74037-7

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Court of Appeals
Division I
State of Washington

NO. 74037-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS CLOYD,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. INTRODUCTION 1

B. ASSIGNMENT OF ERROR 1

Issue Pertaining to Assignment of Error 2

C. TRIAL TESTIMONY AND CLOSING ARGUMENT 2

D. ARGUMENT 8

I. CLOYD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT. 8

II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS. 14

E. CONCLUSION 16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Bartley-Williams v. Kendall
134 Wn. App. 95, 138 P.3d 1103 (2006) 13

CHD, Inc. v. Taggart
153 Wn. App. 94, 220 P.3d 229 (2009) 13

Cunningham v. Reliable Concrete Pumping
126 Wn. App. 222, 108 P.3d 147 (2005) 13

In re Estates of Smaldino
151 Wn. App. 356, 212 P.3d 579 (2009)
review denied, 168 Wn.2d 1033, 230 P.3d 1061 (2010) 13

In Re Personal Restraint of Davis
142 Wn.2d 165, 12 P.3d 603 (2000) 9

Johnson v. Si-Cor Inc.
107 Wn. App. 902, 28 P.3d 832 (2001) 13

State v. Bobenhouse
166 Wn.2d 881, 214 P.3d 907 (2009)) 8, 10, 14

State v. Camarillo
115 Wn.2d 60, 794 P.2d 850 (1990) 14

State v. Fiallo-Lopez
78 Wn. App. 717, 899 P.2d 1294 (1995). 10, 11, 12, 13

State v. Furseth
156 Wn. App. 516, 233 P.3d 902 (2010) 8

State v. Handran
113 Wn.2d 11, 775 P.2d 453 (1989) 11

State v. King
75 Wn. App. 899, 878 P.2d 446 (1994)
review denied, 125 Wash.2d 1021, 890 P.2d 463 (1995), ... 1, 11

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Kitchen
110 Wn.2d 403, 756 P.2d 105 (1988) 8, 9

State v. Nolan
141 Wn.2d 620, 8 P.3d 300 (2000) 15

State v. Petrich
101 Wn.2d 566, 683 P.2d 173 (1984) 8

State v. Sinclair
__ Wn. App. __, __ P.3d __ (2016) 15, 16

State v. Vander Houwen
163 Wn.2d 25, 177 P.3d 93 (2008) 14

RULES, STATUTES AND OTHER AUTHORITIES

11 Washington Practice: Washington Pattern Jury Instructions Criminal, WPIC 4.25 (3d Ed. 2011) 8

RCW 10.73.160 15

RCW 69.50.101(g) 9

RCW 69.50.401 9

U.S. Const. amend. VI 8

Const. art. I, § 22 8

A. INTRODUCTION[1]

Following a jury trial in King county superior court, appellant Nicholas Cloyd was convicted of delivering $20.00 worth of cocaine to "another" during a "buy bust" operation initiated by the Seattle police department. CP 1-6, 12, 32. It was undisputed Cloyd did not physically hand any drugs to the undercover officer; rather, Erika Frunk, who was sitting in the driver's seat of the car in which Cloyd was also sitting, got out of the car and handed drugs to the officer. RP 413. It was the state's theory Cloyd was guilty of delivery *either* because he delivered drugs to Frunk, or because he was an accomplice to Frunk's delivery of cocaine to the officer. RP 412-13, 416-17. The court did not instruct the jury it must be unanimous as to which act it relied on to convict and the state did not elect an act in closing argument. CP 17-34; RP 410-18. As a result of these failings, Cloyd was deprived of his right to a unanimous jury verdict.

B. ASSIGNMENT OF ERROR

Nicholas Cloyd was denied his right to a unanimous jury verdict.

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[1] "RP" refers to the jury trial and sentencing held 7/21/14, 7/22/14, 7/23/14 and 9/1/15. "1RP" refers to the pretrial hearing held 7/17/14.

Issue Pertaining to Assignment of Error

Where the state presented evidence of two acts the jury could have relied upon to convict Cloyd of delivery and argued in closing that both acts constituted delivery, and where the court gave no unanimity instruction, was Cloyd deprived of his right to a unanimous jury verdict?

C. TRIAL TESTIMONY AND CLOSING ARGUMENT

On July 22, 2013, the Seattle police department's "anti-crime" team decided to initiate some drug deals in the Belltown neighborhood. RP 228, 234-35, 240, 275. Officer Andrew Zwaschka acted as the undercover buyer, while officers Kevin Jones and Forrest Lednicky trailed to ensure his safety. RP 240, 253, 269, 277, 329-30. Officer Raul Vaca was part of the arrest team, stationed nearby. RP 232, 369.

Zwaschka approached someone later identified as Andrew Jones and asked if Jones knew where Zwaschka could buy drugs. RP 241, 262. Jones said he did and led Zwaschka north on Third Avenue. RP 241. As they walked, Jones phoned somebody. Zwaschka overheard him say, "where are you?" RP 242. When Jones then asked Zwaschka how much he was "looking for," Zwaschka responded, $20.00 worth. RP 242.

The pair reached Battery Street and turned west towards Elliott Bay. RP 242. Jones directed Zwaschka toward a white Crown Victoria parked facing east on the south side of the street. RP 243.

Zwaschka testified the car's windows were tinted but the passenger-side window was rolled down a crack. RP 243, 256. Zwaschka claimed he approached and started to hand his $20.00 to the passenger, who Zwaschka identified at trial as Nicholas Cloyd. RP 243. According to Zwaschka, Cloyd said, "no, no, no. You're going to deal with the girl." RP 244. Zwaschka claimed that as Cloyd said this, he poured from a container what looked like two small white rocks into the palm of his hand. RP 244-45. Zwaschka further claimed he saw Cloyd "reach over." RP 244. The window was only open a crack, but Zwaschka "assume[d] that he handed it to the girl." RP 244.

Zwaschka testified he stepped away, and the woman (later identified as Erika Frunk) got out of the car and came over to the sidewalk where Zwaschka was standing. RP 245. They walked a bit to the west, where Zwaschka gave Frunk $20.00 and Frunk gave him crack cocaine. RP 245, 352. Zwaschka gave the "good buy" signal and walked back toward Third Avenue. RP 248, 261.

Trailing officer Kevin Jones was following behind Zwaschka as he walked north on Third to the corner of Battery Street and turned west. RP 278. Officer Jones testified he turned the corner onto Battery "five to seven seconds" after Zwaschka. RP 279-280, 313. As Zwaschka approached the Crown Victoria, Frunk got out of the car and met him on the sidewalk:

> Q [prosecutor] Okay. And you saw the – Officer Zwaschka approach this same white-colored Ford Crown Vic; is that right?
>
> A [officer Jones] Yes.
>
> Q Okay. But before he got there, you observed the driver get out of the driver's seat and run around the car to meet the undercover officer on the sidewalk?
>
> A I don't know if I said on the crosswalk, but I said that I observed the female – yep, on the sidewalk. You're right. But before he got there, yeah, I observed the driver get out of the driver's seat and run around and meet the UC on the sidewalk.

RP 293. Jones never saw Zwaschka at the passenger side of the Crown Victoria. RP 314.

Officer Jones testified it would have been too "obvious" for him to stop when they were all standing there, so he continued past Zwaschka and turned around by the alley to "post up." RP 279.

After officer Jones observed Zwaschka interact with Frunk and give the "good buy" signal, Jones radioed the arrest team. RP 282.

Officer Lednicky testified similarly to Jones. RP 331. Lednicky testified that after Zwaschka turned onto Battery, he contacted Frunk:

> Q [prosecutor] And when they made the turn, what happened next?
>
> A [Lednicky] They contacted a female there on the corner of Three and Battery at which point the gentleman that the undercover had met initially kind of became secondary. And it appeared that the undercover was dealing mostly with the female.

RP 331. When asked if he observed Zwaschka interact with the car, Lednicky testified: "I observed him primarily dealing with the female." RP 331.

Once officer Jones radioed for the arrest team, officer Vaca immediately rode his bike to the Crown Victoria, in which Cloyd was still sitting. RP 370-71. Vaca directed Cloyd out of the car and had him sit on the curb. RP 371. After Zwaschka verified Vaca had the right person, Vaca read Cloyd his rights and searched him. RP 372. Vaca did not find any drugs or a container. RP 372, 377. A strip search at the precinct likewise uncovered nothing. RP 372, 379.

Police obtained a warrant and searched the Crown Victoria, which had been towed under police supervision to a secure facility. RP 249, 323-24. Neither drugs nor a container was located inside. RP 250. However, police found $151.00 above the passenger-side visor. RP 250. Police found only $2.00 above the driver's side visor. RP 250.

In closing, the prosecutor argued there were two deliveries:

> The next question, did the Defendant deliver cocaine? I want to look first at what delivery is. And this is instruction number eight. And it informs you that delivery or deliver means the actual or constructed [sic] transfer of a controlled substance from one person to another. It doesn't require that money is received in exchange. All it is, is that someone hands drugs to another person. Hands the cocaine. That's the delivery right there. No requirement that money comes back, just the physical act of transfer.
>
> So was there a delivery in this case? We know that there is a delivery here. Officer Zwaschka asked Mr. Jones about cocaine, they walked to the Crown Vic. Officer Zwaschka interacts with the Defendant inside the Crown Vic. Defendant hand[s] Ms. Frunk drugs. <u>One delivery right there</u>. Ms. Frunk gets out of the car, comes around and hands those drugs to the Defendant (sic). <u>And we have another delivery</u>. Those drugs – or excuse me, not to the Defendant. Hands those drugs to Officer Zwaschka.

RP 412-13 (emphasis added).

The prosecutor argued the jury could convict Cloyd based on his alleged delivery to Frunk or based on his alleged complicity in Frunk's delivery to Zwaschka:

> So not only did the Defendant deliver cocaine himself to Ms. Frunk, but he also aided in the commission of Ms. Frunk's delivery to Officer Zwaschka and he is guilty of that as well.

RP 416.

The prosecutor argued that the money found above the passenger's visor – where Cloyd was sitting – was evidence of accomplice liability:

> And, again it's coming down to Officer Zwashcka's testimony. But we have some physical evidence as well. And there's not a lot in that – in this case. They didn't find drugs on him. That's a fact. It's not necessarily unusual, as you heard from Officer Vaca today. They didn't find drugs on him. But they did find $151 sitting in the visor just above the defendant. The passenger visor. Not the driver's visor.
>
> If Ms. Frunk was doing this alone, why would she keep her money far away from her? Why would it be across the car? That money also points to the Defendant. It points to his involvement and it confirms what Officer Zwaschka saw, what he told you.

RP 417.

D. ARGUMENT

I. CLOYD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

An accused person has the constitutional right to a unanimous jury verdict. Const. art. 1, § 22; U.S. Const. amend. 6; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). When evidence is presented of multiple acts, any one of which could constitute the charged crime, the court must ensure the jury is unanimous as to which of the acts was committed. Petrich, 101 Wn.2d. at 572; State v. Furseth, 156 Wn. App. 516, 517-18, 233 P.3d 902 (2010). Jury unanimity may be preserved either by instructing the jury it must unanimously agree which act has been proved or by the prosecutor clearly electing one of the acts to rely on. Petrich, 101 Wn.2d at 572; 11 Washington Practice: Washington Pattern Jury Instructions Criminal, WPIC 4.25 (3d Ed. 2011).

A unanimity instruction is required whenever the case is a multiple acts case. Furseth, 156 Wn. App. at 520 (citing State v. Bobenhouse, 166 Wn.2d 881, 892, 214 P.3d 907 (2009)). A multiple acts prosecution occurs when several acts are alleged and

any one of them could constitute the crime charged. Furseth, 156 Wn. App. at 520 (quoting Kitchen, 110 Wn.2d at 411).

Under RCW 69.50.401:

> (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, *deliver*, or possess with intent to manufacture or deliver, a controlled substance.

Emphasis added.

"Deliver" or "delivery" means "the actual or constructive transfer from one person to another of a substance, *whether or not there is an agency relationship*." RCW 69.50.101(g) (emphasis added). The "unit of prosecution" therefore is each possession, possession with intent, or "delivery" as is the case here. See e.g. In Re Personal Restraint of Davis, 142 Wn.2d 165, 12 P.3d 603 (2000) (a "separate and distinct" intent to manufacture drugs supports separate units of prosecution under the statute; thus, Davis' two grow operations constituted separate offenses).

In keeping with this unit of prosecution, the prosecutor here argued the facts showed two deliveries and Cloyd could be convicted if the jury found either that he delivered to Frunk or that he was an accomplice to Frunk's delivery to Zwaschka. The court did not instruct the jury it must be unanimous as to which act it

chose, however. The error in failing to require unanimity in a multiple acts case stems from the possibility that some jurors may have relied on one act or incident and some jurors may have relied on a different act, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. Bobenhouse, 166 Wn.2d at 893.

In response, the state may attempt to argue the acts constituted a continuing course of conduct and therefore a unanimity instruction was not required. See e.g. State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995). In that case, the ultimate sale of 9 ounces of cocaine began at a Las Margaritas restaurant. As part of the sale's negotiation, a small sample was provided to the undercover buyer at the restaurant. Fiallo-Lopez, 78 Wn. App. at 719-20. However, before the deal was effectuated, the wife of the man who was acting as a go-between for the buyer and Fiallo-Lopez drove into the parking lot and stopped the negotiations, worried that the police might be involved. Fiallo-Lopez, 78 Wn. App. at 721. The participants, including the undercover buyer, the go-between and Fiallo-Lopez subsequently drove to a nearby Safeway parking lot and concluded the deal. Fiallo-Lopez, 78 Wn. App. at 721-22.

On appeal, Fiallo-Lopez argued that because there were two discrete acts of delivering cocaine – the sample at the restaurant and the baggies at the Safeway – and the state did not elect, the trial court erred by failing to give a unanimity instruction. Fiallo-Lopez, 78 Wn. App. at 723.

This Court disagreed, concluding the drug transaction was a continuing course of conduct:

> Fiallo-Lopez' argument fails because the testimony and other evidence show that the drug transaction was a continuing course of conduct. It started with a delivery of a small sample of cocaine at the restaurant and concluded a short time later with the delivery of the remaining 8 ounces of drugs in the Safeway parking lot. This was one transaction involving the same parties and having as its ultimate purpose the delivery of drugs by Fiallo-Lopez to Cooper. As such, the case is comparable to Handran,[2] where the defendant committed two assaults aimed at the same purpose. 113 Wash.2d at 17, 775 P.2d 453. Unlike State v. King, 75 Wn. App. 899, 903, 878 P.2d 446 (1994), review denied, 125 Wash.2d 1021, 890 P.2d 463 (1995), where there were two separate and distinct quantities of cocaine but only one charge of possession, the facts here show that the delivery of a small sample of cocaine at the restaurant was preliminary to the delivery of the significantly larger amount of cocaine at Safeway a short time later. Thus, that the two deliveries here occurred at different times and places is outweighed by the commonsense consideration that they were both intended for the same ultimate purpose, delivery of cocaine by Fiallo-Lopez to Cooper. . . . We

[2] State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989).

> conclude therefore that a unanimity instruction was not required under the facts of this case.

Fiallo-Lopez, 78 Wn. App. at 727.

The deliveries at issue here, however, are distinguishable from those in Fiallo-Lopez, because the first – from Cloyd to Frunk – was not necessarily "preliminary" to the delivery from Frunk to Zwaschka. In fact, some jurors may have doubted it occurred at all. Neither of the trailing officers saw Zwaschka approach the car. Nor was a pill container or drugs found on Cloyd. Accordingly, it would be possible for some jurors to doubt Cloyd gave the cocaine to Frunk but nevertheless find he was an accomplice to the delivery from Frunk to Zwaschka, based on his presence and the $151.00 in the visor above him. As the state argued: "why would she keep her money far away from her? Why would it be across the car? That money also points to the Defendant." RP 417.

The state recognized the potential for the jury to doubt the first delivery, which is precisely why it argued there were two. The opinion in Fiallo-Lopez does not indicate such hedging by the prosecution or an attempt to argue the jury could convict Fiallo-Lopez's based on one or the other of the alleged deliveries.

Any continuing course of conduct argument should be rejected because that's not the way the state argued it below. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006) (citing Cunningham v. Reliable Concrete Pumping, 126 Wn. App. 222, 108 P.3d 147 (2005)). The doctrine is concerned with inconsistent assertions of fact and applies "if a litigant's prior inconsistent position benefited the litigant or was accepted by the court." CHD, Inc. v. Taggart, 153 Wn. App. 94, 102, 220 P.3d 229 (2009); Johnson v. Si-Cor Inc., 107 Wn. App. 902, 909, 28 P.3d 832 (2001). It preserves respect for judicial proceedings, and seeks to avoid inconsistency, duplicity, and waste of time. In re Estates of Smaldino, 151 Wn. App. 356, 363, 212 P.3d 579 (2009), review denied, 168 Wn.2d 1033, 230 P.3d 1061 (2010).

Therefore, unlike the situation in Fiallo-Lopez, it cannot be said that "the fact that the two deliveries here occurred at different times and places is outweighed by the commonsense consideration that they were both intended for the same ultimate pupose[.]" Fiallo-Lopez, 78 Wn. App. at 726.

The failure to ensure jury unanimity is constitutional error, and reversal is required unless the state proves beyond a reasonable doubt that the error was not prejudicial. State v. Vander Houwen, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

The error is prejudicial unless the evidence offers no basis for the jury to rationally discriminate between the multiple acts. Bobenhouse, 166 Wn. 2d at 894-95 (discussing State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990)). Here, there was a basis for the jury to discriminate between the first delivery and the second. As indicated above, some jurors may have doubted Cloyd delivered drugs to Frunk. The state therefore cannot meet its burden to prove that error in failing to ensure a unanimous jury verdict was harmless beyond a reasonable doubt.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Cloyd was represented below by appointed counsel. Supp. CP __ (sub. no. 78, Order of Indigency, 9/28/15). The trial court found him indigent for purposes of this appeal. Id. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds

the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, it was revealed Cloyd's brother recently died and Cloyd is therefore the only relative available to help care for his mother who is sick. RP 448-49. Cloyd also has children of his own. RP 449. The prosecutor asked the court to waive all non-mandatory fees, which the court did. RP 450, 453-54. Cloyd was sentenced to a prison-based DOSA including 20 months of incarceration and 20 months of community custody. RP 453.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, __ Wn. App. __, __ P.3d __ (2016).[3] Our Supreme Court has rejected the notion that discretion should be exercised only in "compelling circumstances." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

[3] Only the slip opinion is available at the time of this filing. A copy is attached.

In Sinclair, this Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. Slip. op. at 9-10. Moreover, ability to pay is an important factor that may be considered. Slip. op. at 9.

Based on Cloyd's indigence, his family circumstances and his treatment requirements once he is released from prison, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

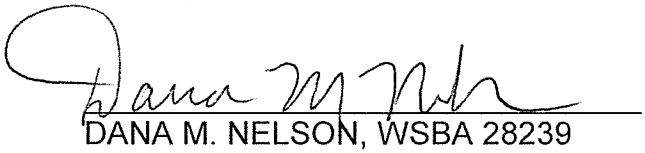
E. CONCLUSION

Cloyd's right to a unanimous jury was violated. This Court should reverse his conviction.

Dated this 1st day of ~~January~~ February, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALAN JAMES SINCLAIR, II, Appellant.	))))))))))	No. 72102-0-I DIVISION ONE PUBLISHED OPINION FILED: January 27, 2016

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JAN 27 AM 8:18

BECKER, J. — Appellant, convicted of sexually abusing his granddaughter, contends the trial court improperly admitted a recording of an incriminating communication obtained without the consent of the participants in the communication. The recording resulted from an inadvertent "pocket dial" from appellant's cell phone to the recipient's voice mail. Finding that any statutory violation was harmless, we affirm.

A jury found appellant Alan Sinclair guilty of two counts of second degree rape of a child, two counts of third degree child molestation, and one misdemeanor count of communication with a minor for immoral purposes. All charges arose from Sinclair's sexual abuse of his granddaughter. According to her testimony at trial, Sinclair began kissing her "tongue to tongue" when she was 11 or 12 years old and progressed to oral sex when she was 13 or 14.

The recording at issue occurred one afternoon when the granddaughter was home alone and Sinclair was visiting her. The granddaughter testified that

Sinclair kissed her "tongue to tongue" and then she and Sinclair went outside and continued a conversation. During the conversation, Sinclair unintentionally dialed the girl's mother with his cell phone. The mother did not answer. Her cell phone transferred the call to voice mail. The voice mail system recorded Sinclair saying, "I love that tongue. . . . I don't know if you love mine." The conversation continued with Sinclair making veiled threats that his dead ancestors would inflict physical injury on the girl for not being "nice." The mother later listened to the voice mail recording on her phone and heard the conversation. This led to the filing of the criminal charges against Sinclair.

Sinclair moved to suppress the voice mail under the Washington privacy act, chapter 9.73 RCW. The privacy act makes it unlawful for any "individual" to record any private conversation "without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030(1)(b). There is an exception for conversations "which convey threats," which "may be recorded with the consent of one party to the conversation." RCW 9.73.030(2). Neither Sinclair nor his granddaughter consented to the recording.

Sinclair contends the lack of consent made the recording inadmissible at trial. The trial court considered a number of issues in connection with Sinclair's motion to suppress. Was the conversation private? Did an "individual" record it? Does an individual incur criminal liability for an inadvertent recording, or must someone be acting with a criminal mens rea to engage the prohibitions of the act? It was undisputed that the call was made inadvertently. The trial court

denied the motion to suppress, concluding the privacy act did not apply because of "the absence of any unlawful act by anybody."

The issues are interesting and novel. But we conclude it is unnecessary to resolve them in this case because any error was harmless. We refrain from attempting a "definitive construction" of the statute in a case involving somewhat "bizarre" facts. State v. Smith, 85 Wn.2d 840, 846, 540 P.2d 424 (1975).

Admission of evidence in violation of the privacy act is a statutory violation, not a constitutional one. An error is not prejudicial unless the erroneous admission of the evidence materially affected the outcome of the trial. State v. Courtney, 137 Wn. App. 376, 383-84, 153 P.3d 238 (2007), review denied, 163 Wn.2d 1010 (2008). Here, there is no reasonable probability that the outcome of Sinclair's trial would have been different if the recording of the pocket-dialed voice mail had been excluded.

The granddaughter's testimony at trial provided independent, unchallenged evidence of the contents of the inadvertently recorded conversation. Her account was corroborated by sexually explicit photographs and a video seized from Sinclair's cell phone and computer. During his closing, Sinclair admitted guilt as to the charges of child molestation in the third degree and communicating with a minor for immoral purposes. The only charges Sinclair disputed were the two counts of second degree child rape. He argued that the State presented insufficient evidence to prove that he engaged in sexual intercourse with the girl before her 14th birthday. He does not make this argument on appeal.

It is unlikely that the jury's verdict of guilt on the two disputed counts was affected by the admission of the recorded conversation. There was no allusion in that conversation either to sexual intercourse or to the age of the granddaughter. Assuming the recording to be inadmissible, we conclude Sinclair has not shown that the error materially affected the outcome at trial.

We now address Sinclair's motion for reconsideration regarding the issue of appellate costs. He asks this court to exercise discretion to amend the decision terminating review by determining that an award of appellate costs to the State is not warranted.

Neither the State nor Sinclair raised the issue of costs in their appellate briefs. Generally, to timely raise an issue for review, a party must present argument in the appellate briefs, with citation to supportive authority and information in the record. Nevertheless, we will consider Sinclair's motion for reconsideration because the issue of appellate costs is systemic in nature, it needs to be addressed, and both parties' positions are well briefed.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added.) The statute provides that appellate costs "shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." RCW 10.73.160(3). Under the Rules of Appellate Procedure, the State may simply present a cost bill as provided in RAP 14.4. State v. Blank, 131 Wn.2d 230, 251, 930 P.2d 1213 (1997). The State is not obliged to request an award of costs in

its appellate briefs, although it does not appear there is any rule preventing the State from doing so. See Blank, 131 Wn.2d at 251.

The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added).[1] Consequently, it appears that a clerk or commissioner has no discretion under the rules to deny an award of costs when the State has substantially prevailed on review. See State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). The appellate court, however, may "direct otherwise in its decision." Nolan, 141 Wn.2d at 626.

An award of appellate costs becomes part of the judgment and sentence. RCW 10.73.160(3). A defendant may petition the sentencing court at any time for the remission of costs if the amount due "will impose manifest hardship on the defendant or the defendant's immediate family." RCW 10.73.160(4).

We filed our opinion affirming Sinclair's conviction on December 7, 2015. On December 9, 2015, the State filed a cost bill requesting an award of $6,983.19 in appellate costs. Of this amount, $6,923.21 would be paid to the Washington Office of Pubic Defense for recoupment of the cost of court appointed counsel ($2,917), preparation of the report of proceedings ($3,907), copies of clerk's papers ($90), and appellate court copying charges ($9.21). The remainder, $59.98, would be paid to the King County Prosecutor's Office.

[1] The definition of "a decision terminating review" is found in RAP 12.3(a).

On December 21, 2015, Sinclair filed both an objection to the cost bill and a motion for reconsideration of the opinion. Sinclair's objection to the cost bill characterized Division One's current system of handling appellate costs as "a blanket refusal to exercise discretion after a cost bill is filed" (Objection to Cost Bill, at 10). Sinclair cited the policy concerns identified in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). He argued that notwithstanding Nolan, commissioners should exercise discretion to deny a cost bill even if the court has not so directed in the decision terminating review. Alternatively, he requested that we direct the trial court to hold a hearing regarding his ability to pay. A ruling on Sinclair's objection to the cost bill was deferred pending resolution of the motion for reconsideration.

In his motion for reconsideration, Sinclair again asserts that Division One's commissioners routinely decline to exercise discretion to deny costs and that the court routinely denies motions to modify. It is unclear, he says, what must happen for this court to exercise discretion. "Must a party raise anticipatory cost objections in his or her opening brief based on the assumption the party's substantive arguments will fail? Or will elected judges exercise appropriate discretion following an indigent party's motion to modify a commissioner's ruling awarding costs?" Motion for Reconsideration at 2. "To the extent that a challenge to appellate costs must be raised in the briefs so that the court can exercise discretion in the decision terminating review, Sinclair asks this court to reconsider and amend its decision terminating review so that it can exercise this discretion." Motion for Reconsideration at 3.

On January 15, 2016, at the court's request, the State answered the motion. The State takes the position that the appellate court should not consider a cost award until after the decision terminating review is filed. The State acknowledges that an appellate court's failure to exercise discretion in the decision terminating review, coupled with the commissioner's lack of discretion under RAP 14.2, generally results in the award of costs to the State as the prevailing party. In the State's view, this is because a motion to modify a nondiscretionary commissioner's ruling awarding costs "is likely to fail, unless the commissioner has overlooked a flaw in the cost bill, or unless the objecting party has correctly identified some discrepancy between the cost bill and the information available to counsel." Answer to Motion for Reconsideration at 10.

The State maintains that a virtually automatic award of appellate costs upon request by the State is preferable to this court's exercise of discretion in the decision terminating review. The State claims there is not enough information available to this court to facilitate an exercise of discretion. Without specifically mentioning Blazina, the State argues that a future trial court remission hearing under RCW 10.73.160(4) is the solution to the problem of indigent offenders who upon release from confinement face a substantial and compounded repayment obligation in addition to the difficulties of finding housing and employment. The State points out that in Blank, 131 Wn.2d at 246, the court rejected a due process challenge to RCW 10.73.160 in part because an offender always has the right to seek remission from an award of costs.

The problem with the State's argument is that it requires this court to refrain from exercising the discretion that we indisputably possess under RCW 10.73.160 and Nolan. Contrary to the State's suggestion, our Supreme Court has rejected the proposition that the broad discretion to grant or deny appellate costs under RCW 10.73.160(1) should be exercised only in "compelling circumstances." See Nolan, 141 Wn.2d at 628.

The future availability of a remission hearing in a trial court cannot displace this court's obligation to exercise discretion when properly requested to do so. The statute vests the appellate court with discretion to deny or approve a request for an award of costs. Under RAP 14.2, that discretion may be exercised in a decision terminating review.

In his objection to the cost bill, Sinclair proposed as an alternative that we remand the cost bill to the trial court to conduct an inquiry into his current and future ability to pay $6,983.19 in appellate costs. As a model for that alternative, Sinclair submitted a cost bill ruling from Division Two. The Division Two commissioner ruled that the State, as prevailing party, was entitled to its costs, but also ruled that an award of appellate costs is a discretionary legal financial obligation that can be imposed only as provided in Blazina. The commissioner ruled that under Blazina, the costs would be imposed only upon the trial court making an individualized finding that the defendant had "the current or likely future ability to pay his appellate costs." Sinclair's Objection to Cost Bill, Appendix C.

The problem with Sinclair's suggested remedy of a remand to the trial court is twofold. Not only would it delegate the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties. We disagree with the Division Two commissioner's statement that an award of appellate costs is a discretionary legal financial obligation controlled by Blazina's decision to "remand the cases to the trial courts for new sentence hearings." Blazina, 182 Wn.2d at 839. The statute considered in Blazina, RCW 10.01.160, does not govern appellate costs. For costs that "may" be imposed upon a convicted defendant at the trial court level, it specifically sets forth parameters and limitations, prominently including the defendant's ability to pay and financial resources. RCW 10.01.160(3).

Our statute, RCW 10.73.160, does not set forth parameters for the exercise of discretion. Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor. Factors that may be relevant to an exercise of discretion by an appellate court under RCW 10.73.160 can be set forth and factually supported at least as efficiently in appellate briefs as in a trial court hearing.

To summarize, we are not persuaded that we should refrain from exercising our discretion on appellate costs. Nor are we attracted to the idea of delegating our discretion to a trial court. We conclude that it is appropriate for

this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief.[2]

We recognize that this approach is not without some practical inefficiencies. The State historically does not ask for an award of costs in every case. Appellate defense counsel may decide it is necessary to include a preemptive argument against costs in every case, only to find that the State does not intend to request costs. And as Sinclair points out, raising the potential issue of appellate costs in the brief of appellant puts appellate defense counsel in the position of assuming the client may not prevail on substantive claims.

A rule change requiring the State to include a request for costs in the brief of respondent would eliminate these problems, but even under the current system, it is feasible for the parties and the court to address costs in the course of appellate review. In the somewhat analogous situation created by RAP 18.1(b), a party who wishes to recover attorney fees under applicable law must "devote a section of its opening brief" to the request for fees or expenses.[3] Typically, a short paragraph or even a sentence is deemed compliant with the rule. Sinclair's motion for reconsideration devotes only half a page to outlining the reasons why this court should exercise its discretion not to impose costs, and

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[2] Sinclair's motion for reconsideration does not ask us to decide, and we do not decide, whether the appellate court has discretion to deny or substantially reduce an award of costs when asked to do so by a motion to modify a commissioner's award of costs under RAP 14.2.

[3] We say "somewhat" analogous because the costs the State is entitled to request are awardable under RAP Title 14, not under RAP 18.1. Under RAP Title 14, the State is not required to request costs in its appellate brief. Blank, 131 Wn.2d at 251. The State may simply present a cost bill as provided in RAP 14.4.

the State's response is similarly brief, so we are not concerned that this approach will lead to overlength briefs. We also point out that where the State knows at the time of receiving the notice of appeal that no cost bill will be filed, a letter so advising defense counsel would be courteous.

The State has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill. The State complains that it lacks access to pertinent information at the stage of appellate briefing. This is not a persuasive assertion. The State merely needs to articulate the factors that influenced its own discretionary decision to request costs in the first place. Both parties should be well aware during the course of appellate review of circumstances relevant to an award of appellate costs. A great deal of information about any offender is typically revealed and documented during the trial and sentencing, including the defendant's age, family, education, employment history, criminal history, and the length of the current sentence. To the extent current ability to pay is deemed an important factor, appellate records in the future may also include trial court findings under Blazina. And the foregoing list of factors is not intended as an exhaustive or mandatory itemization of information that may support a decision one way or another.

As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." Blazina, 182 Wn.2d at 835. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to

pay a bill of $6,983.19 plus accumulated interest can be quite a millstone around the neck of an indigent offender. Still, exercising discretion means making an individualized inquiry. See Blazina, 182 Wn.2d at 838 ("the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.") To decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible exercise of discretion than to decide that they should always be imposed as a matter of policy.

When this court reviews a trial court's ruling on attorney fees in a civil case, we generally require the trial court to explain its reasoning based on the specific facts of the case, or the award will be remanded "to ensure that discretion is exercised on articulable grounds." Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). Similarly, when this court decides the issue of appellate costs, it behooves us to explain the basis for the ruling. Both parties can be helpful to the appellate court's exercise of its discretion by developing fact-specific arguments from information that is available in the existing record.

In the present case, both parties focus on the factor of ability to pay. Sinclair makes the following argument:

> There are several reasons this court should exercise its discretion not to impose costs. Sinclair is currently 66 years old. CP 6. He was sentenced to a minimum term of incarceration of 280 months in June 2014. CP 142, 146. His sentence is indeterminate. CP 146. The trial court made no determination that Sinclair was able to pay any amount in trial court LFOs [legal financial obligations] and in fact waived all nonmandatory LFOs in the judgment and sentence. CP 144. The trial court appointed

> appellate counsel because Sinclair was "unable by reason of poverty to pay for any of the expenses of appellate review." See Appendix C (Indigency Order). Under the circumstances, there is no reason to believe Sinclair is or ever will be able to pay $6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent). This court should accordingly exercise discretion and deny appellate costs in the decision terminating review.

Motion for Reconsideration at 3. Attached to the motion for reconsideration is the trial court order authorizing Sinclair to appeal in forma pauperis and to have appointment of appellate counsel and preparation of the record at State expense. The order states that Sinclair "is unable by reason of poverty to pay for any of the expenses of appellate review" and "the defendant cannot contribute anything toward the costs of appellate review."

The State counters with a citation to the record at sentencing, where Sinclair's attorney stated that Sinclair was retired after 20 years of employment with a substantial local manufacturing company. Thus, the State argues it is "likely" that Sinclair is eligible for retirement income. The State also points out that the indigency order was submitted and signed ex parte, so that there is no independent check on the accuracy of the information on which the order was based.

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency. Important to our determination, the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. No evidence supports the State's speculation that Sinclair has undisclosed retirement benefits. We therefore presume Sinclair remains indigent. Sinclair is a 66-year-old man serving a minimum term of more than 20 years. There is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs. Under these circumstances, we exercise our discretion to rule that an award to the State of appellate costs is not appropriate.

The motion for reconsideration is granted. The conviction is affirmed. Appellate costs will not be awarded. The pending cost bill and objection are stricken.

Becker, J.

WE CONCUR:

Leach, J.

Dwyer, J.

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On February 1, 2016, I e-filed, served and or mailed directed to:

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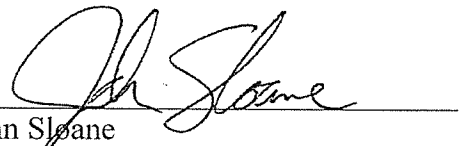
Containing a copy of the opening brief, re Nicholas Cloyd
Cause No. 74037-7-I, in the Court of Appeals, Division I, for the state of Washington.

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



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02-01-2016
Date
Done in Seattle, Washington