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July 28, 2016
Court of Appeals
Division I
State of Washington

NO. 74449-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS RYAN COOK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SAMUEL S. CHUNG

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

TINAMARIE MASTERS
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUE PRESENTED

“Effective assistance of counsel” does not mean “successful assistance,” nor is counsel’s competency measured by the result. In this case, defense counsel’s decisions not to object can reasonably be characterized as legitimate trial strategy. But, even if any of defense counsel’s conduct fell below an objective standard of reasonableness, the defendant has failed to establish that, but for counsel’s conduct, there is a reasonable probability that the outcome of the trial would have been different. Should the court reject the defendant’s claim of ineffective assistance of counsel and affirm his conviction for residential burglary?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Nicholas Cook was charged with residential burglary and theft of a firearm. Clerk’s Papers (CP) 1, 2. At trial, the State moved to amend Count I (residential burglary) to add a victim’s name and moved to dismiss Count II (theft of a firearm). CP 16, 17. The

motions were granted. CP 16, 17; Report of Proceedings (RP¹) 1RP 8. The defendant was convicted by jury trial of the amended charge. CP 63. He was sentenced and ordered to serve a 72-month sentence, to pay restitution in the amount of \$1,411.13, and to pay the \$500 victim penalty assessment and the \$100 DNA fee. CP 67-75; Supp CP __ (sub 81); 6RP 512, 513.

2. FACTS OF THE CRIME.

Grant Bordon and Gail Erickson live in the Richmond Beach neighborhood of Shoreline, Washington. 4RP 351, 352. Their home was broken into on March 18, 2015. 4RP 271. When Bordon arrived home, his house was ransacked and he called 911. 4RP 271, 272. As he assessed the damage, Bordon noticed there were piles of their possessions in the garage that looked staged as if ready for pick up. 4RP 272. In the piles were various items including blank checks, Bordon's birth certificate, a TV, an iPad, an iPod, and musical instruments. 4RP 272. The items were packed arbitrarily in bins, boxes and even Bordon's and Erickson's own suitcases. 4RP 272.

¹ There are six volumes of verbatim Report of Proceedings referenced as follows: 1RP – November 12, 2015; 2RP – November 17, 2015; 3RP – November 18, 2015; 4RP – November 19, 2016; 5RP – November 23, 2015; and 6RP – December 10, 2015.

It took time to sort through these piles. 4RP 272, 340. Fortunately, several items they initially believed were stolen were found in those piles. 4RP 272. However, some items remained missing, including Bordon's laptop and Erickson's bottle of prescription medication and several pieces of her jewelry. 4RP 272.

Kelly Szabo lives near Bordon and Erickson and she is very in tune with what happens in her neighborhood. 4RP 272. She had recently received information that alerted those in the neighborhood to be on the lookout for a white Buick with license plate ANK7245. 4RP 272. Prior to the burglary of the Bordon/Erickson home, Szabo had spotted the Buick and followed it to a home in nearby Edmonds. 4RP 273. In addition to the white Buick, she also observed a red pickup truck with license plate B06088S outside the same home in Edmonds. 4RP 273.

On March 18, 2015, Bordon left home around 9 a.m. 4RP 273. At approximately 11:45 a.m., Szabo was dropping off lunch to her child that attends Syre Elementary School, which is on a dead-end street and right across the street from the Bordon/Erickson home. 4RP 273, 282. There is no through traffic in the area unless the driver knows the side roads. 4RP 282. She observed the white Buick, license plate ANK7245, parked outside her child's school

and later determined to be parked one house away from the Bordon/Erickson home. 4RP 273, 298. She called 911 and waited for police. 4RP 273. When they arrived, she confirmed that the Buick was the same one she was calling about. 4RP 273. She then left to go to her other child's school to drop off lunch. 4RP 292.

King County Sheriff's Deputies had information about this same Buick, as well, and knew Nicholas Cook, his brother and Holly Burkhart were associated with it. 4RP 273, 320. Sergeant Richard Connelly was one of the first to arrive on scene. 4RP 273. He contacted a man in the Buick, later identified as Dane Sullivan. 4RP 273. During the contact, Sullivan's cell phone rang nonstop. 4RP 313, 320. Sergeant Connelly and Detective Mark Souza looked at Sullivan's phone and saw Burkhart's name on the caller identification each time it rang. 4RP 273, 313, 314, 320. Based on training and experience, deputies knew something was wrong. 4RP 273.

During the investigation, Szabo returned to the scene, and while speaking with detectives, the red truck with license plate B06088S she knew was associated with the white Buick came driving down the hill toward them and stopped at the stop sign. 4RP 274. Szabo told Detective Eric Soderstrom police needed to stop

the red truck because it was associated with the white Buick. 4RP 274. Detective Soderstrom then yelled to his partners to stop the red truck as it drove past them faster than the posted speed limit. 4RP 387. Deputies began to pursue the red truck. 4RP 274. During the pursuit, Anthony Birchman flagged officers down and told them he saw a man jump out of the red truck while it was still moving, run through yards, and was now hiding in some bushes behind a fence in a yard. 4RP 274. He also observed the man's hat fall off as he jumped from the truck. 4RP 302.

Detective Souza searched and located Nicholas Cook hiding in a yard sweating, panting, and with fresh marks on his body. 4RP 274. The red truck was driven by Cook's brother. 4RP 274. Burkhart was laying down in the backseat of the truck. 4RP 274.

Detective Cary Coblantz searched the white Buick and red truck pursuant to a search warrant. 4RP 275; 5RP 419. Inside the red truck, he located a black backpack on the front passenger seat floorboard. 4RP 275. Inside was one of Erickson's pieces of jewelry, a prescription pill bottle with Erickson's name on it, and one of her external hard drives. 4RP 275; 5RP 431. Inside the white Buick, he located Nicholas Cook's wallet and identification. 4RP 275; 5RP 428.

3. OTHER RELEVANT FACTS.

During pretrial motions, Cook's counsel argued that testimony about law enforcement's investigation into other burglaries should be excluded and that the word "bulletin" should be excluded due to potential prejudice. 1RP 25, 45. Counsel made it clear she wanted to "minimize sidebars, excessive objections, confusion, et cetera" in order to keep the trial "tidy and clean." 1RP 28, 29.

Counsel objected throughout the trial posing objections based on speculation, relevance and hearsay. 4RP 285, 302, 336, 370, 386, 410, 414, 418². During the discussion of jury instructions, counsel objected to the State's request for Washington Pattern Jury Instructions – Criminal (WPIC) 10.51 (accomplice liability

² (1) Objection when prosecutor asked Szabo "Tell me what happened that -- that day regarding this particular Buick?" (Objection based on relevance; overruled). 4RP 285. (2) Objection when Birchman said, "And he kind of crouched behind the car looking kind of like he was supposed -- kind of ev --" (Objection based on speculation; overruled). 4RP 302. (3) Birchman then said, "it was kind of like he was evading the police kind of in the --" (Objection based on speculation; sustained). 4RP 302. (4) Objection when Erickson said, "He called me at work and said that we had been robbed." (Objection based on hearsay; overruled). 4RP 336. (5) Objection when prosecutor asked Bordon if he had taken "any action to improve your home in any way." (Objection based on relevance; sustained). 4RP 370. (6) Objection when prosecutor asked Bordon if he noticed any damage to his backdoor. (Objection based on relevance; overruled). 4RP 370. (7) Objection when Soderstrom testified, "And she pointed out to me, she said the driver of that pickup truck --" (Objection based on hearsay; sustained). 4RP 386. (8) Objection when Coblantz described the neighborhood surrounding the Bordon/Erickson home. (Objection based on relevance; overruled). 5RP 410. (9) Objection when prosecutor asked Coblantz if he read Randolph Cook his Miranda rights. (Objection based on relevance; overruled). 5RP 414, 418.

instruction) and WPIC 6.51 (expert testimony). 5RP 457, 459. She was successful in her arguments. 5RP 458, 465.

C. ARGUMENT

1. **COOK HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.**

Cook alleges that he was denied effective assistance of counsel at trial because his counsel did not object to two specific statements. His claim of ineffective assistance of counsel should be rejected because he has failed to show that his counsel's performance was deficient and prejudicial.

A criminal defendant has a Sixth Amendment right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The defendant has the burden to establish ineffective assistance of counsel. Id. at 688. The defendant must overcome a strong presumption that defense counsel was effective. State v.

McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). To prevail on an ineffective assistance of counsel claim, the defendant must show both deficient performance and resulting prejudice. In re Personal Restraint of Hubert, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007). The defendant must satisfy both prongs of the ineffective assistance of counsel test. If one prong of the test fails, the court need not address the remaining prong. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A claim of effective assistance of counsel is reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995) (citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 260 (1988)).

Deliberate tactical choices may be considered ineffective assistance of counsel only if the choices are far outside the bounds of professional assistance. However, "exceptional deference must be given when evaluating counsel's strategic decisions." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The failure to object is a classic example of a trial tactic. Only under extreme circumstances may a failure to object warrant reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A three-part test must be satisfied in order to prevail on a

claim of ineffective assistance for failure to object: 1) an absence of a legitimate strategic decision for not objecting, 2) that the judge would have sustained the objection if made, and 3) the result of the trial would have been different if the evidence had not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Cook argues that his counsel's failure to object to Detective Souza's and Detective Soderstrom's brief statements constituted ineffective assistance. However, Cook cannot satisfy the three-part test to justify a finding of ineffective assistance of counsel.

- a. Cook Has Not Established That Trial Counsel's Performance Fell Below An Objective Standard Of Reasonableness.

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). When analyzing counsel's performance, the court must consider whether counsel's assistance was reasonable considering the totality of the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Courts must be careful to "eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. Reasonable tactical decisions cannot support an ineffective assistance of counsel claim. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

- b. While An Objection To Detective Soderstrom's Statement Would Likely Have Been Sustained, An Objection To Detective Souza's Statement Would Likely Have Been Overruled.

Cook argues that Detective Soderstrom's and Detective Souza's testimony was "prejudicial propensity evidence." App. Brief at 11. While an objection to Detective Soderstrom's statement would likely have been sustained, an objection to Detective Souza's statement would likely have been overruled. On direct examination, Detective Soderstrom testified, in relevant part, as follows:

Q: Okay. Were you called out to a particular scene approximately around 11:45 or so?

A: I was.

Q: Okay. What type of call was it?

A: Patrol guys were out with – or looking for a – a white Buick that we had information was possibly associated with a burglary.

4RP 378.

Detective Souza testified, in relevant part, to the following:

Q: Okay. What was the nature of the call?

A: A party that lives down in the lower Richmond Beach area had called 911 to say that a package was stolen – just stolen off her front porch.³

4RP 310, 311. Following his answer, Detective Souza was asked about the location he responded to, what he observed when he arrived on scene, and with whom he had contact. 4RP 311-13. Detective Souza also testified that police had information about a white Buick with license plate ANK7245, that Sullivan told police he had just dropped off some friends, that Sullivan's cell phone rang nonstop, and that Burkhart's name appeared on the caller identification each time Sullivan's phone rang. 4RP 313, 314. The morning break was then taken. When testimony resumed, the prosecutor briefly reviewed Detective Souza's testimony prior to the break. His testimony then continued:

Q: Okay. So we has (sic) stated earlier that you had previously received information about this white Buick, ANK7245. Now you see this phone ringing. Did you take any action based on that?

³ The jury also heard corroborating testimony from Sergeant Richard Connelly when he testified as to what type of call he was responding to and what he observed when he arrived on scene. Sergeant Connelly testified that police received "a call about a possible larceny in progress, possible description of a vehicle that may have been involved. It was described as a white Buick." 5RP 444.

A: We had information that the white Buick that was there, and Holly Burket (sic) along with her boyfriend, Mr. Cook, and his brother, Randy, were associated with that vehicle.

Q: Okay. So what did you do then?

A: Based on the information that we had, previous information, we had suspected that they were somewhere in the neighborhood and a crime was being occurred (sic)."

Q: Okay. Did you receive any instruction from the Sergeant as to what do then?

A: We all – the three of us there put our – kind of put our minds together, and we decided to have the patrol units and the unmarked units, which is us and another detective's – we call it roaming the area or roving the area to see if we can locate where they are, where they're coming from, or where they're hiding, or what they're doing."

Q: Okay. When you say roam or rove, maybe it's self-explanatory, but what exactly do you do?

A: So not knowing where they are, we'll – we'll fan out in a neighborhood with our patrol vehicles and our unmarked cars in hopes of locating them.

Q: Okay.

A: We'll drive up and down streets. And we'll drive into driveways, if they're long driveways, just trying to find them.

4RP 320, 321.

The judge would likely have sustained an objection to Detective Soderstrom's statement. The pretrial rulings prohibited testimony of previous burglaries. However, Detective Souza's statement is different. When taken in context, the judge would likely have overruled an objection to Detective Souza's statement. In response to a proper question, Detective Souza testified that "based on the information that we had, previous information, we suspected they were somewhere in the neighborhood and a crime was being committed." 4RP 321. Read in context, he properly testified that he responded to a 911 call, that law enforcement had information that a package had just been stolen off a nearby porch, that law enforcement had previous information about a white Buick with a specific license plate, that Burkhart, Cook and Cook's brother were associated with this Buick, that Sullivan said he had just dropped off some friends, and that Burkhart was repeatedly calling Sullivan's cell phone. 4RP 310-14, 320; 5RP 444. This information, combined with more than 63 years of law enforcement experience between Detective Souza, Detective Soderstrom and Sergeant

Connelly, led them to surmise that “[Cook, his brother and Burkhart] were somewhere in the neighborhood and a crime was being committed.” 4RP 306, 307, 321, 375; 5RP 442, 443. They then began to “roam” the area. 4RP 321. While unfortunately phrased, Detective Souza never expressed a personal opinion about Cook’s guilt. Rather, he made a general statement as to what he suspected based on his training and experience and to explain why authorities took the actions they did.

Even if Detective Souza’s brief statement was improper and an objection would have been sustained, the remaining prongs cannot be satisfied.

c. Counsel’s Decision Not To Object Was Reasonable And Tactical.

The record demonstrates counsel’s decision not to object was reasonable and tactical. Contrary to Cook’s assertion, there are legitimate strategic reasons not to have objected to the testimony. Detective Souza’s and Detective Soderstrom’s comments were brief and otherwise unobjectionable answers in the midst of a proper line of questioning. In general, an objection could highlight the testimony and draw further attention to evidence a

defendant does not want the jury to know. Here, the record reflects that trial counsel was a zealous advocate for her client. As noted above, counsel was attentive to her client and his case. She objected to the admission of evidence during pretrial motions, numerous times during the trial, and at the time of finalizing jury instructions. She succeeded in many of her arguments. Furthermore, counsel indicated she wanted to "minimize sidebars, excessive objections, confusion, et cetera" in order to keep the trial "tidy and clean." 1RP 28, 29. This demonstrates she carefully thought through each of her decisions throughout the trial and had decided during pretrial motions how she envisioned she would present herself, her client and her case. In that context, it is reasonable to conclude that counsel could have legitimately made a tactical decision to allow Detective Souza's and Detective Soderstrom's answers to pass rather than objecting. Whether the objections were granted and the comments stricken or not, the mere act of objecting could draw the jury's attention back to the passing comments and cause them to ascribe more importance to them than they otherwise would.

Based on the entirety of the record, counsel acted as a prepared, knowledgeable, and zealous advocate for Cook. The fact

that Cook is disappointed with the results and disagrees with two tactical decisions made by his counsel does not establish deficient performance. Therefore, Cook has failed to demonstrate his counsel's decision not to object was anything but reasonable and tactical. This prong of the test is not met.

d. The Result Would Not Have Been Different.

Cook cannot meet the final prong of the three-part test because he cannot show that the result of the trial would have been different. There was substantial evidence that Cook burglarized the Bordon/Erickson home on March 18, 2015. Two brief statements from Detective Souza and Detective Soderstrom did not impact the amount of evidence the State presented that proves beyond a reasonable doubt that Cook is guilty of committing this crime. Based on the evidence presented at trial, the jury could logically piece together the chain of events that occurred that day. By doing so, any reasonable jury would have reached the same conclusion without the admission of Detective Souza's and Detective Soderstrom's brief statements.

A combination of five law enforcement officers and four civilians testified at trial and presented the jury with information as

to what occurred the day of the residential burglary. Cook appears to assume that Detective Souza's and Detective Soderstrom's brief statements were the sole reason Cook was convicted. Cook's reliance on this argument is flawed.

Although no one saw Cook in the home, the jury could reasonably conclude that Cook entered the Bordon/Erickson home. Bordon and Erickson's possessions were piled up and "staged" in their garage. 4RP 338, 339, 355. The neighborhood is comprised only of single-family homes, its streets are convoluted and there is an elementary school across the street from the Bordon/Erickson home. 4RP 282, 289. Because of the configuration of the "bowl," the only people who drive into this area either live there or have a student at Syre Elementary School. 4RP 314. Law enforcement had information about the white Buick; Cook, his brother and Burkhart were associated with the Buick; the Buick was facing toward the Bordon/Erickson home; and, from the home one had a direct view of the Buick (and subsequent police activity). 4RP 282, 301, 313, 314, 320; 5RP 407, 409, 445. There was a pathway behind the Bordon/Erickson home that led up to the main road. 4RP 362. By turning off the main road, it would lead back down the hill to where Szabo and police saw the red truck. 4RP 293, 334.

This is a key piece of evidence when combined with evidence that Bordon and Erickson's possessions were piled and staged as if ready for pick up. Sullivan indicated he had just dropped some friends off and then his phone began to ring repeatedly. 4RP 301, 313, 320; 5RP 409. Burkhart was calling him nonstop. 4RP 320.

Additionally, Szabo knew the red truck was associated with the Buick, Birchman testified the truck was going "pretty fast for the area" (the "area" was a school zone) after seeing police, Cook jumped out of the moving truck, and that the jump was "ungraceful...kind of more of an evading demeanor." 4RP 301, 302. In the process Cook lost his San Francisco Giants baseball hat, that same hat was found in the general path of where Cook ran, and Cook was crouching behind a car and bushes as police were arriving on scene. 4RP 303, 304, 327, 331. Birchman confirmed the hat was the one that fell off Cook as he jumped from the truck. 4RP 304. Also, it was a cold day and yet Cook was found breathing heavily and sweating. 5RP 440. Furthermore, Cook was hiding in someone else's yard and running in the opposite direction of his own home, which was one to two miles away from the Bordon/Erickson home. 5RP 432.

A search warrant was executed for the Buick and truck. 5RP 424. Detective Coblantz located a black backpack on the front passenger floorboard of the red truck and inside the backpack was Erickson's property. 5RP 425. In the Buick, Cook's Washington identification was located in a wallet. 5RP 421, 422.

Notably, neither the State nor Cook's counsel mentioned Detective Souza's or Detective Soderstrom's statements in closing argument. Against this backdrop, it is reasonable to conclude that neither counsel ascribed importance to Detective Souza's or Detective Soderstrom's brief statements and therefore did not rely on them to argue their respective case. Cook's claim fails.

e. Even If The Court Finds That Counsel Was Deficient, Cook Did Not Suffer Prejudice.

As discussed above, the second prong of the Strickland test requires the defendant to prove prejudice arising from the deficient performance. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must also "affirmatively prove prejudice," not simply demonstrate that the

"errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. "Not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Id.

Cook relies on State v. Dawkins to argue that what occurred in Dawkins is similar to what happened in Cook's case. It is not. In Dawkins, "the bulk" of the State's evidence consisted of objectionable, prejudicial testimony about past uncharged incidents. 71 Wn. App. 902, 904, 863 P.2d 124 (1993). Counsel never objected to the testimony during pretrial motions or during trial. Id. at 906. What occurred in Dawkins is not what occurred in the present case.

Here, in the context of all of the evidence presented, Detective Souza's and Detective Soderstrom's statements were only a small part of not only their own testimony, but of all testimony the jurors heard from each of the nine witnesses that was otherwise proper and admissible.

Cook appears to imply that prejudice can be assumed because the case was largely circumstantial. However, criminal cases can be proven by direct or circumstantial evidence. WPIC 5.01. The law does not distinguish between direct and

circumstantial evidence in terms of their weight or value in finding the facts in the case. Id.

As discussed above, there was very substantial direct and circumstantial evidence in which the jury could reasonably conclude that Cook burglarized the Bordon/Erickson home. The jury had to decide for themselves how to evaluate all of the evidence presented to them over several days. The jury was properly instructed to consider all evidence and there is no evidence in the record to indicate the jury did not follow the trial court's instructions. "Juries are presumed to have followed the trial court's instructions, absent evidence to the contrary." State v. Kirkman, 159 Wn.2d, 918, 938, 155 P. 3d 125 (2007).

Even without Detective Souza's and Detective Soderstrom's brief comments, Cook still cannot explain away that the Buick was known to law enforcement and was known to be associated with him, his brother and Burkhart; that his wallet was found in the Buick; that the Buick was parked one house away from the Bordon/Erickson home; that Burkhart continuously called Sullivan; that Burkhart and Cook were in the red truck when police pursued it; that Cook jumped out of the red truck, ran and hid on property that did not belong to him; and that Erickson's property was found

in a black backpack that was on the passenger floorboard where Cook was likely sitting prior to jumping out. Cook claims that there is "no doubt the propensity evidence offered by the detectives likely induced jurors to take that leap [to convict him of burglary]." App. Brief at 17. However, based on the above, the record does not support his assertion.

The defendant must establish a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. He has failed to do so. Thus, counsel was not ineffective and Cook was not prejudiced because there was overwhelming evidence that could lead a reasonable jury to find that Cook had committed the crime of residential burglary.

2. THIS COURT SHOULD PRESERVE THE STATE'S OPPORTUNITY TO SUBMIT A COST BILL.

This Court should not foreclose the State's option to seek appellate costs in this case, should it prevail, because the record is too limited to make such a determination at this stage. As in most cases, Cook's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the

record does not contain information about the appellant's financial status and the State did not have the right to obtain information about Cook's financial situation.

An order authorizing appointment of appellate counsel addresses only an appellant's present financial circumstances and ability to pay appellate costs up front. It does not address future ability to pay or ability to pay over time. It is the future ability to pay, instead of simply the current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments). See also State v. Shelton, 72848-2-I, 2016 WL 3461164, at 7 (Wash. Ct. App. June 20, 2016) (challenge to DNA fee not constitutional until State seeks to collect, and appellant has not shown future inability to pay); State v. Stoddard, 192 Wn. App. 222, 228-29, 366 P.3d 474 (2016) (constitutional challenges to DNA fee fail because they "assume his poverty" while "the record contains no information, other than Stoddard's statutory indigence for purposes of hiring an attorney," that he will not be able to pay).

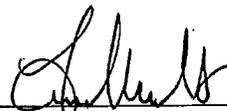
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Cook's conviction of residential burglary. The State also respectfully asks this Court to preserve the State's opportunity to submit a cost bill.

DATED this 28th day of July, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
TINAMARIE MASTERS, WSBA #41450
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Dana Nelson, the attorney for the appellant, at Nelsond@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Nicholas Ryan Cook, Cause No. 74449-6, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 28 day of July, 2016.

Name:
Done in Seattle, Washington