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WASHINGTON STATE
SUPREME COURT

FILED
Apr 25, 2016
Court of Appeals
Division I
State of Washington

Supreme Court No. 93100-3
Court of Appeals No. 72411-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JENARO HERNANDEZ,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. Hernandez requests this Court grant review pursuant to RAP 13.4(b) of the published decision of the Court of Appeals, Division One, in *State v. Jenaro Hernandez*, No. 72411-8-I, filed February 16, 2016. A copy of the opinion is attached as Appendix A. The Court of Appeals denied Mr. Hernandez's motion to reconsider on March 24, 2016. A copy of the court's order is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. A defendant can forfeit his Sixth Amendment right to confront the witnesses against him, but only in very limited circumstances. Before a witness will be deemed "unavailable" for purposes of the forfeiture by wrongdoing doctrine, the State must make reasonable, good faith efforts to secure the witness's presence at trial. Here the State made an attempt to reach the witnesses by phone in Mexico, but did not even follow up with a letter explaining they must return for trial. Where the State was permitted to proceed against Mr. Hernandez without the necessary witnesses, using their hearsay statements instead, should review be granted in the substantial public interest? RAP 13.4(b)(4).

2. Before the trial court could find Mr. Hernandez forfeited his Sixth Amendment right to confront the witnesses against him, it also needed to determine he engaged in "wrongdoing." Where the transcripts

show Mr. Hernandez offered support for the witness's plan to leave for Mexico, but not that he bribed or intimidated her, should this Court accept review in the substantial public interest? RAP 13.4(b)(4).

3. The State requested $5,942.01 in appellate costs and the Court of Appeals granted this request over Mr. Hernandez's objection. Should this Court grant review in the substantial public interest because the record demonstrated Mr. Hernandez does not have the ability, or likely future ability, to pay these legal financial obligations? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

The State charged Jenaro Hernandez with multiple counts of first degree child rape and first degree child molestation, alleging he assaulted his girlfriend's daughter. CP 150. Before trial, Mr. Hernandez moved to compel the State to produce the daughter, Y.M., and her mother, Olga Cruz-Mendez, for defense interviews. CP 176; 6/5/14 RP 42. In response, the deputy prosecutor explained it had come to his attention several weeks before that Ms. Mendez-Cruz had unexpectedly vacated her apartment and moved to Mexico, taking Y.M. and Y.M.'s older brother, Miguel Cruz, with her. 6/5/14 RP 42.

The State acknowledged it had "some obligation to make diligent efforts" to put its witnesses in contact with the defense but that "those efforts can't really extend into Mexico for all practical purposes" and that

the State intended to proceed at trial "by way of child hearsay and corroborative evidence." 6/5/14 RP 43. In ruling on Mr. Hernandez's motion, the court ordered the State to "make reasonable and diligent efforts to locate and produce witnesses Y.M. and Olga Mendez for defense interviews before trial." CP 175; 6/5/14 RP 45-46.

A few days later, the State moved to continue the trial date, arguing it needed more time to investigate an additional charge of witness tampering because, upon reviewing recorded jail phone calls between Mr. Hernandez and Ms. Mendez-Cruz, it appeared the two discussed Ms. Mendez-Cruz's departure for Mexico before she left. CP 107-111; 6/13/14 RP 3-4. According to the deputy prosecuting attorney's affidavit attached to the motion, Ms. Mendez-Cruz's sister-in-law reported Ms. Mendez-Cruz had chosen to leave because of the difficulty in managing all of the appointments the State required her to attend related to the charges against Mr. Hernandez. CP 107.

According to the State, Ms. Mendez-Cruz's brother reported Ms. Mendez-Cruz had arrived safely in Oaxaca and would be visiting their mother soon. CP 108. The brother provided his mother's phone number, but when a detective called the number a young woman answered, said she did not know who Ms. Mendez-Cruz was, and instructed the detective not to call again. CP 108. The State made no additional efforts to locate

Ms. Mendez-Cruz or Y.M. Finding the State had demonstrated good cause, the trial court granted the State's motion to continue. CP 103. Mr. Hernandez was later arraigned on an additional charge of tampering with a witness. CP 63.

In a motion in limine, the State sought the admission of statements made by Y.M., Ms. Mendez-Cruz, and Miguel under the forfeiture by wrongdoing doctrine.[1] 2 RP 152. The court granted the State's motion, allowing the admission of all of Y.M.'s statements, as well as limited statements made by Ms. Mendez-Cruz and Miguel. 2 RP 177. Finding no guidance regarding how the forfeiture by wrongdoing doctrine interacts with the admission of child hearsay, the court performed a separate child hearsay analysis and determined Y.M.'s statements were nontestimonial and admissible pursuant to the child hearsay exception as well. 2 RP 216-220, 233.

At trial, the State offered Y.M.'s statements through school personnel and the forensic nurse examiner. 3 RP 254, 297, 326; 5 RP 520. It also played Y.M.'s interview with an investigator for the jury. 4 RP 388. It offered Miguel's statement that Mr. Hernandez and Y.M. had once been in the bedroom behind a locked door, which Miguel thought was strange. 6 RP 618. It offered statements by Ms. Mendez-Cruz that Miguel

[1] For purposes of clarity, Y.M.'s older brother will be referred to herein by his first name.

had told her about this incident and she had questioned Y.M., as well as information about Ms. Mendez-Cruz's work hours and when Mr. Hernandez typically stayed at the house. 5 RP 591-96. A jury convicted Mr. Hernandez of all seven charges and the trial court imposed an indeterminate sentence of 318 months to life. CP 3, 6. The Court of Appeals affirmed. Slip Op. at 16.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. **This Court should grant review because the Court of Appeals' determination that the witnesses were "unavailable" raises an issue of substantial public interest.**

a. The State was required to engage in reasonable, good faith efforts to secure the witnesses' presence at trial.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." Const. Amend. VI; Const. art. I, 22. A defendant can forfeit this right through his actions, but only in very limited circumstances. *State v. Dobbs*, 180 Wn.2d 1, 11, 16, 320 P.3d 705 (2014). In order to find the defendant has forfeited his confrontation rights, the court must determine by clear, cogent, and convincing evidence that the witness was made unavailable by the wrongdoing of the accused and that the defendant engaged in the wrongful conduct with the intention of preventing the witness from testifying. *Dobbs*, 180 Wn.2d at 11; ER

804(6). Evidence is clear, cogent, and convincing when the facts have been shown to be "highly probable." *Dobbs*, 180 Wn.2d at 12.

In a motion in limine, the State sought to admit out-of-court statements made by Y.M., Miguel, and Ms. Mendez-Cruz, for their truth under the forfeiture by wrongdoing doctrine. 2 RP 159. The trial court granted the State's motion. 2 RP 177. In doing so, it failed to address whether the witnesses were "unavailable," as required by *Dobbs* and ER 804(b)(6), which provides that a statement is not excluded by the hearsay rule if the declarant is "unavailable as a witness" and the statement is "offered against a party that has engaged directly or indirectly in wrongdoing that was intended to, and did, procure the *unavailability* of the declarant as a witness." (emphasis added).

There is a difference between unavailability for Confrontation Clause purposes and unavailability for evidentiary purposes. *State v. Beadle*, 173 Wn.2d 97, 115, 265 P.3d 863 (2011). "[W]here testimonial evidence is at issue... the Sixth Amendment demands what the common law required; unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In the constitutional sense, unavailability "requires the prosecutor to make a good faith effort to obtain the witness' presence at trial." *State*

v. Ryan, 103 Wn.2d 165, 171, 691 P.2d 197 (1984); *see also Beadle*, 173 Wn.2d at 113; *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). "[T]he lengths to which the prosecution must go to produce the witness is a 'question of reasonableness.'" *State v. Smith*, 148 Wn.2d 122, 132, 59 P.3d 74 (2002); *California v. Green*, 399 U.S. 149, 189 n. 22, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

The State is required to use all available means or procedures at its disposal in order to bring the witness to trial. *State v. Hobson*, 61 Wn. App. 330, 336, 810 P.2d 70 (1991); *State v. Goddard*, 38 Wn. App. 509, 513, 685 P.2d 674 (1984). It is not required to perform a futile act, but if there is even a remote possibility that affirmative measures might produce the declarant, the obligation of good faith may demand the State undertake them. *Smith*, 148 Wn.2d at 132. The burden of proving unavailability for constitutional purposes lies with the proponent of the hearsay statement or, in this case, the State. *Id.*

The Court of Appeals incorrectly found that, under this heightened constitutional standard, the State had met its burden to show it used all available means at its disposal to bring the witnesses to trial. Slip Op. at 12. The record demonstrates that, in fact, the State put forth very little effort to obtain Ms. Mendez-Cruz's presence, and her children's presence, at trial.

b. The State failed to engage in reasonable, good faith efforts to secure the witnesses' presence at trial.

i. *The State had the ability to identify the witnesses' precise location in Mexico.*

As evident from the State's motion for a pre-trial continuance, the State learned from Ms. Mendez-Cruz's brother, Manuel Cruz, that Ms. Mendez had arrived safely in Mexico. CP 108. Although the caller identification on his phone indicated the phone number was "private," Mr. Cruz told a detective his mother had later called and informed him that Ms. Mendez-Cruz had arrived in Oaxaca and planned to visit her soon. CP 108. At trial, Mr. Cruz testified that his mother lives in a small town in Oaxaca where everyone knows each other. 4 RP 418.

Mr. Cruz provided the detective with his mother's phone number. CP 108; 4 RP 419. When the detective called this number, a young woman answered the phone, said she did not know Ms. Mendez-Cruz, and instructed the detective not to call again. CP 108. The State made no further attempts to contact Ms. Mendez-Cruz or secure her presence at trial.

The State did not present this information to the court when arguing its motion in limine and the court did not make a specific finding that the witnesses were unavailable. When arguing its pre-trial motion to continue, the State presented its view that it had "some obligation to make

diligent efforts" but that "those efforts can't really extend into Mexico for all practical purposes." 6/5/14 RP 43.

The first time the trial court addressed the issue of whether the witnesses were "unavailable" was in the course of its ruling on child hearsay. 2 RP 228. The court found, "we have the physical fact that [Y.M.], her mother, and her brother are now in Mexico, which we all know that to be the fact, makes her, per se, unavailable." 2 RP 228. The court's finding that the witnesses were "per se" unavailable is unsupported by authority.

ii. *Given the State's ability to locate the witnesses' precise location, the mere fact they were in Mexico did not support a finding they were "unavailable."*

Where the State makes no effort to produce a witness, it cannot rely on the mere possibility that the witness would resist such efforts. *Hurtado*, 173 Wn. App. at 607. Yet the State appears to have done this here. It presumed, after one phone call in which a detective spoke with an unidentified woman, that Ms. Mendez-Cruz would resist any efforts to return to Washington for trial and made no further attempts to secure her presence at trial.

When a witness is out of the country *and* cannot be located, she is sufficiently unavailable to satisfy the Confrontation Clause. *State v. DeSantiago*, 149 Wn.2d 402, 412, 68 P.3d 1065 (2003). However, these

were not the circumstances presented here. Although Ms. Mendez-Cruz and her children were in Mexico, the State could have easily learned the witnesses' exact location if it had simply asked Mr. Cruz for his mother's address. Contrary to the trial court's assertion that the witnesses being in Mexico made them "per se unavailable," the Ninth Circuit has found that the government's failure to make any effort to contact a witness when it had his address in hand was "per se unreasonable." *United States v. Pena-Gutierrez*, 222 F.3d 1080, 1088 (9th Cir. 2000).

Given that Ms. Mendez-Cruz and her children appeared to be living at an easily ascertained location in a small town in Mexico, it was unreasonable for the State to make one phone call and abandon all efforts to contact Ms. Mendez-Cruz and explain the importance of her returning to Washington with her children. The State's actions fell far short of using all available means to bring the witnesses to trial. *See Hobson*, 61 Wn. App. at 336. Thus, the witnesses were not "unavailable" and the trial court's finding that their statements were admissible under the forfeiture by wrongdoing doctrine violated Mr. Hernandez's Sixth Amendment confrontation right. The Court of Appeals' holding to the contrary raises an issue of substantial public interest and this Court should accept review.

2. This Court should grant review in the substantial public interest because the State did not satisfy the "wrongdoing" requirement.

The trial court's finding, adopted by the Court of Appeals, that the witnesses' statements were admissible under the forfeiture by wrongdoing doctrine was also made in error because the State failed to show Mr. Hernandez engaged in "wrongdoing." Under *Dobbs*, the court must find both that the witness was made unavailable by the wrongdoing and that the defendant engaged in the wrongful conduct with the intention of preventing the witness from testifying. 180 Wn.2d at 11.

The doctrine is designed to present defendants from having an incentive to "bribe, intimidate, or even kill witnesses against them." *Id.* at 4 (quoting *Giles v. California*, 554 U.S. 353, 365, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)). Thus, courts have found wrongful conduct where the defendant committed an act of violence against a witness. *See State v. Mason*, 160 Wn.2d 910, 916, 162 P.3d 396 (2007) (defendant killed his friend); *Giles*, 554 U.S. at 356 (defendant shot and killed his ex-girlfriend). Courts have also found wrongful conduct where the defendant threatened violence against a witness. *See State v. Fallentine*, 149 Wn. App. 614, 622, 215 P.3d 945 (2009) (witness feared for his life if he testified); *Dobbs*, 180 Wn.2d at 12-13 (defendant brandished a gun and threatened to kill his ex-girlfriend if she testified against him).

Here, there is no indication Mr. Hernandez induced Ms. Mendez-Cruz to leave for Mexico through a wrongful act of bribery, intimidation, or violence. Instead, the transcript of the jail phone calls demonstrate Mr. Hernandez offered support for Ms. Mendez-Cruz's decision to leave the state.

When determining whether to admit the witnesses' statement under the forfeiture by wrongdoing doctrine, the trial court rejected the State's concession that Ms. Mendez-Cruz was the first to propose returning to Mexico before trial. 2 RP 154, 173. However, the transcript shows the court erred in making this finding and that, in fact, Ms. Mendez-Cruz did broach the subject first:

> Olga – Should I go to Mexico with the kids?
>
> Jenaro – Eh?
>
> Olga – Should I go to Mexico with the kids?
>
> Jenaro – If you do it, you should do it as soon as possible.
>
> Olga – That's what I'm telling you. I think it would be easier, no?
>
> Jenaro – Yeah. But if you do that you should decide it right away, before trial.
>
> Olga – That's why I'm saying.
>
> . . . .

Jenaro – Yeah, but... But I don't want that either, I don't want you to go to Mexico.

Olga – Why?

Jenaro – Well no, I don't know. It doesn't give me a good feeling.

Olga – But then you can go to trial, and even win it.

Jenaro – If that happens, I would win the trial for sure. But we cannot talk about that over the phone, my love. It's your decision, not mine. I don't know, I don't know what you can do about that so... understand?

. . . .

Jenaro – But if you want, think about it. I don't know what you'll decide. You can do it, and maybe it can be good, it can be bad. I don't know.

Olga – It's the only option too.

Jenaro – Oh yeah, it's a very good option, and I had never thought about that one either.

Olga – But I'm telling you, is [sic] the only option I have.

Ex. 15 at #118, 8:01.

Mr. Hernandez later offered to help Ms. Mendez-Cruz with the cost of going to Mexico. Ex. 15 at #128, 17:02. While she expressed hope that she would not have to leave, he did not threaten or intimidate her, and she proceeded to discuss the details with him at great length over the course of several weeks. Ex. 15 at #128, 1:18 - #157, 2:50. Evidence presented at the child hearsay hearing suggested Ms. Mendez-Cruz's

primary motivation for leaving for Mexico was a fear that her children would be removed from her care, after CPS indicated as much when it discovered she was leaving the kids home alone.[2] 1 RP 72.

The State claimed Mr. Hernandez's actions constituted "wrongdoing" because a court order prohibited Mr. Hernandez from contacting Ms. Mendez-Cruz. 2 RP 153. However, the violation of the court order is not what caused Ms. Mendez-Cruz to take her children and leave for Mexico. *See Dobbs*, 180 Wn.2d at 11 (a defendant forfeits his confrontation rights when "the witness had been made unavailable *by* the wrongdoing." (emphasis added)). Unlike an act of bribery, intimidation, or violence, Mr. Hernandez's assistance with a plan that Mr. Mendez-Crus initiated was not "wrongful conduct."

Because the State failed to satisfy the requirements of the forfeiture by wrongdoing doctrine, the trial court was required to evaluate whether Y.M.'s statements were admissible under RCW 9A.44.120, which allows for a child's hearsay statements to be admitted under certain circumstances. The Court of Appeals declined to engage in a hearsay analysis because it found the statements were properly admitted under the

[2] This is unsurprising, given evidence presented at the child hearsay hearing and trial indicated Mr. Hernandez watched the children while Ms. Mendez-Cruz worked. 1 RP 34; 3 RP 263; 5 RP 592.

forfeiture by wrongdoing doctrine. Slip Op. at 15. This Court should accept review and conduct the appropriate analysis.

3. This Court should grant review because the Court of Appeals' order imposing costs on appeal against Mr. Hernandez, when the record demonstrates he does not have the ability to pay, raises an issue of substantial public interest.

In *Blazina* this Court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. 182 Wn. 2d 827, 835, 344 P.3d 680 (2015). Among other concerns, unpaid costs from a criminal conviction increase recidivism for indigent offenders because they "accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time" and an impoverished person is far more likely to accumulate astronomical interest than a wealthy person who can pay the costs in a timely manner. *Id.*

To confront this problem, as well as the other serious consequences of LFOs, this Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn. 2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.*

The *Blazina* court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the *Blazina* court identified.

In acknowledgement of *Blazina*, the Court of Appeals recently determined in *State v. Sinclair* that it was not appropriate to refrain from exercising its discretion on appellate costs, or to delegate that discretion to the trial court. 192 Wn. App. 380, 389, 367 P.3d 612 (2016). Instead, the court determined it should rely on the record available on appeal to determine whether appellate costs should be awarded. *Id.* In this case, despite the trial court's determination that Mr. Hernandez could not pay more than $600 in LFOs, the Court of Appeals reviewed the record on Mr. Hernandez's motion for reconsideration, including the supplemental documentation provided by the State, and ordered Mr. Hernandez to pay $5,942.01 in costs. Appendix B; Appendix C (State's Cost Bill).

This ruling was made in error. The record shows Mr. Hernandez qualified for indigent defense services in the trial court and continued to qualify for indigent defense services on appeal. Mr. Hernandez was convicted of multiple counts of first degree child rape and first degree child molestation, and sentenced to an indeterminate sentence of 318 months to life. CP 3, 6. At his sentencing, the trial court only imposed the LFOs it deemed mandatory, which totaled $600. CP 9. This record does not demonstrate Mr. Hernandez's financial condition has improved from the time the trial court made this finding, nor does the record suggest it will improve in the future. *See Sinclair*, 192 Wn. App. at 393.

In response to Mr. Hernandez's motion for reconsideration, the State produced copies of the case financial history, showing Mr. Hernandez owed a total of $700 and that despite making regular payments since December 2014, he has paid only $136.10. Appendix D (Case Financial History). Yet his balance remains $680.41, because $116.51 in interest accrued over that same time period. Thus, over a period of 15 months of regular payments, he has paid less than $20 of the original balance. In addition, the documentation produced by the State shows Mr. Hernandez's payments have been less frequent lately. In January, February, and March of this year he was able to pay only $8.06. Appendix D. The record does not support a finding Mr. Hernandez has

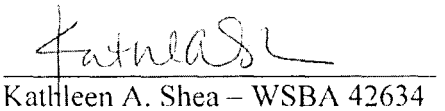
February, and March of this year he was able to pay only $8.06. Appendix D. The record does not support a finding Mr. Hernandez has the ability, or likely future ability, to pay $5,942.01 in appellate costs, and this Court should accept review.

E. CONCLUSION

The Court should grant review of the Court of Appeals published opinion affirming Mr. Hernandez's conviction and subsequent award of appellate costs.

DATED this 25th day of April, 2016.

Respectfully submitted,



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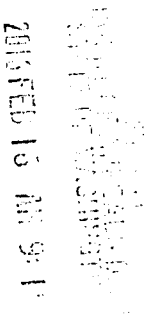
APPENDIX A

COURT OF APPEALS, DIVISION I PUBLISHED OPINION

February 16, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JENARO DE JESUS HERNANDEZ, Appellant.	)	DIVISION ONE No. 72411-8-I PUBLISHED OPINION FILED: February 16, 2016



DWYER, J. — Two principles control the decision in this case. First, under the doctrine of forfeiture by wrongdoing a defendant forfeits his Sixth Amendment right to confront a witness against him when clear, cogent, and convincing evidence demonstrates that he engaged in wrongdoing that was designed to, and did, procure the unavailability of the witness at trial. Second, when a defendant forfeits his Sixth Amendment right of confrontation by wrongdoing, he also forfeits his right to interpose hearsay objections to the same evidence. In this case, involving allegations of sex crimes committed upon Y.C., a child, by Jenaro Hernandez, the trial court correctly ruled that Hernandez engaged in wrongdoing—with Olga, Y.C.'s mother as his co-conspirator[1]—that was designed to, and did, procure the unavailability of Y.C., Olga, and Y.C.'s brother at trial. The trial court, thus, correctly ruled that Hernandez had forfeited his Sixth Amendment right to confront any of these witnesses. Additionally, because

[1] For clarity, we refer to Y.C.'s mother by her first name, Olga.

Hernandez forfeited his Sixth Amendment right of confrontation, he also forfeited the right to interpose hearsay objections to Y.C.'s testimony, including an objection pursuant to RCW 9A.44.120, the child hearsay statute. Accordingly, we affirm.

I

On November 21, 2013, eight-year-old Y.C. approached her teacher in the classroom at her school. Y.C. told her teacher that "this hurts," while pointing to her genital area. When Y.C.'s teacher asked why it was hurting, Y.C. responded "[m]y stepdad." Y.C.'s teacher then asked if it had been going on for a while, and Y.C. responded "yes."

Y.C.'s teacher left her classroom in the care of a student teacher and immediately escorted Y.C. to the nurse's office. Upon arrival, Y.C's teacher located the school nurse and the school psychologist. Y.C.'s teacher informed them that "we may have an issue of abuse here, sexual abuse." While in the nurse's office, Y.C. explained—in the presence of her teacher, the nurse, and the psychologist—that the alleged sexual contact with her "stepdad" began when she was six years old and recounted the details to them. Following this conversation with Y.C., the psychologist wrote a report and telephoned both the police and Child Protective Services.

Later that same day, Y.C. was taken to the Swedish Mill Creek emergency department by a foster care representative. She was there examined by a forensic nurse. During that examination, Y.C. identified her "stepdad,"

Hernandez, as the man who had sex with her.[2] Y.C. also, once again, recounted the details of her alleged sexual contact with Hernandez.

In the days following Y.C.'s initial report at school, Y.C. was interviewed by a child interview specialist at the request of law enforcement. Olga and Y.C.'s brother also spoke with Detective Karen Kowalchyk of the Everett Police Department about the instances of alleged sexual contact between Hernandez and Y.C.

Ultimately, the State charged Hernandez by twice amended information with three counts of rape of a child in the first degree, three counts of child molestation in the first degree, and one count of tampering with a witness. He pleaded not guilty to all counts.

On June 3, 2014, the defense filed a motion to compel witness interviews with Y.C. and Olga. Two days later, the parties appeared before the trial judge to address preliminary matters. Defense counsel orally moved to compel interviews with the intended witnesses.

> MS. LOPEZ DE ARRIAGA [Defense Counsel]: We had interviews scheduled today at 2:30 of the alleged victim and her mother. It's my understanding from counsel that those are not going to go forward. I can't defend my client effectively, Your Honor, without that interview. I'm here asking the Court to compel the State to produce the witnesses for interview.
>
> THE COURT: Do you have any objection?
>
> MR. ALSDORF [Prosecutor]: I don't really see a way I can object, but I would like to explain the state of affairs, if that's okay, if I could by way of [an] offer of proof.

---

[2] The record indicates that Hernandez was actually Olga's boyfriend.

THE COURT: Go ahead.

MR. ALSDORF: It came to my attention, perhaps about a month ago now, a few weeks ago anyway, that [Y.C.], the victim in this case, had stopped attending school. When Child Protective Services went to investigate why she was no longer coming to school, they went to her apartment and found that the apartment had been completely moved out of. No sign of anyone residing there.

Who should have been resid[ing] there is [Y.C.], her older brother, [M.C.], and [Y.C.'s] mother, all three of whom would be witnesses if they were available.

I had Detective Kowalchyk investigate the matter. Her efforts included contacting co-workers of [Y.C.'s] mother at her place of employment. They confirmed that [Y.C.'s] mother had also stopped attending her job. Further, that they had heard from her by telephone, and that [Y.C.'s] mother was indicating over the telephone that she had taken [Y.C.] and herself to Mexico specifically to avoid all of the appointments, I think, related to this case and this investigation.

So that's our understanding of where [Y.C.] and her mother and her brother are is in Mexico. Although I certainly acknowledge the State has some obligation to make diligent efforts to put our witnesses in contact with the defense for an interview, I think that those efforts can't really extend into Mexico for all practical purposes.

. . . .

So I guess that's my way of saying [that] I intend to proceed in this case without the live testimony of [Y.C.], her mother, or her brother.

The trial court then ordered "the State to make reasonable and diligent efforts to locate and produce those witnesses." In so ordering, the trial judge noted that, "I think that's all the Court can do and all that the State is responsible to do."

Following this ruling, the State continued its efforts to procure the presence of the intended witnesses at trial. These efforts were later outlined in an affidavit that was attested to by the prosecutor and in the State's trial

memorandum as detailed offers of proof to the trial court. The record indicates that the State's efforts included having Detective Kowalchyk contact Olga's employer, co-workers, and several of her family members. Olga's brother provided Kowalchyk with a private telephone number in Mexico, from which he had received a call from Olga. The State's affidavit detailed that when Kowalchyk utilized an interpreter to call the telephone number provided by Olga's brother, "[o]n the third attempt a young woman answered, who claimed to not know who Olga was and that it must be a wrong number. This woman assertively told the interpreter to never call back again."

In addition to making these telephone calls, the affidavit explained that "the State obtained copies of the audio recordings of all of the defendant's jail phone calls" and arranged to have them translated from Spanish into English. A preliminary examination of the call log was "concerning" to the State, given that it evidenced that "the defendant ha[d] placed 142 calls to Olga's cell phone number since the Court ordered him not to have contact with any [of the] State's witnesses. Since that time the defendant ha[d] also placed 16 calls to the land line associated with Olga and [Y.C.'s] now-vacant apartment."

Finally, the affidavit detailed that the prosecutor "asked Detective Kowalchyk to investigate whether corroborative evidence exist[ed] to prove exactly when Olga, [Y.C.], and [Y.C.'s brother], purchased tickets to travel by bus to Mexico, and when they crossed the border." In effectuating this request, Kowalchyk contacted the Greyhound bus company and law enforcement officials

who were familiar with the border between the United States and Mexico.[3]

On June 23 and 24, the court held a hearing to determine the admissibility of certain statements made by Y.C., Olga, and Y.C.'s brother. After hearing testimony and the argument of counsel, the trial court found that statements made by Y.C., Olga, and Y.C.'s brother were admissible pursuant to the forfeiture by wrongdoing doctrine and that certain of Y.C.'s statements were admissible pursuant to the child hearsay statute, RCW 9A.44.120.[4]

A trial was held and the jury found Hernandez guilty on each count. He was sentenced to an indeterminate sentence ranging from a minimum of 318 months of confinement to a maximum term of life in prison. He now appeals.

II

Hernandez contends that the trial court erred by concluding that certain statements made by Y.C., Olga, and Y.C.'s brother were admissible under the forfeiture by wrongdoing doctrine. This is so, he asserts, both because the "State did not satisfy the 'wrongdoing' requirement,"[5] and because the witnesses were not "unavailable" as evidenced by "the State['s] fail[ure] to engage in reasonable, good faith efforts to secure the witnesses' presence at trial."[6] We disagree.

"The Sixth Amendment provides that '[i]n all criminal prosecutions, the

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[3] The record indicates that, when the intended witnesses were still in the United States, the State's efforts to procure their presence at trial included having a prosecutor and a victim witness advocate meet with Y.C. and Olga. In addition, after receiving notification that the intended witnesses may have been in Mexico, the State mailed subpoenas to their last known address.

[4] The trial judge did make a redaction to one of Olga's statements. He declined to admit what he deemed to be a "very speculative" statement that was uttered by Olga about Hernandez's alleged desire to touch Y.C.

[5] Br. of Appellant at 20.

[6] Br. of Appellant at 1, 17.

accused shall enjoy the right . . . to be confronted with the witnesses against him.'" State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009) (alterations in original) (quoting U.S. CONST. amend. VI). "[T]he Sixth Amendment's right of an accused to confront the witnesses against him . . . is made obligatory on the States by the Fourteenth Amendment." Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).[7]

The right of confrontation has been "'most naturally read'" as "'admitting only those exceptions established at the time of the founding.'" Giles v. California, 554 U.S. 353, 358, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (quoting Crawford v. Washington, 541 U.S. 36, 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). Under one such exception, the forfeiture by wrongdoing doctrine, "defendants who are responsible for a witness' unavailability at trial forfeit their right to confront the missing witness." State v. Mason, 160 Wn.2d 910, 924, 162 P.3d 396 (2007). Forfeiture occurs "when clear, cogent, and convincing evidence shows that the witness has been made unavailable by the wrongdoing of the defendant and that the defendant engaged in the wrongful conduct with the intention to prevent the witness from testifying." State v. Dobbs, 180 Wn.2d 1, 11, 320 P.3d 705 (2014).[8] "'To permit the defendant to profit from such conduct

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[7] "Article I, section 22 of the Washington Constitution also guarantees criminal defendants the right to confront and cross-examine witnesses against them. However, as [the defendant] made no arguments based on the state constitution, we do not address the state constitution here." State v. Ohlson, 162 Wn.2d 1, 10 n.1, 168 P.3d 1273 (2007).

[8] We review legal issues arising out of the Sixth Amendment's confrontation clause de novo. Koslowski, 166 Wn.2d at 417. When we review factual findings that must be proved by clear, cogent, and convincing evidence, as here, "the fact at issue must be shown to be 'highly probable.'" Dobbs, 180 Wn.2d at 11 (quoting In re Welfare of Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)); Mason, 160 Wn.2d at 926-27 (declining to adopt a preponderance of the

would be contrary to public policy, common sense and the underlying purpose of the confrontation clause.'" Dobbs, 180 Wn.2d at 5 (quoting United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976)).

A

Hernandez first asserts that the State failed to demonstrate that he engaged in wrongdoing. We disagree.

The forfeiture doctrine's application is not limited to direct acts of wrongdoing by a defendant. Giles, 554 U.S. at 359-61. Indeed, it includes instances where a defendant "uses an intermediary for the purpose of making a witness absent." Giles, 554 U.S. at 360. In addition, it is not limited to acts of wrongdoing that are procured by means of violence. Dobbs, 180 Wn.2d at 4 (noting that "[w]ithout such a forfeiture rule, defendants would have 'an intolerable incentive . . . to *bribe*, *intimidate*, or even kill witnesses against them'" (emphasis added) (alteration in original)) (quoting Giles, 554 U.S. at 365).

In ruling on the motion in limine, the trial judge made a factual determination that Hernandez engaged in wrongdoing by analyzing several recorded jailhouse telephone calls.

> The series of calls that I've reviewed are an effort by [the] defendant to get [Y.C.], Olga, and [Y.C.'s brother] out of the country. They are used in code which is so rudimentary that it does not require a code breaker to understand what is going on here. It

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evidence standard of proof); In re Det. of LaBelle, 107 Wn.2d 196, 209, 728 P.2d 138 (1986) ("[W]here the State must prove its case by clear, cogent and convincing evidence, the evidence must be more substantial than in the ordinary civil case in which proof need only be by a preponderance of the evidence, in other words, the findings must be supported by substantial evidence in light of the 'highly probable' test." (citation omitted)).

is not speculation to understand that the words "goats" and "herd" refer to the children. "Shepherd" refers to Olga. "Movies" refers to Mexico. "Chocolate" refers to cash. He knows this, he knows he's being recorded, and he makes these references in code that Olga understands in order to manipulate her and to have the effort to get her out of the country established.

The code, as I said, there's no speculation on anybody's part if you read the transcripts as to what's -- what this means and how she responds.

I reject the idea that Olga initiated this. She did not. And I'll get to the transcript. On page 128 of the transcript, in fact, that's clear to me that she did not. If you look at 128, you will see the following exchange:

[Hernandez]: "Hello."

Olga says, "Hello."

[Hernandez]: "Hello, love."

Olga: "Hello, love."

[Hernandez]: "What are you doing?"

"I'm just watching TV," says Olga. "I'm sitting here watching TV."

That conversation is initiated by [Hernandez] and not by Olga. Then goes on. He says, "Olga, I love you. I have to tell you something, but you are going to need to take it not too bad." He goes on to say that, "I'm going to tell you something, but you have to digest it slowly." And then he says, "I don't think what we had planned is going to work." Implying that there was a plan between the two of them.

[Olga]: "Why?"

[Hernandez]: "Because I was talking to my cousin. The flock has got to get -- the flock has to leave, all sheep."

Which is a euphemism for the family.

[Olga]: "What?"

[Hernandez]: "All the sheep have to get out of the pen. Do you understand?"

She says, "So so."

[Hernandez]: "I mean they have to go from one field to the other." Continuing with the agricultural euphemisms.

[Olga]: "Yes, love."

[Hernandez] says, "It's going to be difficult like this because if the flock stays out of the pen, I don't know what will happen really, and I don't want anything bad to happen that's why they have to leave the pen and go [to] another field."

And she says, "All the way to where we talked about?" Implying that Olga knows, of course, where they're going.

[Hernandez]: "Yeah, love. And I'll give you ten chocolates so you can take the flock with you."

Now, there's no evidence before me that this was an agricultural family that owned sheep or goats or had pens or that they were fine diners on chocolates. So I could assume, perhaps, that this would have other meanings. They're euphemisms.

She says, "I don't want to leave."

And then he says, "Me neither. But that's the worst. But don't say it like that. I don't want to take the flock away from here. But, anyway, it has to be done because one way or the other over here, they will look for the flock, and they will take it away from you, and I don't want that."

And her response, "I don't want that either."

That is a clear statement of their plan; a clear statement of the motivation; and a clear statement, in my mind, of what [Hernandez] wants her to do and how he is manipulating her with cash.[9]

They go on to say on page 423 of section 128: "There's an option. It's risky. You have to do it anyway. It's already a mess," and so forth.

The transcripts that I read are replete with this kind of communication between [Hernandez] and Olga, designed to get Olga, [Y.C.], and [Y.C.'s brother] out of the country. And it's designed based upon what the defendant knows about Olga and that she's easily manipulated, she's afraid, and that she's overwhelmed.

And if I look -- as I look at the evidence rule, it has nothing to do with the person who is trying to be – who the defendant is trying

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[9] The record indicates that in a transcript of one conversation Hernandez and Olga discussed the plan to go to Mexico without the use of coded language:

Olga – Should I go to Mexico with the kids?
[Hernandez] – Eh?
Olga – Should I go to Mexico with the kids?
[Hernandez] – If you do it, you should do it as soon as possible.
Olga – That's what I'm telling you. I think it would be easier, no?
[Hernandez] – Yeah. But if you do that you should decide it right away, before trial.
Olga – That's why I'm saying.
[Hernandez] – And then come back in two years.
Olga – If I leave, no no, no . . . How can I say it? If I come back later, what's going to happen?
[Hernandez] – I think they would free me. I don't really know what would happen with that.
. . . .
Olga – But then you can go to trial and even win it.
[Hernandez] – If that happens, I would win the trial for sure . . . But we cannot talk about that over the phone, my love.

> to move out of the country, it has to do with the defendant's actions that we primarily look at. Are his actions designed to have the witness secreted and prevent them from testifying?[10]
>
> The mention of chocolates, certainly euphemism, as I said, for cash. The statement made to the third party about research essentially asking what happens if the victim and the other witnesses are here, what are my odds, so to speak, and I paraphrase.[11] That's contained there. Certainly goes to a scheme or plan on part of the defendant.
>
> So looking at that, looking at the [State v.]Dobbs case,[12] then, it's clear to me by clear, cogent, and convincing evidence that Mr. Hernandez has engaged in activity specifically designed to prevent the witnesses -- Olga, [Y.C.], and [Y.C.'s brother] -- from testifying.

Based on the trial judge's explanation of his ruling, it is evident that the trial judge concluded that Hernandez's use of coded language was an effort to conspire with Olga to take the children to Mexico in advance of his trial date. The

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[10] The trial judge was referring to ER 804(b)(6). This rule creates an exception to the rule against hearsay, provided that the declarant is unavailable as a witness, and the statement that is sought to be admitted is "[a] statement offered against a party that has engaged directly or indirectly in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

[11] The record indicates that in a transcript of one conversation with the unidentified male, Hernandez made the following request:

> [Hernandez] – I want you to do some research for me, man.
> Male – Okay.
> [Hernandez] – Suppose that they are accusing you . . . I am accusing you of . . . Shooting at me.
> Male – Mmmm
> [Hernandez] – Okay, so I go to Mexico, I run off to Mexico . . . you are accusing me, no, I am accusing you of shooting at me, and so I get you in jail. So, I am the only witness, and if I go to Mexico, what would happen to you? Would they let you go free?
> Male – Mmmm . . . I don't know, man.
> [Hernandez] – Look that up for me, man. I need you to look it up for me because something could free me from all this mess. And that's good . . . that I go to Mexico, and you go free . . . that would be free, no?
> Male – Yes, without the witness. . .
> [Hernandez] – Without the victim.
> . . . .
> [Hernandez] – Yes, I need you to do that research because . . . Like I tell you, I want to go to Mexico, and because I don't want to be in jail; maybe they can let you go out . . . and that's what I think, and so if it'll help me, I'll do that business, man.

[12] 180 Wn.2d 1.

coded language, when coupled with Hernandez's request of an unidentified male to conduct research about the law regarding his probability of success if a victim was not present to testify at trial, evidenced intentional acts by Hernandez that were designed to procure the unavailability of a key witness—the victim, Y.C.[13] The trial judge was in the best position to make the determination that Hernandez engaged in wrongdoing. He did so thoroughly, thoughtfully, and with reference to the correct legal standard. There was no error.

B

Hernandez next asserts that the trial court erred by concluding that the witnesses were rendered unavailable. Again, we disagree.

"The Sixth Amendment requires a demonstration of unavailability when the declarant witness is not produced." State v. Ryan, 103 Wn.2d 165, 170, 691 P.2d 197 (1984). "Unavailability means that the proponent is not presently able to obtain a confrontable witness' testimony." Ryan, 103 Wn.2d at 171.

"A witness may not be deemed unavailable unless the prosecution has made a good faith effort to obtain the witness' presence at trial." Ryan, 103 Wn.2d at 170-71 (citing Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)).

> "[T]he lengths to which the prosecution must go to produce the witness is 'a question of reasonableness.'" [State v.]Smith, 148 Wn.2d [122,] 133, [59 P.3d 74 (2002)] (internal quotation marks omitted) (quoting [Ohio v.]Roberts, 448 U.S. [56,] 74, [100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), abrogated on other grounds by Crawford, 541 U.S. 36]). In particular, the "good faith" standard

[13] Indeed, the absence of three potential witnesses was procured: Y.C., Olga, and Y.C.'s brother.

> does not require the State to undertake a "futile act" to satisfy the confrontation clause. Ryan, 103 Wn.2d at 172 (citing Roberts, 448 U.S. at 74). However, if the State makes no effort whatsoever to produce the witness, the State cannot rely on the mere possibility that the witness would resist such efforts.

State v. Beadle, 173 Wn.2d 97, 113, 265 P.3d 863 (2011). The burden of proving unavailability lies with the proponent of the hearsay statement. Beadle, 173 Wn.2d at 112.

Here, the State obtained recordings of numerous jailhouse telephone calls between Hernandez and Olga, and between Hernandez and an unidentified male. It had a Spanish-language interpreter listen to these recordings and transcribe them into English. From a reading of these transcripts, the State was able to establish that Hernandez and Olga acted in concert in developing and implementing a plan to take the children to Mexico in order to ensure Y.C.'s unavailability at trial. Olga's role as a co-conspirator gave the State, and later the court, insight into what efforts would be reasonable in an attempt to procure Y.C.'s presence at trial.

In this context, with the knowledge that Olga was a co-conspirator in the effort to keep Y.C. away from the trial—and given that Y.C. was under Olga's control and custody—the State's efforts to procure Y.C.'s presence at trial included speaking with Olga's employer, co-workers, and family members. The detective obtained a telephone number from Olga's brother and, with the aid of an interpreter, called the telephone number on three separate occasions. On the last occasion, the only occasion on which a call was answered, the interpreter was directed by the call's recipient not to call again. It was reasonable for the

State to infer that the woman who answered the telephone was either Olga herself or someone who was aware of the conspiracy to keep Y.C. away from the trial and that any further efforts to make contact would be futile.

In ruling on whether Y.C. was unavailable at trial—given the State's offer of proof regarding its efforts—the trial judge acknowledged that the joint efforts of Hernandez and Olga "makes unavailable not only Olga and [M.C.], the brother, and the mother of [Y.C.], but [Y.C.] herself. That's the key reason why she is not here. And that clearly is a fact these three parties are not here." Ultimately, the trial judge made a factual determination that "the physical fact that [Y.C.], her mother, and her brother are now in Mexico, which we all know that to be the fact, makes her, per se, unavailable."

Given the trial judge's explanation of his ruling, he clearly concluded that the State's efforts of speaking with Olga's employer, co-workers, and family members, obtaining a private telephone number in Mexico, and utilizing an interpreter to make three separate telephone calls constituted a reasonable response to Olga's flight to Mexico with the children in tow. Moreover, given that Olga and Hernandez were intimately involved in a conspiracy to keep Y.C. away from the trial by causing her to move to Mexico, the State was not presented with a situation akin to attempting to procure the presence of an adult victim at trial. Instead, the trial judge recognized that the State was charged with the task of attempting to change the mind of an adult co-conspirator in order to procure the return to this country and the presence of a child victim for testimony at trial. In this regard, the trial judge reasonably concluded that, given that Y.C. was under

the control and custody of Olga, the State's efforts were circumscribed by Olga's role as a co-conspirator. The trial judge was in the best position to make the determination that Y.C., Olga, and Y.C.'s brother were made unavailable *due to* the efforts of Olga and Hernandez, and that nothing more the State could reasonably have done would have had the foreseeable effect of encouraging Olga to change her mind and return to the United States with Y.C. for Hernandez's trial. The trial judge ruled thoroughly, thoughtfully, and on the record before him. There was no error.[14]

III

Finally, Hernandez contends that the trial court erred by admitting certain statements made by Y.C. pursuant to RCW 9A.44.120, the child hearsay statute. We need not evaluate this claim because Hernandez forfeited his right to interpose such an objection.

In State v. Dobbs, 180 Wn.2d at 16-17, the court addressed whether an individual who forfeits his or her right to confrontation by wrongdoing also forfeits the right to assert hearsay objections to the same evidence. The court held that this is so, explaining that, "when the defendant's actions *are the reason* that the State must rely on out-of-court statements, he is hardly in a position to complain

[14] In his brief, Hernandez argues that the additional step of sending a "letter to the mother's address would have demonstrated at least minimal effort on the part of the State" to procure Y.C.'s presence at trial. Reply Br. of Appellant at 8. Hernandez made no such suggestion to the trial court. Instead, he offers this suggestion to us for the first time on appeal. Unsurprisingly, Hernandez points to nothing in the record that would indicate that such an act would have been anything other than a futile act. The State was not required to engage in futile acts in order to satisfy its burden of proof on the question. Beadle, 173 Wn.2d at 113.

about the use of those out-of-court statements, whether through an assertion of confrontation rights or a hearsay objection." Dobbs, 180 Wn.2d at 16.

Because Hernandez forfeited his Sixth Amendment right of confrontation by engaging in wrongdoing, he also forfeited his right to interpose hearsay objections to the same evidence.

Affirmed.

We concur:

APPENDIX B

ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION

March 24, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

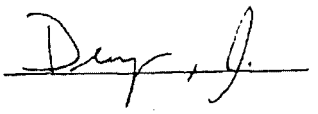
STATE OF WASHINGTON, Respondent, v. JENARO DE JESUS HERNANDEZ, Appellant.	)	DIVISION ONE No. 72411-8-I ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration and objection to cost bill herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration and objection to cost bill be, and the same is, hereby denied.

DATED this 24th day of March, 2016.

For the Court:



2016 MAR 24 PM 3:20

APPENDIX C

STATE'S COST BILL

February 25, 2016

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

THE STATE OF WASHINGTON, Respondent, v. JENARO DE JESUS HERNANDEZ, Appellant.	No. 72411-8-I COST BILL

State of Washington, Respondent, asks that the following costs be awarded:

(1)	Costs of producing Brief of Respondent (39) pages at $2.00 per page	$	78.00
(2)	Reproduction costs charged by the Court for copying the Brief of Respondent	$	7.83
(3)	Costs of producing Petition for Review (__) pages at $2.00 per page	$	-0-
(4)	Reproduction costs charged by the Court for copying State's Petition for Review	$	-0-
(5)	Cost of preparing the Clerk's Papers	$	91.00
(6)	Costs charged by defense for Pro Se Copying: RAP 10.10(e)	$	141.15
(7)	Cost of preparing the transcript	$	2,696.14
(8)	Reproduction costs charged by the Court for copying the Brief of Appellant	$	10.89

(9)	Cost of Court appointed appellate counsel	$ 2,917.00
	TOTAL	$ 5,942.01

The above items are expenses reasonably necessary for review of this matter that were actually incurred by the State in prosecuting the defendant that are allowed as costs by Rule 14.3 and RCW 10.73.160.

Appellant, JENARO DE JESUS HERNANDEZ, should be ordered to pay $85.83 (items 1, 2, 3 and 4) to the Snohomish County Prosecuting Attorney's Office and $5,856.18 (items 5 through 9) to the Appellate Indigent Defense Fund.

DATED this 25 day of February, 2016.

ANDREW E. ALSDORF, #35574
Deputy Prosecuting Attorney
Attorney for Respondent

I certify that I sent via e-mail a copy of the foregoing Cost Bill to: Washington Appellate Project, kate@washapp.org; wapofficemail@washapp.org on the 25th day of February, 2015. 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 25th day of February, 2015, at the Snohomish County Office.

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

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE
Appellate Program

Indigent Defense Fund Cost Summary Request

Use this form to request a summary of the amount paid by the Washington State Office of Public Defense on a case as outlined in RAP 14.3.

TO BE COMPLETED BY REQUESTOR

Request Date: 2/19/16 Hernandez Due Date: 2/29/16
Case Name: Jenkins Jones COA No.: 72411-8
Superior Court No.: 13-1-02023-1 County: Snohomish
Requestor Name: Diane K. Kremenich/Snohomish County Prosecutor's Office
Phone No.: (425) 388-3501 Email Address: Diane.Kremenich@snoco.org

Email the completed request form to: Michele.young@opd.wa.gov

TO BE COMPLETED BY OPD ACCOUNTING DIVISION

Amount Paid to Date

Counsel Fees:	$ 2917.00
VRP:	$ 2696.14
VRP copy (RAP 10.10(e)):	$ 141.15
Clerk's Papers:	$ 91.00
Brief Copies:	$ 10.89
TOTAL:	$ 5856.18

☒ If this box is checked either no invoice or only a partial invoice has been received and additional expenses may be incurred.

For cases consolidated with one or more co-defendants, the amount provided here reflects an even distribution of the total cost with the exception of counsel fees.

Signature of OPD Staff — Date 2/19/16

QUESTIONS

Michele Young, Fiscal and Budget Manager
Washington State Office of Public Defense
P.O. Box 40957
Olympia, WA 98504-0957
(360) 586-3164 ext. 101
michele.young@opd.wa.gov

APPENDIX D

CASE FINANCIAL HISTORY

11:10:44 Tuesday, March 15, 2016

03/15/16 11:10:36

DG1310MI Case Financial History (CFHS) SNOHOMISH SUPERIOR S31

Case: 131026231 S1 Csh: Pty: DEF 1 StID: D HERNAJD186JZ WA

Name: HERNANDEZ, JENARO DE JESUS NmCd: IN 676 11907

A C C O U N T I N G S U M M A R Y

TOTAL TRUST		TOTAL AR			
Current Bail:		AR ORDERED:	Fine/Fee:	700.00	
Bail Payable:			Restitution:		
Undisbursed Fnds:			TOTAL AR ORDERED:		**700.00**
Other Trust:		ADJUSTMENTS:	Fine/Fee:		
Trust Balance:			Restitution:		
Other Rev Rec:			AR ADJUSTMENTS:		
Current Bond:		INTEREST:	Int Accrued:	116.51	
Bond Payable:			Int Received:		
Disbur to Payees:			INTEREST BALANCE:		**116.51**
Bail Forfeit Rec:		RECEIVED:	Fine/Fee:	136.10	
Disp Code:			Restitution:		
Last Receipt Date: **03/01/2016**			TOTAL AR RECEIVED:		**136.10**
Cln Sts: Time Pay: **N**			BAIL/OTHER APPLIED:		
Joint and Several Case: **N**		BALANCE:	Fine/Fee:	680.41	
Case Fund Investments: **N**			Restitution:		
Obligor AR Rec:			TOTAL AR BALANCE:		**680.41**

PF Keys: AR=2 Adj=3 Rec T=4 Rec Dt=5 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11

11:10:52 Tuesday, March 15, 2016

03/15/16 11:10:45
DG1316MI Case Financial History (CFHR) SNOHOMISH SUPERIOR S31 1 of 3
Case: 131026231 S1 Csh: Pty: DEF 1 StID: D HERNAJD186JZ WA
Name: HERNANDEZ, JENARO DE JESUS NmCd: IN 676 11907

RECEIPTING DETAIL

RCPT DATE	RECEIPT NUMBER	PYMT TYPE	PYMT MODE	PAYER NAME	RCPT AMOUNT	DISTRIB AMOUNT	A/R TYPE
12/01/2014	14042348801	AR	CK	STATE, DOC	4.00	4.00	RCC
12/16/2014	14042465401	AR	CK	STATE, DOC	0.72	0.72	RCC
01/02/2015	15040028301	AR	CK	STATE, DOC	2.00	2.00	RCC
01/22/2015	15040158901	AR	CK	STATE, DOC	8.00	8.00	RCC
01/30/2015	15040265301	AR	CK	STATE, DOC	2.00	2.00	RCC
02/20/2015	15040381201	AR	CK	STATE, DOC	0.33	0.33	RCC
03/02/2015	15040461801	AR	CK	STATE, DOC	1.35	1.35	RCC
03/17/2015	15040544701	AR	CK	STATE, DOC	2.44	2.44	RCC
04/20/2015	15040695001	AR	CK	STATE, DOC	6.00	6.00	RCC
05/18/2015	15050343701	AR	CK	STATE, DOC	9.40	9.40	RCC
06/18/2015	15050458201	AR	CK	STATE, DOC	7.40	7.40	RCC
07/07/2015	15041068601	AR	CK	STATE, DOC	7.40	7.40	RCC
07/20/2015	15050600801	AR	CK	STATE, DOC	6.00	6.00	RCC

PF Keys: Sum=12 AR=2 Adj=3 Rec T=4 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11

03/15/16 11:10:50
DG1316MI Case Financial History (CFHR) SNOHOMISH SUPERIOR S31 2 of 3
Case: 131026231 S1 Csh: Pty: DEF 1 StID: D HERNAJD186JZ WA
Name: HERNANDEZ, JENARO DE JESUS NmCd: IN 676 11907

RECEIPTING DETAIL

RCPT DATE	RECEIPT NUMBER	PYMT TYPE	PYMT MODE	PAYER NAME	RCPT AMOUNT	DISTRIB AMOUNT	A/R TYPE
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07/30/2015	15050804701	AR	CK	STATE, DOC	14.00	14.00	RCC
08/20/2015	15050911201	AR	CK	STATE, DOC	6.00	6.00	RCC
08/28/2015	15050999501	AR	CK	STATE, DOC	10.00	10.00	RCC
09/24/2015	15051117401	AR	CK	STATE, DOC	9.00	9.00	RCC
09/30/2015	15051181601	AR	CK	STATE, DOC	3.00	3.00	RCC
10/22/2015	15051317301	AR	CK	STATE, DOC	6.00	5.04	PCV
10/22/2015	15051317301	AR	CK	STATE, DOC		0.96	RCC
10/28/2015	15051385501	AR	CK	STATE, DOC	5.00	5.00	PCV
11/30/2015	15051479501	AR	CK	STATE, DOC	6.00	6.00	PCV
11/30/2015	15051542801	AR	CK	STATE, DOC	6.00	6.00	PCV
12/21/2015	15041408601	AR	CK	STATE, DOC	3.00	3.00	PCV

PF Keys: Sum=12 AR=2 Adj=3 Rec T=4 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11

11:10:52 Tuesday, March 15, 2016

03/15/16 11:10:51
DG1316MI Case Financial History (CFHR) SNOHOMISH SUPERIOR S31 3 of 3
Case: 131026231 S1 Csh: Pty: DEF 1 StID: D HERNAJD186JZ WA
Name: HERNANDEZ, JENARO DE JESUS NmCd: IN 676 11907

RECEIPTING DETAIL

RCPT DATE	RECEIPT NUMBER	PYMT TYPE	PYMT MODE	PAYER NAME	RCPT AMOUNT	DISTRIB AMOUNT	A/R TYPE
12/30/2015	15041471601	AR	CK	STATE, DOC	3.00	3.00	PCV
01/28/2016	16050030601	AR	CK	STATE, DOC	3.00	3.00	PCV
02/17/2016	16050096601	AR	CK	STATE, DOC	2.06	2.06	PCV
03/01/2016	16050161101	AR	CK	STATE, DOC	3.00	3.00	PCV

PF Keys: Sum=12 AR=2 Adj=3 Rec T=4 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11

11:11:02 Tuesday, March 15, 2016

03/15/16 11:10:56
DG1311MI Case Financial History (CFHA) SNOHOMISH SUPERIOR S31 1 of 2
Case: 131026231 S1 Csh: Pty: DEF 1 StID: D HERNAJD186JZ WA
Name: HERNANDEZ, JENARO DE JESUS NmCd: IN 676 11907

ACCOUNTS RECEIVABLE SUMMARY

A/R Type: REIMB-COLL COST A/R Priority: 70
Obligor Name HERNANDEZ, JENARO DE JESUS

Amount :	100.00
Adjustments:	
Amount Received:	100.00
Amount Applied:	
Balance:	

A/R Type: PEN-CRIME VICT A/R Priority: 75
Obligor Name HERNANDEZ, JENARO DE JESUS

Amount :	500.00
Adjustments:	
Amount Received:	36.10
Amount Applied:	
Balance:	463.90

PF Keys:Sum=12 Adj=3 Rec T=4 Rec Dt=5 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11

03/15/16 11:11:01
DG1311MI Case Financial History (CFHA) SNOHOMISH SUPERIOR S31 2 of 2
Case: 131026231 S1 Csh: Pty: DEF 1 StID: D HERNAJD186JZ WA
Name: HERNANDEZ, JENARO DE JESUS NmCd: IN 676 11907

ACCOUNTS RECEIVABLE SUMMARY

A/R Type: DNA COLL FEE 5 A/R Priority: 76
Obligor Name HERNANDEZ, JENARO DE JESUS

Amount :	100.00
Adjustments:	
Amount Received:	
Amount Applied:	
Balance:	100.00

A/R Type: INTEREST INCOME A/R Priority: 78
Obligor Name HERNANDEZ, JENARO DE JESUS

Amount :	116.51
Adjustments:	
Amount Received:	
Amount Applied:	
Balance:	116.51

PF Keys:Sum=12 Adj=3 Rec T=4 Rec Dt=5 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11

11:11:09 Tuesday, March 15, 2016

03/15/16 11:11:05

DG1315MI Case Financial History (CFHR) SNOHOMISH SUPERIOR S31

Case: 131026231 S1 Csh: Pty: DEF 1 StID: D HERNAJD186JZ WA

Name: HERNANDEZ, JENARO DE JESUS NmCd: IN 676 11907

RECEIPT TOTALS

Total Revenue Received:	136.10
Total Probation Received:	
Total Restitution Received:	
Total Bail Received:	
Total Other Trust Received:	
Total Other Revenue Received:	
Total Interest Received:	
Total Bail Forfeiture:	
Grand Total Received:	136.10
Total Applied:	

PF Keys: Sum=12 AR=2 Adj=3 Rec Dt=5 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72411-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Andrew Alsdorf, DPA
[aalsdorf@snoco.org]
Snohomish County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 25, 2016