

73552-7

73552-7

FILED  
May 10, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73552-7-1

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

---

STATE OF WASHINGTON

Respondent

v.

SIMON P. SOLOMON

Appellant

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

KATHLEEN WEBBER  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

**TABLE OF CONTENTS**

I. ISSUES ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT ..... 5

    A. SINCE THE SUPREME COURT HAS REQUIRED TRIAL  
    COURTS TO USE THE CHALLENGED REASONABLE DOUBT  
    INSTRUCTION IT IS NOT MANIFEST CONSTITUTIONAL ERROR  
    TO DO SO..... 5

    B. THE EVIDENCE WAS SUFFICIENT TO PROVE THE  
    DEFENDANT WAS IN POSSESSION OF A FIREARM..... 7

    C. THE COURT SHOULD IMPOSE COSTS ON APPEAL. .... 15

IV. CONCLUSION.....21

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 146 P.3d 423 (2006)..... 6

Glass v. Stahl Specialty Co., 97 Wn.2d 880, 652 P.2d 948 (1982)17

In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 903 P.2d 443 (1995)..... 19

National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1, 66 Wn.2d 14, 400 P.2d 778 (1965)..... 17, 18

Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979)..... 17

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007)..... 5, 6

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997) ..... 18, 19

State v. Bowman, 36 Wn. App. 798, 678 P.2d 1273, review denied, 101 Wn.2d 1015 (1984)..... 8

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990) ..... 15

State v. Faust, 93 Wn. App. 373, 967 P.2d 1284 (1998)..... 13

State v. Garbaccio, 151 Wn. App. 716, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027, 230 P.3d 1060 (2010)..... 7

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) ..... 7

State v. Harras, 25 Wash. 416, 65 P. 774 (1901)..... 6

State v. Keeney, 112 Wn.2d 140, 112 P.2d 140, 769 P.2d 295 (1989)..... 17

State v. Lubers, 81 Wn. App. 614, 915 P.2d 1157, review denied, 130 Wn.2d 1008, 928 P.2d 413 (1996) ..... 8

State v. Mathe, 35 Wn. App. 572, 668 P.2d 599 (1983), affirmed, 102 Wn.2d 537 (1984)..... 8, 9

State v. McKee, 141 Wn. App. 22, 167 P.3d 575 (2007), review denied, 163 Wn.2d 1049 (2008)..... 9

State v. Ng, 110 Wn.2d 32, 750 P.2d 632 (1988)..... 5

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000)..... 16

State v. Padilla, 95 Wn. App. 531, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999)..... 13

State v. Pierce, 155 Wn. App. 701, 230 P.3d 237 (2010).. 11, 13, 15

State v. Raleigh, 157 Wn. App. 728, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029 (2011)..... 8, 12, 13

State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008)... 11, 12, 13

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992)..... 7

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016)..... 16

State v. Tasker, \_\_\_ Wn. App. \_\_\_, ¶ 51, \_\_\_ P.3d \_\_\_ (2016 WL 1701530)..... 8, 13

<u>State v. Thompson</u> , 13 Wn. App. 1, 533 P.2d 395 (1975).....	6
<u>State v. Tongate</u> , 93 Wn.2d 751, 613 P.2d 121 (1980).....	8
<u>Water Dist. No. 111 v. Moore</u> , 65 Wn.392, 397 P.2d 845 (1964) ..	18

**WASHINGTON STATUTES**

Laws of 1995, ch. 275 .....	16
RCW 10.73.150.....	17
RCW 10.73.160.....	16, 17, 19
RCW 10.73.160(1) .....	16
RCW 10.73.160(3) .....	16
RCW 10.73.160(4) .....	20
RCW 10.82.090.....	20

**COURT RULES**

RAP 2.5(a)(3) .....	7
---------------------	---

**OTHER AUTHORITIES**

WPIC 2.10.01 .....	12
WPIC 4.01 .....	1, 5, 6

## **I. ISSUES**

1. Is it manifest constitutional error to use the pattern reasonable doubt instruction, WPIC 4.01?

2. The defendant was charged with unlawful possession of a firearm and first degree robbery with a firearm allegation. Was the evidence sufficient to prove the defendant was armed with a firearm in each of these charges?

3. Should the court impose appellate costs?

## **II. STATEMENT OF THE CASE**

On September 30, 2014 Brandon Smith went to the Walmart on the Tulalip reservation to do some grocery shopping and sell some marijuana. Instead of selling the marijuana, however, the defendant, Simon Solomon, and his accomplice Jal Thareek, robbed him at gunpoint. 4/15/15 RP 47, 51-60.

Mr. Smith had a prescription for medical marijuana. Before September 30 he put an ad on Craigslist to sell some for medical patients only. He received texts to meet on two prior occasions but the contact did not appear. The third attempt to meet was set for the Walmart parking lot on September 30. Smith originally thought he was only communicating with one person. He was concerned

when he learned just before the defendant and Thareek arrived that there were two people coming. 4/15/15 RP 39-50. 98.

J.R. and her mother were also in the Walmart parking lot as Thareek and the defendant approached Smith's car. J.R. saw one of the two men with a gun, and told her mother "mom, that guy has a gun – I seen it." J.R.'s mother was concerned and told her daughter to hurry into the store. 4/14/15 172-173, 202, 215.

When they arrived at Smith's car Thareek got in. Thareek pulled out a small revolver while the defendant knocked on the back driver's side window and demanded to be let in. When Smith would not let him in the defendant ran around to the front passenger side and got in the car as Thareek got out. Thareek then tried to get into the back passenger area but was not able to, ultimately breaking the handle on Smith's door. The defendant hit Smith in the face with his gun, knocking Smith's glasses off. Smith tried to pull his gun out of his pocket, but it snagged on the stitching. The defendant demanded to know where the marijuana was. Smith told the defendant where it was and shined a light on it when the defendant told him to do so. Smith then shined the light on the defendant, knocked his gun away, and then pulled his own gun on the defendant. The defendant yelled "don't shoot me!" and

jumped out of Smith's car. Smith locked the doors. The defendant pounded on the door demanding the marijuana and saying "do you want to get in a firefight?" 4/15/15 RP 52-59.

Smith turned around to see what Thareek was doing when he heard the window shatter. Smith then turned and fired toward the defendant. He did not know if he or the defendant had been shot. Smith then turned and pointed his gun at Thareek, telling him to leave the area. Thareek and the defendant then left the area. 4/15/15/ RP 59-61.

Smith went home and told his wife and his father what happened. Smith and his wife went to the State Patrol office to report the robbery and that Smith had shot at one of the robbers. Police searched the area around where Smith's vehicle had been during the robbery. They found some glass on the ground. There was no marijuana, but there was a baggie that was consistent with the kind used to package marijuana. 4/16/15 R 42-43, 73-77, 11-113, 120-126, 193.

The defendant and Thareek went to Providence Hospital in Everett. There Dr. Crawford treated the defendant for a gunshot wound to his arm. Pursuant to hospital protocol he notified the police. Smith was transported to the hospital where he identified

Thareek as one of the men involved in the robbery. 4/16/15 RP 98-99, 103; 4/17/15 RP 82-83.

Smith had two ounces of marijuana in his car when he arrived at the parking lot, but it was not in his car after the defendant and Thareek ran off. He did not give the defendant or Thareek permission to take his marijuana without paying for it. 4/15/15 RP 57, 107-108, 165-166; 4/16/15 RP 23-24.

The defendant was charged with first degree robbery while armed with a firearm and while on community custody (count I), and unlawful possession of a firearm first degree. 1 CP 180-181. At trial the defendant stipulated that he had been convicted of a serious offense before September 30, 2014. He also stipulated that he had been on community custody on that date. 4/16/15 RP 93-94. The jury convicted the defendant of attempted first degree robbery and unlawful possession of a firearm first degree. The jury found that the defendant was armed with a firearm and was on community custody when he committed the attempted robbery. 1 CP 61, 89, 92-93.

### **III. ARGUMENT**

#### **A. SINCE THE SUPREME COURT HAS REQUIRED TRIAL COURTS TO USE THE CHALLENGED REASONABLE DOUBT INSTRUCTION IT IS NOT MANIFEST CONSTITUTIONAL ERROR TO DO SO.**

For the first time on appeal the defendant challenges the trial court's instruction defining the reasonable doubt standard as set out in pattern instruction WPIC 4.01.

This instruction has a status that is unusual and possibly unique. Ordinarily, trial courts have discretion to decide how instructions are worded. State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). WPIC 4.01, however, must be used without change. The Supreme Court has warned against any attempts to improve this instruction:

We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction.

State v. Bennett, 161 Wn.2d 303, 317-18 ¶ 19, 165 P.3d 1241 (2007).

The defendant now claims that WPIC 4.01 is erroneous. The Supreme Court, however, has required trial courts to use WPIC

4.01 without change. To change that instruction would require overruling Bennett. This court is required to follow controlling precedent from the Supreme Court. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578 ¶ 18, 146 P.3d 423 (2006). Only the Supreme Court can overrule Bennett.

In any event, this court has already rejected the defendant's arguments, in State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). The defendant there argued that WPIC 4.01 "misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." Id. at 5. Division Two upheld the instruction:

[T]he particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.

Id. at 5, citing State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901). Today, that statement could be changed to "over 110 years."

Because the defendant's challenge is being raised for the first time on appeal, he must demonstrate that the trial court's instruction contained "manifest error affecting a constitutional right."

RAP 2.5(a)(3). The instruction was the standard one that is mandated by the Supreme Court. Giving it was not error.

**B. THE EVIDENCE WAS SUFFICIENT TO PROVE THE DEFENDANT WAS IN POSSESSION OF A FIREARM.**

The defendant next challenges the sufficiency of the evidence to support the firearms enhancement and the unlawful possession of firearm charge. Evidence is sufficient to support the charge if after viewing the evidence in the light most favorable to the State any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and most strongly against the defendant. State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010). When evaluating the sufficiency of the evidence a reviewing court will treat circumstantial evidence as probative as direct evidence. Id. When a defendant challenges the sufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences that could be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court gives deference to the trier of fact who resolves

conflicting testimony, evaluates the credibility of the witnesses, and weighs the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008 (1996).

Evidence is sufficient to support a firearm enhancement or an unlawful possession of firearm charge if there is evidence which shows the defendant or an accomplice possessed a "gun in fact" rather than a toy. State v. Tongate, 93 Wn.2d 751, 755, 613 P.2d 121 (1980), State v. Raleigh, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029 (2011). Whether the weapon was a firearm may be proved by circumstantial evidence. State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273, review denied, 101 Wn.2d 1015 (1984).

Testimony from an adult witness that she was sure that the defendant pointed a gun at her during a kidnap and robbery was sufficient to support a finding that he was armed with a real gun during the commission of those crimes. State v. Tasker, \_\_ Wn. App. \_\_, ¶ 51, \_\_ P.3d \_\_ (2016 WL 1701530). A witness' testimony describing the gun in detail and the defendant's threat to use the gun also supported a finding that the defendant was armed with a firearm. Bowman, 36 Wn. App. at 803, State v. Mathe, 35

Wn. App. 572, 581-582, 668 P.2d 599 (1983), affirmed, 102 Wn.2d 537 (1984). Testimony that the witness knew the gun used in a rape was real because of its weight and the way it felt when it was held to her head, and because she would have behaved differently if it had not been real was also sufficient to support a firearm enhancement. State v. McKee, 141 Wn. App. 22, 31-32, 167 P.3d 575 (2007), review denied, 163 Wn.2d 1049 (2008).

Much of the evidence presented in each of the forgoing cases is similar to that presented here. J.R. was familiar with guns, and described one of the two men in possession of a gun that looked like a 9 mm before approaching Mr. Smith's car. She was so convinced it was real that she told her mother that one of the men had a gun. This in turn caused her mother to hurry them into the store, which is evidence that mother and daughter did not want to possibly be in the line of fire. 4/14/15 RP 172-174, 202, 215.

Mr. Smith owned a .40 caliber Smith & Wesson firearm and was familiar with the difference between real guns and toy guns. He knew that a real gun had rifling in the barrel that makes the projectile spin in the cylinder in order to shoot straight. He described the gun held by the defendant's accomplice as "a little revolver," meaning "a small, black five-shot, like Smith & Wesson

revolver." In his opinion it was a real gun, because it was glossy. 4/15/15 RP 52, 55.

Mr. Smith described the defendant as getting in his car and hitting him in the face with a gun. He described it in detail as a full-sized black HK, either .40 or .45 caliber gun. He estimated the gun weighed at least two pounds based on how it felt when the defendant hit him with it. Smith responded by pointing his own gun at the defendant when the defendant pointed his gun at Smith. Smith would not likely have reacted that way had the defendant pointed a toy gun at him. When confronted with Mr. Smith's gun the defendant said "do you want to get in a firefight?" 4/15/15 RP 55, 59; 4/16/15 RP 24. Detective Bilyeu, an experienced police detective who was also familiar with the difference between real firearms and BB or airsoft guns, confirmed Mr. Smith's testimony. 4/20/15 98-99, 106-107.

In addition to the forgoing there was evidence that either the defendant or his accomplice actually fired a gun. Mr. Smith fired his gun once after hearing a "boom" and the glass from his rear window shatter. Glass was found scattered inside his car, indicating that the shot had come from outside the car. Several witnesses testified to hearing two or more gunshots. 4/14/15 RP

172-175, 202, 216, 220; 4/15/15 RP 60-61, 106; 4/17/15 RP 85-87, 138, 151; 4/20/15 RP 173.

The foregoing evidence, taken in a light most favorable to the State, was sufficient to prove beyond a reasonable doubt that the defendant or his accomplice were armed with a real gun and not a toy during the robbery. The defendant argues the evidence was not sufficient because there was no evidence the gun was operable. He asserts that because certain evidence was not presented, and other evidence was arguably contradicted, the State had not proved the defendant or an accomplice was armed with a firearm. The court should reject these arguments.

The defendant largely relies on State v. Pierce, 155 Wn. App. 701, 230 P.3d 237 (2010). There the court said that the State must present evidence from which a jury could conclude the weapon in question was a firearm, i.e. "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." In order to satisfy this definition the court said the evidence must be sufficient to find the firearm was operable. Id. at 714. The court concluded that "operability" was a necessary fact to be proved relying on State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008).

In Recuenco the court had said:

The dissent appears to argue that because the only deadly weapon discussed at trial was a handgun, it was appropriate to ask for the firearm enhancement at sentencing rather than the charged and convicted deadly weapon enhancement. The dissent overlooks here that in order to prove a firearm enhancement the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a "firearm:" "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." 11 WASHINGTON PRACTICE; WASHINGTON PATTERN JURY INSTRUCTIONS; CRIMINAL 2.10.01 (Supp. 2005) (WPIC). We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.

Recuenco, 163 Wn.2d at 437 (emphasis added).

Other courts have rejected this reading of Recuenco. In Raleigh the court considered an argument that Recuenco required that a firearm be operable in order to support a conviction for a firearm enhancement. Raleigh, 157 Wn. App. at 735. The court noted that the issue in Recuenco was whether a harmless error analysis applied when the State failed to submit a firearm enhancement to the jury. The language the defendant relied on from Recuenco was non-binding dicta because it was cited only to point out the difference between a deadly weapon sentencing enhancement and a firearm enhancement. Id. at 735.

In Tasker the court again rejected the argument that Recuenco required evidence that a firearm was operable in order to prove a firearm enhancement. The court read the dicta in Recuenco as consistent with earlier Washington authority that held that evidence a defendant wielded a firearm that appeared real is evidence that it is operable, i.e. capable of firing a projectile. Tasker, \_\_\_ P.3d \_\_\_ ¶44. The court found that a firearm is a device capable of being fired if it may be fired either instantly or with reasonable effort and within a reasonable time, following the courts' reasoning in State v. Faust, 93 Wn. App. 373, 967 P.2d 1284 (1998), and State v. Padilla, 95 Wn. App. 531, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999). Id. at ¶ 49. "Evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm." Tasker at ¶44.

Because the court in Pierce relied on dicta in Recuenco to conclude that the State must prove the firearm was operable during the commission of the offense, the court should reject its reasoning and instead rely on the reasoning in Tasker and Raleigh. However even if the court followed the reasoning in Pierce the evidence was sufficient to show that either the defendant or his accomplice was

armed with an operable firearm. Mr. Smith fired the only bullet he had in his gun. 4/15/15 RP 61. Witnesses heard more than one gunshot. Glass from Mr. Smith's window was in his car, suggesting that it had been broken from some force outside his car. This evidence taken together is circumstantial evidence that one of the guns seen in either the defendant or his accomplice's possession fired into Mr. Smith's car. Since it was capable of firing a bullet, it was operable.

The defendant challenges this evidence, arguing that since Detective Bilyeu concluded only one shot was fired during the incident it was speculative whether the defendant or his accomplice's gun was operative. Detective Bilyeu reviewed the surveillance video of the incident. He could not tell from the video whether either the defendant or his accomplice had a gun. However he concluded that at least one shot had been fired based on Mr. Smith's statement and that people suddenly ran from his car. 4/20/15 RP 159-160, 170. The detective did not testify that only one shot had been fired. Even if he had it would have been evidence that contradicted other witness's testimony that more than one shot had been fired. In that case the jury was faced with a credibility determination which it was entitled to resolve in favor of

finding multiple shots had been fired. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The defendant also points out that the guns used by the defendant and his accomplice were not recovered, there were no bullets, bullet holes, or shell casings found and no bullet wounds (except his own wounds) or muzzle flashes reported. These were some facts the court suggested might support finding a firearm was operable. Pierce, 155 Wn App. at 244, n. 11. But the court did not state that this was an exclusive list that may support finding the defendant possessed an operable firearm. Many other cases cited by both the State and the defendant acknowledge that a variety of evidence may support that finding, much of which was present in this case. Moreover the court in Pierce included "gunshots heard" as evidence that would support such finding. Id. That is the very evidence presented in this case. Thus, taking all of the evidence in the light most favorable to the State, there was ample evidence to prove the firearms enhancement and the unlawful possession of firearms charge beyond a reasonable doubt.

### **C. THE COURT SHOULD IMPOSE COSTS ON APPEAL.**

At sentencing the court imposed the mandatory \$500 crime victim penalty assessment and \$100 DNA fee. It set payments at

\$25 per month starting 60 days after release from confinement. 5/29/15 RP 11-12. The defendant has paid \$65.74 toward his legal financial obligations. Supp CP. \_\_ (sub \_\_).

The defendant asks the court to deny appellate costs if this court affirms his conviction. He argues it is appropriate to deny imposition of those costs because he has been found indigent. He states that since the trial court did not make any findings regarding his ability to pay presently or in the future, this court should not assess appellate costs against him.

Under RCW 10.73.160(1), this court "may require an adult offender convicted of an offense to pay appellate costs." As this court has recognized, the statute gives this court discretion as to the award of costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The defendant's arguments to deny an assessment of costs ignore the language and history of RCW 10.73.160.

To begin with, RCW 10.73.160 expressly applies to indigent persons. The title of the enacting law is "An Act Relating to indigent persons." Laws of 1995, ch. 275. RCW 10.73.160(3) expressly provides for "recoupment of fees for court-appointed counsel." Counsel is ordinarily appointed only for indigent persons. RCW

10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

Second, the statute adopts existing procedures. "Costs ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." "In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs.

Prior to 1995, the rules governing appellate costs in criminal cases were the same as those applied in civil cases. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, the rule was that "[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs." Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979). The appellate court nonetheless had discretion to deny costs.

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1,

66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn.392, 397 P.2d 845 (1964). In NECA, the court refused to award costs in a moot case. This was because the case was decided in the public's interest, rather than because of the interests of the parties. NECA, 66 Wn.2d at 23. In Moore, the court refused to award costs when the error that resulted in reversal was the fault of the appealing party. Moore, 65 Wn.2d at 393.

As these cases illustrate, appellate courts have discretion to deny costs if some unusual circumstance renders an award inequitable. The circumstances that the court considers are those connected with the issues raised in the appeal. They have nothing to do with the parties' financial circumstances.

This analysis makes practical sense. The appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. Gaining such information requires factual inquiries which the court is poorly positioned to conduct. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Litigating such issues is likely to increase the length and expense of

the appeal. This court should therefore decide the issue of costs based on the appellate record rather than on suppositions.

This analysis is also consistent with long-standing practice under RCW 10.73.160. That statute was enacted in 1995. In 1997, the Supreme Court held that costs could be awarded under the statute without a prior determination of the defendant's ability to pay. Blank, 131 Wn.2d at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal. The Legislature has made no changes to the statute with regard to adult offenders.

"In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period." In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 780, 903 P.2d 443 (1995). For almost 20 years, this court and the Supreme Court construed RCW 10.73.160 as providing for the routine imposition of costs against indigent defendants. The Legislature has acquiesced in that decision. There is no reason for applying different standards now. If the Legislature believes that this results in an undue burden on adult defendants, it can amend the statute.

In the present case, this analysis should lead the court to impose costs. The case presented an issue involving jury instructions and the sufficiency of evidence. The defendant litigated the case for his own benefit, not for any public interest. Nothing in this case supports permanently shifting the costs of the defendant's appeal from the guilty defendant to the innocent taxpayers.

If this court focuses on the defendant's ability to pay, nothing in the record indicates that the defendant lacks that ability. The defendant is a young man; there is no evidence that he has any disability that would prevent him from obtaining gainful employment upon his release from confinement. Moreover, he has demonstrated that he has some ability to pay since he has made regular payments through the DOC toward his legal financial obligations. Supp CP \_\_.

If payments create any future hardship, the trial court can remit costs. RCW 10.73.160(4). Also, if accrual of interest creates hardship in the future, the court can reduce or waive interest under RCW 10.82.090. At this point in the proceedings, the court should award costs.

#### **IV. CONCLUSION**

For the foregoing reasons the State asks the Court to affirm the defendant's conviction. The State further asks the court to assess the defendant with appellate costs.

Respectfully submitted on May 10, 2016.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
KATHLEEN WEBBER, #16040  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

SIMON P. SOLOMON,

Appellant.

No. 73552-7-I

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

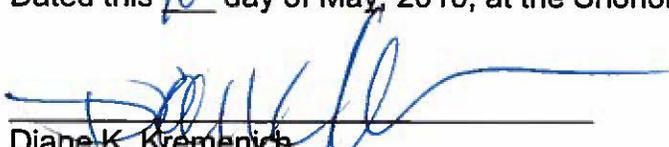
The undersigned certifies that on the 10<sup>th</sup> day of May, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

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

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

Dated this 10<sup>th</sup> day of May, 2016, at the Snohomish County Office.

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