

NO. 73902-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMEEL L. PADILLA,

Appellant.

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Court of Appeals
Division I
State of Washington

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. The defendant was charged with communicating with a minor for immoral purposes (CMIP) by electronic communication. The charging language did not explicitly require the State to prove the intent to communicate with minor, an element that was included in the to-convict instruction. Is the element of intent implicit in the language of the statute?

2. Defense counsel notified the court that someone watching the trial with him had noticed that Juror 8 being inattentive and asked that Juror 8 be dismissed as the alternate. The court was of the opinion, based on his and others' observations, that this was not the case. Based in those circumstances was the trial court required to hold a hearing on issue or to dismiss the juror?

3. The court imposed a sentence condition that forbade then defendant from frequenting places where minors congregate as defined by his CCO. Should the court strike the condition when it is unconstitutionally vague? The court imposed a condition that prohibited the defendant from possessing "pornographic materials" a phrase that was defined in the condition. Is a sentence condition unconstitutionally vague when it provides notice of what is prohibited and does not permit arbitrary enforcement?

4. Should appellate costs be imposed when the defendant is not the prevailing party, has not raised an issue of public interest, and may be able to pay costs in the future?

II. STATEMENT OF THE CASE

In March and April 2012, the defendant Jameel Padilla, using the screen name Jim Wilcox and for an immoral purpose, sent then-9-year old K.M. a series of Facebook messages suggesting various methods of sexual contact and intercourse.

In December 2011, nine-year-old K.M. was living with her father G.M., mother, and sisters in Arroyo Grande, California. For her ninth birthday, her family set up a Facebook account for her. She used it for games and other activities. She sometimes posted pictures of herself. Her profile picture showed her at eight and a half. 4 RP 121-25.

Between March 5 and April 14, 2012, someone who identified himself as Jim Wilcox sent K.M. a series of texts via Facebook. K.M. didn't understand his messages but responded because she thought he might be a friend of her parents. She became disturbed by the messages and, when they did not stop, blocked Wilcox. She decided she would not use the account

anymore. 4 RP 127, 129, 131. She showed her father G.M. the exchange:

Wilcox: you are pretty. I'm so hard jerking off to you.

K.M.: k?

Wilcox: what are you doing?

K.M.: nothing

Wilcox: are you alone?

K.M.: ya.y?

Wilcox: cause I'm jerking off to you. what are you wearing?

Wilcox: you are so pretty, my cock is still hard for you.

K.M.: shut up I am 9!!!!!!!!!!!!

Wilcox: suck it

K.M. no u r gross I am 9 so back off

Wilcox: open wide

K.M. shut up!!!!!! 1...2...3!!!!!! Block

Wilcox: say aahhhh

K.M. shut up go away!!!!

Wilcox: go deep

Ex. 11; 4 RP 139. G.M. was livid. He unblocked Wilcox and the two men had an exchange:

G.M. hey how is it going?

I WILL find you! You will be reported through the FCC and register as a sexual predator [sic] and offender.. you messed with the wrong Dad! I assure you!!!

Wilcox: Retard. You don't even know my age LOLLOL
eat shit LOL

Ex. 12.

G.M. contacted the Arroyo Grande Police Department (AGPD) and gave them screen shots of the conversations and access to his IP addresses. They conducted an investigation which they eventually handed over to the Everett Police Department (EPD). 4 RP 141.

In August 2012, EPD Detective Aaron deFolo was assigned the case and given AGPD's investigation. AGPD had already located, through search warrants, the defendant's Facebook and Comcast IP records, including billing and his physical address in Everett. 4 RP 151-54.

In September 2012, EPD served a search warrant at the defendant's Everett address and seized his computer. That same day, they called Boeing to arrange to meet with the defendant. 4 RP 156-57, 161.

Det. deFolo told the defendant what he had learned through the investigation and read him an excerpt of the communication between Wilcox and K.M. At first the defendant did not admit or deny that he was Wilcox. He did admit to similar chats in the past. He explained that the messages were not necessarily sexual, that a cock was a rooster and a jerk was a dance. But he admitted that he used his own and fictitious profiles to troll for similar situations and to upset people when he did. He said he started a lot of conversations using the word cock to upset people. He said he had had exchanges with other parents who were angry with him and made threats which he enjoyed. 4 RP 162-64, 174.

The defendant said that people had to be 13 years old to have a Facebook account. He said he chatted with girls who appeared to be under 18 and were as young as 13. He knew what he had done was wrong and had gotten out of hand. 4 RP 165-66, 168-69.

EPD Det. Klingman did a forensics evaluation of the defendant's computer by first cloning the hard drive to make an exact copy and then examining what was on it. He believed that defendant was the only user because there was no evidence of any other person using the computer, something that would have been

readily apparent. The defendant had used multiple accounts with multiple aliases. 4 RP 177-88; 5 RP 14, 21, 18.

The facebook chats with K.M. were not stored on the defendant's computer. Nonetheless the evidence that they had originated from that computer was definitive. The defendant's IP address and unique Facebook identifier, present on the defendant's computer, were located on the chats from K.M.'s facebook page. The name Wilcox matched the name on K.M.'s messages. 5 RP 22-24, 26, Ex. 13.

Facebook records confirmed that the defendant was logged on each time K.M. received a message from him and each time he received one from her. Sometime after he was confronted by G.M., the defendant had Googled "JW stalker" and "Facebook stalker". 5 RP 28, 38, Ex.25.

The records also showed that the defendant had texted and messaged other women numerous times using the same unique language used in K.M.'s messages. One date in March 2010 he sent out the same language at least a hundred times. Those texts and messages were purportedly sent by Wilcox and the defendant's other aliases. 5 RP 40-41.

Det. Klingman found on the defendant's computer over 80,000 pictures that suggested a sexual interest in children. The photographs showed children being sexually assaulted in virtually every imaginable way. Some showed real children, including infants, performing sexual acts on themselves and others being sexually penetrated in various ways by adult men. Some were fantasy images of beasts and monsters raping children. 5 RP 44-45.

The photographs of the actual children being raped and abused were in unallocated space. That meant that the defendant had visited child pornography sites that offered the images but had not saved them as he had images of children who were scantily dressed and provocatively posed. The children in those photographs appeared to be ages 8 through 10. 5 RP 47, 49.

The State charged the defendant with one count of CMIP:

COUNT I: COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES VIA ELECTRONIC COMMUNICATION, COMMITTED AS FOLLOWS:
That the defendant, on or about the 5th day of March, 2012, through the 14th day of April, 2012, did communicate with a person under the age of 18 years for immoral purposes through the sending of an electronic communication; proscribed by RCW 9.68A.090(2), a felony.

He was also charged with four counts of Viewing Depictions of Minors Engaged in Sexually Explicit Conduct, Counts II-V. CP 63-4.

Count I was severed for trial which began on June 22, 2015. 2 RP 26. K.M., G.M., and Detectives deFolo and Klingman all testified.

At the close of testimony, the State offered WPIC 47.06, the to-convict instruction, on CMIP, which contained the following elements:

- (1) That on or about the 5th day of March, 2012 through the 14th day of April 2012, the defendant communicated with K.M. for immoral purposes of a sexual nature;
- (2) That the defendant communicated with K.M. through the sending of an electronic communication;
- (3) That K.M. was a minor; and
- (4) That this act occurred in the State of Washington.

Supp. CP __ (sub. no. 56, Plaintiff's Proposed Instructions). The defendant also proposed WPIC 47.08 with an element that the defendant believed K.M. was a minor. CP 61. The court proposed, and later gave, its own to-convict instruction which, in its final form, read:

- (1) That on or about the 5th day of March, 2012, through the 14th day of April, 2012, the defendant communicated with K.M.;
- (2) That the communication was done for immoral purposes of a sexual nature and was intended to reach a minor;
- (3) That the defendant communicated with K.M. through the sending of electronic communication;
- (4) That the communication was received by K.M.;
- (5) That K.M. was a minor;
- (6) That any of these acts occurred in the State of Washington.

CP 50.

The court believed that case law had articulated a non-statutory essential element of CMIP. 5 RP 150-54. The defense agreed to the addition of an intent element and the State's objection to the instruction was overruled. 5 RP 157-171; 6 RP 3-8.

Before the instructions were read, defense counsel told the court that people watching the trial with him had noticed that Juror 8 "appeared to be sleeping" and "[n]odding off," and that "we" saw "a lot of inattention there." He did not clarify if the "we" included him. He had apparently discussed the matter with the State and Detective Klingman because he informed the court that neither of them had noticed a problem. He proposed that Juror 8 be named

the alternate juror on the basis of "what appears to be inattention."
He did not ask for a hearing on the issue. 6 RP 11-12.

The State said that it had scanned the jury frequently during trial and had seen no problem with Juror 8. The court noted that it, too, had watched the jury and seen no juror either sleeping or acting in a way that caused it concern. The court indicated that because someone closed his eyes to listen or concentrate did not mean he was asleep. The judge denied the motion to name Juror 8 the alternate. Id.

After the jury returned a verdict of guilty, the court explained its ongoing observations of Juror 8. Juror 8 appeared to be attentive to what was occurring in court. 6 RP 82-3.

III. ARGUMENT

A. THE CHARGING DOCUMENT CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF CMIP VIA ELECTRONIC COMMUNICATION.

The court reviews a challenge to the sufficiency of a charging document *de novo*. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). If the challenge is first raised after a guilty verdict, the court will liberally construe the charging document in favor of validity. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The document must contain all essential elements and

be construed using common sense and facts that are necessarily implied. The question is whether the document reasonably apprised the defendant of the crime. Id. at 109. Even when an essential element is missing, the charging document is sufficient if it impliedly contains the missing element. Id. at 104. If the missing element is impliedly contained, the court must determine whether the defendant has shown that he was actually so prejudiced by unartfully language that he lacked notice of the crime charged. Id. at 106-06.

In the present case, the defendant was charged with violating RCW 9.68A.090(2) which provides in relevant part:

A person who communicates with a minor for immoral purposes is guilty of a class C felony... if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes including the purchase and sale of commercial sex acts and sex trafficking through the sending of an electronic communication.

The charging language tracked the statute's language and informed the defendant that he was being charged with communicating with a person under the age of 18 for immoral purposes through electronic communication. CP 63. A fair reading of the charging document contains every element of CMIP, including the intent element.

The intent element was first addressed in State v. Hosier, 157 Wn.2d 1, 133 P.3d 936 (2006). There, a defendant left sexually explicit messages on the lawn of a minor, messages that were intercepted by the minor's father who warned his daughter in general terms of their content. Hosier argued that he was guilty of attempted CMIP, at most, because the minor never received his messages. The Supreme Court disagreed. The father, it said, was a conduit for the notes. Id. at 10.

The Supreme Court also addressed the defendant's complaint that the Court of Appeals had rewritten the statute and added a foreseeability requirement. It said,

Foreseeability is not an element of the crime of communicating with a minor for immoral purposes. Rather, the State must prove that the defendant intended that the communication reach the child...[T]he Court of Appeals correctly recognized that a person must have "the predatory purpose of promoting [children's] exposure to and involvement in sexual misconduct" in making the communication. (citation omitted.) Thus, despite its brief discussion of foreseeability, the Court of Appeals properly held that the State had produced sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that Hosier placed two sexually explicit notes in M.S.'s yard, a place where he had seen her play, with the intent to communicate with M.S., a minor, for an immoral purpose and that M.S. received the message...

Id. at 15. The court thus recognized an implicit intent element based on the language of the statute itself.

In the present case, the charging document used the language of the statute with its implicit intent element. The predatory purpose, or predatory intent, was contained within the language of the statute and charging document.

A person acts with intent when he acts with the purpose to accomplish a crime. WPIC 10.01; State v. Allen, 67 Wn. App. 824, 826, 840 P.2d 905 (1992) (intent contemplates purposeful conduct). The charging document used the phrase “immoral purpose” which means an intent to commit sexual misconduct. State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). An immoral purpose is a predatory undertaking with the intent, or purpose, of promoting sexual misconduct. Id.

The charging document here explained that the communication had to be made with an immoral or predatory purpose or intent. “Communication” means both the transmission and the reception of a message. Hosier, 157 at 8. The charging language notified the defendant that the communication had to have been sent with a predatory sexual intent.

Applying common sense and logic to the charging document, the defendant had notice that he had to intend that his communication reached a minor. The CMIP statute does not prohibit vulgar but lawful communication about sexual conduct that would be legal if performed. State v. Pietrzak, 100 Wn. App. 291, 296-97, 997 P.2d 947 (2000). Therefore, the defendant was on notice that his communication had to have been sent not only with a predatory purpose but also with an intent to reach a minor.

The CMIP criminalizes making predatory, illegal, sexual suggestions to a minor. A fair reading of the charging document told the defendant that he was charged with just that: suggesting illegal and predatory sexual misconduct to a minor. That is an intentional act by its own terms.

In Kjorsvik, the use of the term "unlawfully" was sufficient to convey the "intent to steal" element of robbery. The court's reasoning was based on all the language in the information read as a whole and in a commonsense manner. 117 Wn.2d at 110-11. In the present case, use of the term "improper purpose" was sufficient to convey an improper intent, that is, the intent to involve a minor in sexual misconduct.

The trial court itself recognized that the element was contained in the statute: “[H]ow can you have a communication with a minor for immoral purposes if it is not intended to reach a minor?” 5 RP 171. The charging document, which tracked the language of the statute, when liberally construed, contained every element of the offense.

Under the second prong of Kjorsvik, the court must determine whether the defendant has shown that he was actually prejudiced by the wording of the charging document. 117 Wn.2d at 106. In making that determination, the court may look beyond the charging document and may look to the affidavit of probable cause which can inform the defendant of the charges against him. Id. at 111.

In the present case, the defendant has not alleged prejudice. A reading of the affidavit of probable cause shows why. The affidavit described how the defendant intentionally and repeatedly sent the little K.M. invitations to perform sex acts. They continued after she repeatedly told him she was only nine years old. The defendant’s intent was unmistakable.

Wilcox: you are so pretty. My cock is still hard for you.
K.M.: shut up I am 9!!!!!!!!!!!!
Wilcox: suck it

K.M.: no u r gross I am 9 so back off
Wilcox: open wide
K.M. shut up!!!...
Wilcox: saw aaahhh
K.M. shut up and go away!!!!
Wilcox: go deep.

Ex. 11.

The probable cause affidavit described the allegations against the defendant in a manner that informed him of the intent element of CMIP. It gave him notice of the charge against which he was defendant himself, the all-too-real actions of a sex predator who actively and intentionally sought out a child for immoral purposes.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT REPLACING A JUROR WHEN IT WAS SATISFIED THE JUROR HAD NOT BEEN INATTENTIVE.

Juror misconduct may deprive a defendant of his Fifth Amendment right to due process or Sixth Amendment right to an impartial jury and fair trial. United States v. McKeighan, 685 F.2d 956, 973-74 (10th Cir.2012); United States v. Freitag, 230 F.3d 1019, 1023 (7th Cir.2000); United States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987). State v. Jorden, 103 Wn. App. 221, 226-27, 11 P.3d 866 (2000). RCW 2.26.110 sets out circumstances under which a court must excuse a juror.

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110; Jorden, 103 Wn. App. at 226-27. CrR 6.5 outlines the procedure for substitution of an unfit juror. The obligation to replace an unfit juror is ongoing and mandatory under both the statute and the rule. A trial court's decision on the issue is reviewed for an abuse of discretion. Id., CrR 6.5.

In the present case, the court was not of the opinion that Juror 8 was sleeping or even inattentive. The State and a detective present during the entire trial had noticed no such thing. The court itself had seen no such thing. The trial court had no obligation to excuse a juror who, in its opinion, has not manifested an unfitness to serve.

The defendant should not rely on Jorden. There, the State informed the court after the first day of trial that a juror appeared to be asleep. During the remainder of the trial, the court took several steps to keep a juror awake. It dismissed the juror after a hearing at which witnesses testified that the juror had yawned, dozed, and sat with closed eyes during testimony of several witnesses. After

the verdict, the defendant complained that the court should have interviewed the juror before removing her. The appellate court disagreed. It was not an abuse of discretion to dismiss the juror. It was undisputed that the juror was inattentive and the court, once it found her unfit, was required to remove her. Id. at 125-27.

The record in the present case establishes just the opposite. The court had no reason to hold a hearing because it found no basis for the allegation that Juror 8 was inattentive. No hearing was required.

United State v. Barrett, 703 F.2d 1076 (9th Cir.1983), calls for no other result. There, a juror told the court that he did not want to serve because he had slept during the trial. The judge did not remove him. After the verdict, the judge denied a defense motion to interview the juror because "there was no juror asleep during the trial." The reviewing court found an abuse of discretion. It was undisputed that the juror had been sleeping as reported by the juror himself. The reviewing court could not accept "the trial judge's bare assertion that no juror had been asleep during trial." Id. at 1083.

The present case is entirely different. Whether Juror 8 was asleep or even inattentive was not undisputed. In fact, most observations, including the court's, supported the court's opinion

that Juror 8 was not sleeping or even inattentive. Rather, the court's opinion was based on its own observations and the observations of others in the courtroom including the State and the attending detective. As the State noted, the only "people watching the trial" with defense counsel suggested that Juror 8 was perhaps unfit. Those were the defendant and his mother. 6 RP 13.

The court was well within its discretion when determined, based on its own observations and those of others, that there was no unfit juror. The court acted within its discretion in refusing to dismiss Juror 8 and was under no obligation to further investigate the juror.

The defendant's reliance on a series of out-of-state cases is likewise misplaced. Each of those involved a situation where it was undisputed that the juror had likely been asleep during the trial.

In Commonwealth v. Braun, the trial court abused its discretion when it failed to dismiss a juror despite the fact that the court had "substantial reason" to believe the juror had been sleeping. 74 Mass. App. Ct. 904, 905, 905 N.E.2d 124 (2009). A court officer, defense counsel, and the judge himself had all seen the juror sleeping during the trial. The reviewing court distinguished this case from one where there is simply a complaint of

inattentiveness. “We do not suggest that every complaint regarding juror attentiveness requires a voir dire.” Id.

In People v. South, defense counsel reported that he had seen a juror sleep during several portions of the trial. 177 A.D. 2d 607, 576 N.Y.S.2d 314 (1991). The trial court confirmed that it, too had seen the juror with her eyes closed during two portions of the trial but did not question the juror. The reviewing court said this was an abuse of discretion. The trial court should have conducted voir dire on the issue because of the undisputed “apparent sleeping episodes.” Id. at 608.

In State v. Hampton, both defense counsel and the trial court noticed that a juror was sleeping through at least some of the trial. 201 Wis.2d 662, 671-72, 549 N.W.2d 756 (1996). Even after a bailiff asked if he wanted coffee, the juror dozed off again. The failure of the court to conduct any further investigation was an abuse of discretion. There was little disagreement that the juror was sleeping. The only question was for how long. Id.

None of those cases is helpful in the present case. Here, there was no agreement that Juror 8 was sleeping or even inattentive. In fact, there was a disagreement on whether any inattention had taken place at all. The defendant has cited no

Washington case, no federal case, and no case from any other state where a reviewing court has found an abuse of discretion under these circumstances here. The trial court acted well within its discretion when it refused to dismiss a juror who had shown no unfitness.

C. COMMUNITY CUSTODY CONDITIONS PROHIBITING VISITS TO PLACES WHERE MINOR CONGREGATE WAS UNCONSTITUTIONALLY VAGUE BUT THE PROHIBITION ON PORNOGRAPHY WAS NOT.

The court imposed 18 community custody conditions when it sentenced the defendant. CP 37. They included:

5. Do not frequent areas where minor children are known to congregate as defined by the supervision Community Corrections Officer...
6. Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer... Pornographic materials are defined as images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.

Id.

1. Condition 5 Is Unconstitutionally Vague And Should Be Stricken.

A law is unconstitutionally vague if it does not (1) provide ordinary people fair warning of proscribed conduct and (2) does not have standards to avoid arbitrary enforcement. State v. Irwin, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). The same applies to

sentence conditions. Community custody conditions are not presumed to be constitutional. Id. at 655.

The Irwin court addressed a virtually identical community custody condition. The prohibition on frequenting areas where minors congregated would not give an ordinary person sufficient notice of what was prohibited. Permitting the CCO to determine what those places were not only highlighted its vagueness but also made the condition susceptible to arbitrary enforcement. Thus, the condition was void for vagueness. Id. at 655. A pre-enforcement challenge to it was ripe for review. Id. at 650-51.

Irwin applies here. The condition is unconstitutionally vague, the challenge is ripe for review, and the condition should be remanded to be either stricken or amended for clarification.

2. Condition 6 Defines Pornographic Material And Is Not Unconstitutionally Vague.

A community custody conditions that prohibits the defendant from viewing pornographic materials is unconstitutionally vague if the word "pornography" is not further defined. State v. Bahl, 164 Wn.2d 739, 758, 164 P.3d 678 (2008). In deciding a vagueness challenge, words are looked at in their context. Id. at 754. A pre-

enforcement challenge to such a condition is ripe for review. Id. at 752.

The court in Bahl did not address a condition identical to the one imposed in the present case. There, the challenged condition imposed a blanket prohibition on “pornographic materials, as directed by the supervision [CCO].” The term “pornographic materials” was not defined anywhere in the condition. Id. at 744.

In the present case, the term “pornographic materials” was defined. The trial court defined it in three ways, as images of simulated or real sexual intercourse, as images of masturbation, or as images that displayed intimate body parts. CP 37. There is nothing vague about that prohibition. There is no confusion about what the defendant cannot view or possess. The prohibition includes any depiction of intimate body parts.

In Bahl, the defendant was not only left without a clear definition of the term “pornographic materials”. A second flaw in the condition was that the meaning of that term was left to the discretion on of the CCO. That rendered the condition unconstitutionally vague, both because the term was undefined and also because it was susceptible to arbitrary enforcement by the CCO. Id. at 757-58.

Neither of those problems is present in the condition in this case. The condition defines "pornographic materials" in a manner that makes absolutely clear what is included. It removes from the CCO any ability to arbitrarily enforce it. The condition is not vague.

A condition that restricts a limitation on fundamental rights is permissible if sensitively imposed. Id. at 757; State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). When a condition implicates the First Amendment, the restrictions must be clear and reasonable. Id.

That is exactly what the definition of pornographic material does in the present case. The restriction on what the defendant may possess is clear: depictions of sexual intercourse, masturbation, or intimate body parts. The restriction was reasonable in that it accomplished the State's needs of restricting him from keeping him from access to any display of intimate body parts without the need for a decision of whether those displays were sexually erotic or artistic.

The condition prohibiting possessing or accessing pornographic materials was not unconstitutionally vague. The imposition of the condition should be upheld.

However, even if the court were to find the third part of the definition vague, the rest of the definition has not been challenged. At most, the court should remand to the trial court which can strike the challenged language and, if necessary, further clarify its definition of pornographic materials.

D. THE COURT SHOULD IMPOSE APPELLATE COSTS.

The defendant's argument that costs should not be imposed because the trial court found him indigent ignores the language and history of RCW 10.73.160. The statute authorizes the court to exercise its discretion to require an adult offender to pay appellate costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The statute expressly applies to indigent persons and expressly provides for "recoupment of fees for court-appointed counsel." Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

"In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948

(1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs. Prior to 1995, the rules governing appellate costs in criminal cases and civil cases were the same. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, “[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs.” Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979).

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1, 66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn.2d 392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case and refused to award costs because the case involved not a personal consequence to either party but instead an issue of public interest. NECA, 66 Wn.2d at 23.

In Moore, the Supreme Court reversed a lower court’s judgment because the action was brought prematurely and refused to award costs: “While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of

the premature action and will not be permitted to recover costs on this appeal." Moore, 65 Wn.2d at 393.

Each case illustrates and appellate courts denying costs because of an issue-based unusual circumstance that renders an award inequitable, not because of a litigant's financial situation. That makes practical sense since the appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). The Blank court said that costs could be awarded without a prior determination of the defendant's ability to pay. *Id.* at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal, something to which the Legislature silently acquiesced for almost 20 years.

Applying that reasoning to the present case, this court should deny the defendant's motion and impose costs. The case presents a routine issue that was litigated for the defendant's own benefit, not for any public interest. Nothing in this case supports

permanently shifting the costs of the defendant's appeal from the guilty defendant to the innocent taxpayers.

But even if this court focuses on the defendant's ability to pay, the award of costs is appropriate. Although the defendant was indigent when he filed his appeal, the current ability to pay costs is not the only relevant factor to be considered in the imposition of costs. State v. Sinclair, 192 Wn. App. 380, 389, 367 P.3d 612 (2016). The future ability to pay is important as well and if costs are imposed and a defendant is unable to repay in the future, the statute contains a mechanism for relief. Blank, 131 Wn.2d at 250.

This defendant is in a very different position from the defendant in Sinclair. Sinclair was 66-years old, indigent, and unlikely to ever be released or to be able to find employment. 192 Wn. App. at 393.

The defendant in the present case was 39 years old and sentenced to only 75 days of jail. At the time of his offense, the defendant had a record of successful military service, a job at Boeing, his own apartment, cell phones and a computer. Although unemployed and indigent at the time of sentencing, there was no indication that the defendant would be forever unable to work. He claimed no health or other issues that would prevent him from

becoming a productive and earning member of society. He was assessed costs at trial of only \$600. 3 RP 10.

This court should not assume that the defendant will be forever indigent. If it turns out that he cannot find profitable work and/or that payment creates manifest hardship, he can move for remission under RCW 10.73.160(4). If interest accrual creates a hardship, the court can reduce or waive interest under RCW 10.82.090.

IV. CONCLUSION

For the foregoing reasons, the conviction should be affirmed.

Respectfully submitted on September 7, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:



JANICE C. ALBERT, #19865
Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

JAMEEL L. PADILLA,

Appellant.

No. 73902-6-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 7th day of September, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Mary Swift, Nielsen, Broman & Koch, swiftm@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of September, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office