

NO. 74939-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN SWANSON,

Appellant.

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FILED  
Sep 29, 2016  
Court of Appeals  
Division I  
State of Washington

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

The Honorable Catherine Shaffer, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	7
1. THE TRIAL COURT ERRED IN DENYING SWANSON’S REPEATED MOTIONS TO SEVER THE ASSAULT AND ROBBERY CHARGES.....	7
2. APPELLATE COSTS SHOULD NOT BE IMPOSED. ....	16
D. <u>CONCLUSION</u> .....	18

**TABLE OF AUTHORITIES**

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Bradford</u> 56 Wn. App. 464, 783 P.2d 1133 (1989).....	12
<u>State v. Brown</u> 132 Wn.2d 529, 940 P.2d 546 (1997).....	13, 16
<u>State v. Bythrow</u> 114 Wn.2d 713, 790 P.2d 154 (1990).....	8
<u>State v. Curry</u> 118 Wn.2d 911, 829 P.2d 166 (1992).....	16
<u>State v. Duncan</u> 185 Wn.2d 430, 74 P.3d 83 (2016).....	16
<u>State v. Fish</u> 99 Wn. App. 86, 992 P.2d 505 (1999).....	13
<u>State v. Gunderson</u> 181 Wn.2d 916, 337 P.3d 1090 (2014).....	14
<u>State v. Harris</u> 36 Wn. App. 746, 677 P.2d 202 (1984).....	7, 8, 11, 16
<u>State v. Lane</u> 125 Wn.2d 825, 889 P.2d 929 (1995).....	13
<u>State v. MacDonald</u> 122 Wn. App. 804, 95 P.3d 1248 (2004).....	8, 10
<u>State v. Ramirez</u> 46 Wn. App. 223, 730 P.2d 98 (1986).....	7
<u>State v. Russell</u> 125 Wn.2d 24, 882 P.2d 747 (1994).....	13

**TABLE OF AUTHORITIES**

	Page
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	13
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 (2016).....	16
<u>State v. Sutherby</u> 165 Wn.2d 870, 204 P.3d 916 (2009).....	8, 9, 11, 12
<u>State v. Tharp</u> 96 Wn.2d 591, 637 P.2d 961 (1981).....	13
<u>State v. Wade</u> 98 Wn. App. 328, 989 P.2d 576 (1999).....	14
<u>State v. Watkins</u> 53 Wn. App. 264, 766 P.2d 484 (1989).....	14

**FEDERAL CASES**

<u>Drew v. United States</u> 331 F.2d 85 (D.C. Cir. 1964).....	8
---	---

**RULES, STATUTES AND OTHER AUTHORITIES**

CrR 4.3.....	7
CrR 4.4.....	7
ER 404(b).....	12, 14
RAP 15.2.....	17
RCW 3.66.010 .....	15
RCW 12.12 .....	15

**TABLE OF AUTHORITIES**

	Page
RCW 12.12.030 .....	15
WPIC 3.01 .....	11

A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant's motion to sever the two charges offenses.

Issue Pertaining to Assignments of Error

Appellant was tried jointly on one count of fourth degree assault and one count of second degree robbery, occurring on different dates. The trial court denied appellant's motion to sever the charges, made before trial and renewed after the State rested. Where the two charges allowed the jury to unfairly cumulate the evidence against appellant and improperly inferred a criminal disposition, did the trial court err in denying appellant's motion to sever?

B. STATEMENT OF THE CASE

On May 6, 2015, the State charged John Swanson with one count of fourth degree assault – domestic violence and one count of second degree robbery. CP 1. For the assault charge, the State alleged that on April 23, 2015, Swanson intentionally assaulted his wife, Ellen Swanson,<sup>1</sup> by slamming her against a wall. CP 1-3. For the robbery charge, the State alleged that five days later, on April 28, Swanson grabbed Ellen's purse as she was walking to school and wrestled it away from her. CP 1-8.

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<sup>1</sup> This brief refers to Ellen by her first name to avoid confusion.

Before trial, Swanson's counsel moved to sever the two counts. CP 27-28; 2RP 33-34.<sup>2</sup> Counsel pointed out that while the legal argument in relation to the robbery was hotly disputed, the evidence of that charge was clear and largely undisputed. CP 27-28. Conversely, evidence of the assault was entirely testimonial and came only from one witness—Ellen. CP 28; 2RP 33-34. The robbery, which occurred five days after the assault, provided propensity evidence to make the assault more likely. CP 28. The State agreed the robbery would not be admissible against the assault if the counts were tried separately. 2RP 36.

The trial court denied the motion to sever, believing the strength of the evidence was the same on both charges. 2RP 43-46. The court agreed the robbery would not be admissible against the assault, but found the assault would be admissible against the robbery because it went to Swanson's motive and intent. 2RP 44-45. Finally, the court believed the defenses to the two counts were consistent with one another. 2RP 44-45.

The case proceeded to a jury trial in January 2016. Ellen explained she and Swanson married in 2007 and have a young daughter. 4RP 132-33. At the time of the alleged incidents, they lived together on Capitol Hill and

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<sup>2</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP – July 7, 2015; 2RP – January 26, 2016; 3RP – January 27, 2016; 4RP – January 28, 2016; 5RP – January 29, 2016; 6RP – February 1, 2016; 7RP – February 26, 2016.

Ellen attended classes at Seattle Central College. 4RP 132-33. Together they ran a handyman business. 4RP 135-36.

Ellen testified that in April 2015, Swanson began monitoring her whereabouts, as well as her e-mails and phone activity, because he was suspicious both that she was having an affair and that she was spying on him. 4RP 136-41. Ellen said she gave Swanson her Facebook and e-mail passwords in an effort to be transparent with him. 4RP 142-43. But she changed her passwords on April 23, so Swanson could no longer access her accounts. 4RP 144-45. Upon discovering this, Ellen testified Swanson called her at school “very angry,” yelling at and threatening her. 4RP 145. When she thought Swanson had calmed down, she walked home to their condominium. 4RP 145.

Once home, Ellen said Swanson snuck up behind her, took her cell phone from her purse, and threw it in the toilet. 4RP 146-47. Ellen testified that when she went to retrieve her phone from the toilet, Swanson came into the bathroom holding their laptop, shaking it, and yelling at her. 4RP 148. She said he was “very, very angry,” and the general nature of his yelling was, “You fucked with me; now, I’m going to fuck with you, and I’m going to make you feel how you made me feel.” 4RP 149.

Ellen said Swanson then set the laptop down and stepped closer to her. 4RP 150. She claimed “at some point, he grabbed me by the collar, and

shoved me back against the wall really hard.” 4RP 150. Ellen testified she hit her head against the wall, “the lights went out,” and her glasses fell off. 4RP 151-53. She said Swanson had his arms against her shoulders and his hands on her face, with one of his hands in her mouth, pushing her into the wall. 4RP 151. She testified they somehow ended up on the ground and Swanson did not stop straddling her until she stopped screaming. 4RP 151-55. Later that night, Ellen told Swanson she wanted a divorce. 4RP 156. Ellen did not report the alleged incident. 4RP 156.

Ellen testified that on the morning of April 28, she drove their daughter to daycare. 4RP 158-59. On the way back, Swanson called her cell phone to ask her who a certain number belonged to that she texted, suspecting she was having an affair with that person. 4RP 160. The call dropped when Ellen entered their parking garage. 4RP 160.

Ellen testified she then walked a different route to school to avoid Swanson seeing her. 4RP 160-61. But soon she saw him coming towards her quickly, asking her to come home and talk with him. 4RP 160-61. When she refused, Ellen testified Swanson got angry and tried to take the bag she was carrying. 4RP 162. Ellen explained the bag was her school bag, which she also used as a purse. 4RP 162-66. Inside were her phone, school materials, as well as records from their shared business. 4RP 166.

Ellen testified she let go of the bag when Swanson bit her hand, and he ran down the street with it. 4RP 162-63. Bystanders retrieved the bag from Swanson and returned it to Ellen. 4RP 164. Ellen agreed she did not know what Swanson wanted from the bag, and acknowledged he said something like, “you’re taking something from me” during the altercation. 6RP 198-99.

Two eyewitnesses corroborated Ellen’s recount of the April 28 events. James Johanson was walking nearby when he saw Swanson and Ellen having an argument. 6RP 212. Johanson testified it was “kind of vocal. The guy was being kind of forceful: pushing her up against the building.” 6RP 212. Johanson described Swanson’s tone was irate and said Swanson got more forceful as Ellen resisted. 6RP 213. Johanson recalled Swanson “was trying to wrench [the bag] from her . . . he bit her, and then got it, and took off, running down the street.” 6RP 214. Johanson said Swanson “slammed” into him as he ran past. 6RP 215.

Arryvanh Chanthamaly testified she was waiting at a nearby bus stop when she heard a woman screaming for help. 4RP 92, 95. She turned and saw Swanson pulling Ellen’s bag, saying something like, “It’s mine” or “That’s my bag.” 4RP 97-98. Chanthamaly said Swanson was “really angry,” yelled at Ellen, and “called her names” like “bitch.” 4RP 98-99. Chanthamaly called 911 and Officer Katrina Walter arrived shortly

thereafter. 4RP 97, 122-26. Chanthamaly told Walter she heard Swanson say, “This is my stuff; you can’t take my stuff.” 4RP 107. Chanthamaly’s 911 call was played for the jury. 4RP 102-05.

Walter testified Ellen recounted the events that occurred between her and Swanson over the previous several days. 4RP 118. Walter also photographed a faint bite mark on one of Ellen’s knuckles, which was shown to the jury. 4RP 120-21.

After the State rested, Swanson’s counsel renewed the motion to sever, which the trial court noted. 6RP 222. In closing, Swanson’s defense to the assault charge was lack of corroboration and Ellen’s credibility. 6RP 283-85. His defense to the robbery charge was that Ellen’s purse and its contents were community property, and so he could not have intent to steal property that he also owned. 6RP 286-91; see also CP 42 (defense-proposed instruction on community property). During deliberations, the jury asked, “May we please have the definition of common law property?” and “Can common law property be stolen between husband & wife?” CP 46.

The jury acquitted Swanson of second degree robbery, but found him guilty of fourth degree assault. CP 43. The trial court sentenced Swanson to 24 months of unsupervised probation. CP 71-72. The court commended Swanson at sentencing for having “stepped up and addressed the issues that led to his offending behavior.” 7RP 12. Swanson timely appealed. CP 77.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING SWANSON'S REPEATED MOTIONS TO SEVER THE ASSAULT AND ROBBERY CHARGES.

The trial court “shall grant a severance of offenses” when “the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). Severance is required under such circumstances even if the offenses were properly joined in one charging document. CrR 4.4(b); see also CrR 4.3(a) (permitting joinder when the offenses “[a]re of the same or similar character, even if not part of a single scheme or plan”). A motion to sever “must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require.” CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2).

Joinder is “inherently prejudicial.” State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). For instance, the accused may be prejudiced by having to present separate defenses; the jury may use evidence of one or more of the charged crimes to infer a criminal disposition; or the jury may cumulate evidence of the charges and find guilt when, if considered separately, it would not do so. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984). A more subtle prejudicial effect may also be the “latent

feeling of hostility engendered by the charging of several crimes as distinct from only one.” Id. (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)). Therefore, “[s]everance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant’s guilt for another crime or to infer a general criminal disposition.” State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009)

In determining whether to sever charges, the trial court must consider: (1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) whether the trial court can successfully instruct the jury to decide each count separately; and (4) the cross-admissibility of evidence between the various counts, even if not joined for trial. Id. at 884-85; State v. MacDonald, 122 Wn. App. 804, 814-15, 95 P.3d 1248 (2004). Where the accused demonstrates the manifest prejudice of joinder outweighs concerns for judicial economy, severance should be granted. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Denial of a motion to sever offenses when such severance should be granted is an abuse of discretion. Harris, 36 Wn. App. at 749-50.

Considering the first factor, the strength of the State’s evidence on the assault charge was significantly weaker than the robbery. Ellen’s testimony about the robbery was corroborated by two eyewitnesses and the responding police officer. 4RP 95-99 (Chanthamaly); 6RP 212-14

(Johanson). Officer Walter interviewed Ellen, wrote a police report, and photographed the bite mark on Ellen's hand. 4RP 118-21. Indeed, the State pointed out in closing "[i]t is unrefuted that the defendant took Ellen Swanson's purse from her through force. Unrefuted." 6RP 296.

By contrast, there was no corroborating evidence or witnesses to the assault, which was based exclusively on Ellen's testimony. The State acknowledged this, and accordingly had to argue in closing that "the credible testimony of one witness is sufficient to find a defendant guilty . . . And so, Ellen Swanson's credible testimony is sufficient." 6RP 269. In Sutherby, the court concluded evidence of certain counts was weaker where it consisted solely of trial testimony, prior statements by the victim, and inconclusive medical records. 165 Wn.2d at 885. The evidence was much weaker in Swanson's case, consisting of only Ellen's trial testimony.

Furthermore, the witnesses to the robbery unfairly bolstered Ellen's testimony about the assault. The fact that Ellen appeared to be telling the truth about the robbery made her testimony about the assault more credible. The State emphasized this in closing. Discussing how Ellen said Swanson read her e-mail, the State acknowledged "[t]here's not going to be anything that's useful in the way of corroborating evidence to support that. You just have to evaluate her credibility with regard to that, based on her testimony." 6RP 294. The State continued, however, "we know that a lot of what Ms.

Swanson told you was true . . . because it's corroborated by two eye-witnesses." 6RP 294. The State essentially bootstrapped the weak assault charge onto the much stronger robbery charge. "When one case is remarkably stronger than the other, severance is proper." MacDonald, 122 Wn. App. at 815. The first factor therefore supports severance.

Second, Swanson's defenses to the two charges were antagonistic. His defense to the assault charge was to attack Ellen's credibility and bias, as well as the general lack of corroboration. 6RP 283-85. For instance, Swanson's counsel emphasized in closing:

Any time there's a marriage that's heading towards divorce, the parties could have powerful motive to spin things to their advantage, to make an accusation against the other party: to, say, get a let up in child custody proceedings.

Or, in this case, where there was a shared condominium, get possession of a principle residence.

Or, just in general, to get leverage in the impending divorce.

So, it's important -- that much more important in these types of cases -- to look beyond just the word of an accuser, someone that you don't know, and have very little opportunity to observe or get to know.

6RP 283. He also pointed out that Ellen did not report the assault. 6RP 284.

Conversely, Swanson did not dispute he grabbed Ellen's purse from her on April 28. CP 27-28. Nor could he, really, because of the eyewitness corroboration. Rather, his defense was that the contents of Ellen's purse—

including their shared business records—were community property. 6RP 286-91. As such, Swanson argued he could not have intent to steal his own shared property: “So, this is not a situation where someone is trying to steal something that they have no right to.” 6RP 288. In other words, he asserted a legal defense to the essential intent to steal element of robbery. 6RP 289.

Swanson’s legal defense to the robbery was more definite and straightforward than his amorphous attack on Ellen’s credibility on the assault charge. Swanson’s defense to the robbery also undercut his defense to the assault, because he was forced to acknowledge he “behaved badly” in grabbing Ellen’s purse. 6RP 290. His admittedly aggressive, forceful behavior on April 28 bolstered Ellen’s credibility as to the April 23 assault. If Swanson grabbed Ellen’s purse on April 28, then how could he legitimately argue he did not assault her on April 23? Had the charges been severed, Swanson would not have been forced to undermine his own defense in this way. Such separate defenses no doubt “embarrassed” Swanson. Harris, 36 Wn. App. at 750. The second factor therefore weighs in Swanson’s favor. See Sutherby, 165 Wn.2d at 885 (recognizing denial and lack of intent defenses were inconsistent).

On the third factor, the jury was given the standard instruction that it must decide each count separately. CP 56; WPIC 3.01. However, there was no limiting instruction directing the jury that evidence of one crime could not

be used to decide guilt for the other crime. Sutherby, 165 Wn.2d at 885-86 (emphasizing the difference between these two instructions). Furthermore, as discussed, the State argued in closing that the eyewitnesses to the robbery demonstrated Ellen's testimony, on the whole, was credible. 6RP 294. Severance is appropriate where the State argues that one offense proves the other. See Sutherby, 165 Wn.2d at 885. The third factor also weighs in Swanson's favor.

Fourth, as both the State and the trial court recognized, the robbery would not be admissible to prove the assault. 2RP 36, 44-45. In denying Swanson's severance motion, the trial court focused solely on the cross-admissibility of the assault against the robbery, ignoring the prejudice to the Swanson on the assault charge. 2RP 45.

ER 404(b) bars admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." This includes crimes occurring after the charged conduct. State v. Bradford, 56 Wn. App. 464, 467, 783 P.2d 1133 (1989) ("ER 404(b) applies to evidence of other crimes or acts regardless of whether they occurred before or after the alleged crime for which the defendant is being tried.").

ER 404(b) evidence may be admissible if it is logically relevant to a material issue before the jury, which means the evidence is "necessary to

prove an essential ingredient of the crime charged.” State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). This includes “other purposes,” such as proof of motive, intent, knowledge, plan, identity, absence of mistake, or res gestae. None of these other purposes apply here. There was no dispute as to Swanson’s identity during the assault—the issue was only whether the assault actually occurred. And the offenses were not “so unusual and distinctive” that they rose to the level of a modus operandi. State v. Russell, 125 Wn.2d 24, 67, 882 P.2d 747 (1994).

Most significantly, the robbery occurred *after* the assault. The robbery would therefore not be admissible as res gestae evidence, because the robbery occurred five days after the assault. State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505 (1999) (“Under the res gestae or ‘same transaction’ exception, evidence of other crimes is admissible ‘to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.’” (emphasis added) (quoting State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995))). For another bad act to be admissible under a res gestae theory, it must be “a ‘link in the chain’ of an unbroken sequence of events surrounding the charged offense.” State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (quoting State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). The sequence of events in Swanson’s case was broken by five days time.

Rather, the robbery would go only to show Swanson's aggressive disposition towards Ellen, making the assault more plausible. Such propensity evidence is inadmissible: if Swanson was forceful and aggressive with Ellen on April 28, then he must have also been on April 23. As Swanson's counsel pointed out:

Even if Mr. Swanson did not rob Mrs. Swanson, the fact that he physically fought over property held by Mrs. Swanson could be used by the State to suggest that he is a violent person who was more likely to have committed the uncorroborated assault that allegedly occurred five days earlier.

CP 28. This is precisely the "forbidden inference" ER 404(b) is designed to prevent. State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999); accord State v. Watkins, 53 Wn. App. 264, 271-72, 766 P.2d 484 (1989) (holding the trial court abused its discretion in denying severance when only this factor was met).

The Washington Supreme Court has recognized "the risk of unfair prejudice is very high" when propensity evidence is admitted in domestic violence cases. State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). In Gunderson, it was reversible error to admit two prior domestic violence incidents between Gunderson and the complaining witness when Gunderson was charged with violation of a no-contact order. Id. at 919-21. The court concluded "it is reasonably probable that absent the highly

prejudicial evidence of Gunderson's past violence the jury would have reached a different verdict." Id. at 926. Like in Gunderson, the robbery was very prejudicial to the assault because it suggested an ongoing pattern of domestic violence.

Finally, the prejudice resulting from joinder outweighed the concern for judicial economy in Swanson's case. Trial on both counts lasted just a few days. Had the assault been severed, only Ellen would have to return to court to testify. Severance would inconvenience no other witnesses. Nor would such a brief trial be a great burden on the court or the prosecutor's office. As a gross misdemeanor, fourth degree assault would also fall within the jurisdiction of King County District Court, allowing for a six-member jury and shorter jury selection.<sup>3</sup>

For all reasons discussed, there is great danger the jury used evidence of both charges to infer a criminal disposition. Likewise, the jury may have cumulated the evidence of the crimes to find guilt. At the very least, trying the charges together necessarily engendered a latent feeling of hostility toward Swanson. A jury instruction to decide the counts separately was not sufficient to mitigate the prejudice inherent in trying the two counts together.

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<sup>3</sup> RCW 3.66.010(1) (district courts may impanel a jury to try a criminal case in accordance with chapter 12.12 RCW); RCW 3.66.060(1) (district courts have jurisdiction "[c]oncurrent with the superior court of all misdemeanors and gross misdemeanors committed in their respective counties"); RCW 12.12.030 (jury shall be composed of six persons).

Therefore, the assault and robbery counts should have been severed to guarantee Swanson a fair trial. This Court should reverse and remand for a new trial. Harris, 36 Wn. App. at 752.

2. APPELLATE COSTS SHOULD NOT BE IMPOSED.

If Swanson does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts “may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State’s request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State’s request for costs).

Swanson’s ability to pay must be determined before discretionary LFOs are imposed.<sup>4</sup> The trial court made no such finding, instead waiving all discretionary LFOs. 7RP 12; CP 72. The court explained, “Mr. Swanson needs to put his resources into finishing treatment and also supporting his child as well as the financial obligations imposed in family court.” CP 72.

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<sup>4</sup> See State v. Duncan, 185 Wn.2d 430, 436, 74 P.3d 83 (2016) (recognizing “[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations,” and a “constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements,” including “[t]he financial resources of the defendant must be taken into account” (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992))).

An award of appellate costs would undermine this legitimate goal. Furthermore, at sentencing, Swanson explained he was in bankruptcy proceedings and “[w]e are out of money at this point.” 7RP 13-15.

Finally, the trial court entered an order of indigency, finding Swanson “unable by reason of poverty to pay for any of the expenses of appellate review.” CP 75. There has been no order finding Swanson’s financial condition has improved or is likely to improve. RAP 15.2(f) specifies “[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” This Court must therefore presume Swanson remains indigent and give him the benefits of that indigency. RAP 15.2(f).

For these reasons, this Court should not assess appellate costs against Swanson in the event he does not substantially prevail.

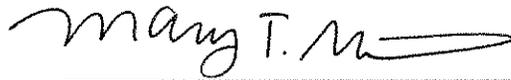
D. CONCLUSION

For the reasons discussed above, this Court should reverse Swanson's conviction and remand for a new trial.

DATED this 29<sup>th</sup> day of September, 2016.

Respectfully submitted,

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