183 Wn.2d at 696-97. In contrast, the trial court in *Birdsall's* case did not believe it was precluded from considering his youth. Instead, the case was more analogous was *State v. Hernandez-Hernandez*, 104 Wn. App. 263, 15 P.3d 719 (2001). The defendant in *Hernandez-Hernandez* appealed from a standard range sentence, contending his trial counsel was ineffective in not citing applicable case law and arguing

for an exceptional sentence below the range. The court found the defendant could not prove prejudice, as even without counsel's argument, the trial court had discretion to impose an exceptional sentence downward. *Hernandez-Hernandez*, 104 Wn. App. at 266. The court was "not convinced the outcome would have been different had defense counsel argued [the relevant case law] to support an exceptional sentence." *Id.*

In the instant case, regardless of any citation to authority, the trial court had discretion to impose a sentence at the bottom of the standard range (or an exceptional sentence downward if it believed it to be appropriate). The trial court's oral ruling quoted above shows it was very knowledgeable regarding juvenile brain development, and there is no reason to conclude the sentence would have been different if authority had been cited by name. This is not a case like *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002), where citation to authority could have disabused the trial court of its erroneous impression that it had no discretion to depart from the standard range. In our case, there is nothing to suggest the trial court had any misunderstanding of the law.

Moreover, the trial court's error in *O'Dell* was in believing it had

no discretion to consider youth as a mitigating factor. *O'Dell*, 183 Wn.2d at 696-97. Thus, the matter was merely remanded with instructions for the trial court to consider “whether youth diminished O’Dell’s culpability.” *Id.* at 697. The *O’Dell* court did not establish a laundry list of factors relevant to youth that must be considered in every case. *Id.*

Also instructive is *In re Pers. Restraint of Meippen*, 193 Wn.2d 310, 440 P.3d 978 (2019). In *Meippen*:

At sentencing, Meippen’s counsel argued that mitigating qualities of youth – Meippen’s age, immaturity and failure to appreciate the consequences of his actions – supported a sentence at the bottom of the standard range. The trial court considered these mitigating qualities and, nevertheless, imposed at top-end standard range sentence.

Id. at 316. The court found nothing in its record showed the trial court would have imposed a different sentence if it had the benefit of later-decided case law. *Id.* at 317. “The trial court determined that Meippen’s actions were cold and calculated, and it clearly intended to impose a sentence at the top of the standard range despite Meippen’s youth.” *Id.* Accordingly, he was not actually and substantially prejudiced by the unavailability of later case law. *Id.*

Similarly, the defense counsel in our case argued that

mitigating factors of youth justified a sentence at the bottom of the standard range. RP of Sentencing 37-40. The trial court considered these mitigating qualities and nonetheless imposed a sentence at the top of the standard range. RP of Sentencing 40-42. Defendant was not prejudiced by any failure to make a different argument.

This is simply not a case where the defendant's youth, immaturity and failure to appreciate the consequences of his actions justified a more lenient sentence. He had four prior felony adjudications in the course of two and one-half years. CP 109. "A review of his criminal history record shows that he has had an extensively assaultive history as he has been charged with assault over 10 times inside and outside of confinement." CP 99. His behavioral issues at the Franklin County Jail required he be housed at the Intensive Management Unit (IMU) of the Washington State Penitentiary even before sentencing. CP 99. As the pre-sentence writer explained:

It should be noted, the minimum escort standard in a Maximum Custody Facility like an IMU is two officers with one offender in restraints. At the time of this interview Mr. Cadenas had conditions of confinement which required him to be escorted with four officers and one offender in restraints with a 'spit sock' to prevent him from being able to spit on anyone. This is not

common practice and is reserved for offenders who are a risk to themselves and others.

CP 99. Far from being someone whose youth diminished his capacity to appreciate the wrongfulness of his conduct or conform that conduct to the requirements of the law, defendant had developed into a dangerous career criminal at a relatively early age.

(c) Community custody supervision fees are not a cost of the prosecution. A defendant's indigence at time of sentencing is not relevant to his ability to pay fees while on supervision.

Defendant also challenges the provision in his Judgment and Sentence for community custody supervision fees. While the State acknowledges there is a split of authority on this issue, the better view is stated in *State v. Stone*, 12 Wn. App. 2d 1024, 2020 WL 824449, No. 52233-1-II (2020) (an unpublished opinion cited as persuasive authority pursuant to GR 14.1).

RCW 10.01.160(3) provides that that the trial court shall not order a defendant to pay costs if the defendant is indigent at the time of sentencing. RCW 10.01.160(2) limits costs to "expenses specially incurred by the state in prosecuting the defendant, to administer a deferred prosecution program, or to administer pretrial supervision."

However, supervisory assessment fees are imposed under RCW 9.94A.703(2)(d), which states, “Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of Corrections].” The supervision assessment fee fails to meet the definition of a “cost” under RCW 10.01.160(2) because it is not an expense specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. Thus, the *Stone* court concluded, “Because the supervision assessment fee is not a cost as defined under RCW 10.01.160, the statutes do not prohibit the trial court from imposing the fee based on Stone’s indigence.” The same rationale applies here.

Community custody supervision fees are substantially different from costs. They are determined by the Department of Corrections, not the court. RCW 9.94A.703(2)(d). A defendant’s indigence at time of sentencing is irrelevant, as ability to pay will depend on whether the offender has gainful employment *while on community custody*. If the offender is indigent at that time through no fault of his own, the department can take that into account in determining what if any fee to assess.

IV. CONCLUSION

On the basis of the arguments set forth above, it is respectfully requested that the Judgment and Sentence of Pedro Cardenas in Franklin County Cause No. 17-1-50358-11 be affirmed.

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

DATED: July 14, 2020.

Respectfully submitted:

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

DATED July 14, 2020, Pasco, WA
Matthew Breaux
Original filed at the Court of Appeals, 500
N. Cedar Street, Spokane, WA 99201

FRANKLIN COUNTY PROSECUTING ATTORNEY'S OFFICE

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