

NO. 74231-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW WONG,

Appellant.

FILED

September 22, 2016

Court of Appeals

Division I

State of Washington

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD F. MCDERMOTT

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether Wong has failed to show that the prosecutor committed reversible misconduct in closing argument.

2. Whether Wong has failed to show that trial counsel was constitutionally ineffective for failing to object to the state's closing argument.

3. Whether this Court should deny Wong's preemptive objection to appellate costs where the record is devoid of information on which this Court can find no likely ability to pay.

**B. STATEMENT OF THE CASE**

At about 10:00 PM on February 3, 2014, Auburn Police Officer Tyson Luce noticed a white Honda Civic with its lights on parked diagonally across three parking spaces at the far end of a grocery store parking lot. RP 171-73<sup>1</sup>; CP 3. Officer Luce checked the license plate with dispatch and learned that the car was stolen.

RP 174; CP 3.

As Officer Luce watched, the stolen car made a U-turn in the parking lot and entered the McDonald's drive-through lane. RP 175, 177; CP 3. Although it was dark, ambient street lighting and numerous light poles in the parking lot provided decent illumination

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<sup>1</sup> The record of proceedings consists of four consecutively-paginated volumes. The State refers to this material by page number only.

of the area. RP 173. Officer Luce saw that the car's driver was alone in the car. RP 174; CP 3. With an unobstructed view of the driver from just one car-length away, Luce observed that the driver was a young Asian or Hispanic male with short black hair, wearing a black leather jacket. RP 173; CP 3.

Officer Luce relayed the driver's description to dispatch and waited for back-up. RP 177. As the stolen car moved around the corner in the drive-through line, Luce briefly lost sight of it. RP 179. He then saw a man who looked like the driver and who was wearing a black leather jacket running away from the car. RP 179. The now-empty car was still in the McDonald's drive-through line with the driver's side door open, its engine running, and no key in the ignition. RP 179-81, 193.

Officer Luce followed the fleeing man in his patrol car and activated his emergency lights. RP 181. He saw the man running toward a 7-11 store, but temporarily lost sight of him while waiting for oncoming traffic to pass. RP 181. Officer Luce saw the man a minute or two later, standing in front of the 7-11, and immediately recognized him as the driver he had been following. RP 182-83. The man matched the physical description Luce had given to

dispatch and was wearing a black leather jacket. RP 182. There were no other pedestrians in the area. RP 180.

Officer Luce got out of his patrol car and directed the suspect, Andrew Wong, to lay on the ground. RP 183. Wong eventually complied and was arrested. RP 184. After advising Wong of his rights, Luce performed a search incident to arrest. RP 184. Luce found Wong's identification cards, a pair of gloves, and a set of keys. RP 188. None of the keys were manufactured Honda keys, but two of the keys were "shaved" to enable them to start any kind of car. RP 192. When used to start a car, shaved keys can be removed while the engine is running. RP 193.

The officer asked Wong what he was doing in the stolen car. RP 186. Wong did not deny that he had been in the car; he replied that he was an automotive technician in the area to visit a friend. RP 186.

Detective Joshua Matt interviewed Wong after his arrest. RP 144. Wong claimed that he was at the 7-11 because his "good friend" dropped him off there, but could not recall the friend's last name and provided no contact information. RP 145-46. When informed that Officer Luce had seen him in the stolen car, Wong asked if there was any video and then denied that he had been in

the car. RP 148-49. Wong was familiar with the concept of shaved keys and understood that they were commonly used to steal cars. RP 152. But when asked why he had a set of shaved keys, Wong simply repeated that he is an automotive technician.<sup>2</sup> RP 151.

Police contacted the Honda's registered owner, Rory Pesacreta, who confirmed that the car was his and that he had not given Wong permission to take it. RP 227-28; CP 4. There was no damage to the ignition, strongly suggesting that whoever stole the car used a shaved key to start it. RP 152-53; CP 4. Officer Luce was unable to recover any fingerprints from the car. RP 194.

The State charged Wong with possession of a stolen vehicle. CP 1-5. At trial, Officer Luce, Detective Matt, and Rory Pesacreta testified as described above. RP 139-231. Wong did not testify or present any other evidence. RP 222. The jury found Wong guilty as charged. RP 274. The court later granted Wong a first time offender waiver with no jail time. RP 295; CP 49. The court imposed only mandatory legal financial obligations. RP 295; CP 48. Additional facts are set forth in the argument sections to which they pertain.

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<sup>2</sup> No other evidence presented at trial indicated that Wong worked in automotive repair or that shaved keys are commonly used in that field.

**C. ARGUMENT**

**1. THE PROSECUTOR COMMITTED NO MISCONDUCT.**

Wong contends that the prosecutor committed reversible misconduct in closing argument by a) arguing that Wong's explanation for being in the stolen car was "nonsense" and b) trivializing the State's burden of proof and the consequence of conviction. The prosecutor's remarks were appropriate inferences from the evidence. Any suggestion that he trivialized the State's burden is belied by his vigorous embrace of that burden. And the passing reference in rebuttal to whether there was a "downside" to conviction was a proper response to the defense attempt to place before the jury irrelevant information pertaining to possible punishment. There was no misconduct.

**a. Relevant Facts.**

The prosecutor began his initial closing argument by describing the night of the incident from Officer Luce's perspective. RP 236-38. As part of that narrative, he pointed out that Wong did not deny that he was in the stolen car when initially asked. RP 238. Arguing that Wong's "story gets a little more elaborate and frankly a little better" when he was interviewed by a detective the following day, the State described Wong's statement that he was not in the

car, that he is an automotive technician, and that he had been dropped off at the 7-11 by his "good friend," whose last name he could not recall. RP 238. The prosecutor argued that Wong's story was not credible: "It's all bologna. It's a made up story, and you can know it's a made up story because it doesn't make any sense." RP 238.

Defense counsel objected "to the terms 'bologna' and 'made up story.'" RP 238. The trial court overruled the objection, noting, "It's closing argument, counsel. I always permit that kind of thing to be argued. You can have liberal leeway as well." RP 238.

Defense counsel was undeterred: "My objection is it's the jury's – the jury's supposed to determine the facts. The State's not supposed to inject personal opinions and attacks and we're approaching that." RP 238-39. The trial court adhered to its ruling: "Not there yet, counsel, I don't think. Objection is noted and overruled." RP 239.

The State continued its argument, using evidence from trial to support the inference that Wong's statement to police was untrue:

And you know that it's nonsense because you know what the officer saw the night before. You know that there was a car with that man in it and then all the

sudden that man's not in the car anymore and it's running by itself and it's in the line to get food at McDonald's.

Now, the door is open, that man runs across and away, he follows him, he finds him. That's why you know it's nonsense. His argument that it is (unintelligible) is tied specifically to the facts and that's what I'm arguing to you.

RP 239.

Turning next to the jury instructions, the prosecutor emphasized that the attorney's arguments were not evidence: "The evidence in this case is what you heard from Officer Luce, from what you heard from Detective Matt, and what you heard from the car owner here, Rory Pesacreta, this morning. The evidence includes the gloves, the keys; the evidence includes these photos."

RP 240. The prosecutor reiterated the instruction that the law does not distinguish between direct and circumstantial evidence, and to argue the circumstantial evidence that supported each element in the "to convict" instruction. RP 241-47.

Toward the end of his initial argument, the prosecutor recalled a discussion during voir dire, in which he apparently stated

that this case was relatively simple and not the “crime of the century”:<sup>3</sup>

And, you know, I asked some questions about whether or not your light goes off in your refrigerator or whether or not so common sensical or conclusions of things that you would make. This is that case. I submit to you that this is the light in your refrigerator that the door closes and you know beyond a reasonable doubt that that light is out. Here, the evidence presented to you [--] there’s no video, there’s no DNA (unintelligible). There’s no video of – it might not even be critical given (inaudible). It’d be great if we had video, it’d be great if we [had] ten different witnesses who can stand around and say, well I saw him open that door and then I saw him, you know, step beyond and then ran back to 7-11, and here’s what he did. We don’t have those witnesses. That’s not what we have. We have the officer’s observations as this very short event transpired.

RP 247-48. The prosecutor ended by asking the jury to “conclude that beyond a reasonable doubt Mr. Wong possessed this vehicle.”

RP 248.

The theme of the defense closing argument was that the jury should not credit Officer Luce’s testimony because the officer was relatively inexperienced and Wong’s statements had not been recorded. RP 249, 251-57, 259-60. Counsel responded to the State’s remark about the case being a simple one: “Well, the State wants you to – you know, the State says this isn’t the crime of the

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<sup>3</sup> Voir dire has not been transcribed.

century, but *we're here because it's a felony ...*" RP 260.

Addressing the presumption of innocence and reasonable doubt, counsel argued, "Proof beyond a reasonable doubt is the highest standard and for good reason. We don't guess people guilty. *We don't guess them guilty of felonies.*" RP 262.

The State objected to the repeated reference to the crime being a felony. RP 262. The court overruled the objection: "I think it's closing argument and I've given both of you leeway because I believe that the jury can decide what's argument and what's facts and they have to make the ultimate decision in terms of the lawyer's arguments." RP 262. Turning to the jury, the court reminded them, "Remember what the lawyers say isn't evidence, but – the lawyers should have the opportunity to take the evidence as they see it and to argue to you and I've tried to allow both lawyers to be able to do that and I'll continue to do that." RP 262.

Defense counsel went on, discussing the reasonable doubt standard and the nature of an "abiding belief." RP 262-63. He cautioned the jury that their verdict would be permanent, and pushed back against the prosecutor's reliance on circumstantial evidence: "You might believe it's going to rain tomorrow or you might believe it's going to be sunny tomorrow, but that's not proof

beyond a reasonable doubt. Would you bet your house on it? Would you bet your kids' future on it? No, it's an important standard because we do not – we do not, members of the jury, take this lightly.” RP 263.

The deputy prosecutor began his rebuttal by highlighting the instruction that the jury has nothing to do with punishment and may not consider the fact that punishment may follow conviction, except that it may tend to make them more careful. RP 264. The prosecutor explained why he brought up the instruction:

I just – normally I don't even look at this paragraph for reference because I think it's obvious, but there were two references to – in closing argument and I just want to remind you that you're not going to bet your house, you're not going to bet your child's education because you're not supposed to even consider the level of downside, if there is a downside, to a conviction. There's no punishment consideration that you're allowed to make and you need to just wipe all that off your mind.

RP 264-65. There was no objection. After highlighting flaws in the stories Wong told police, the prosecutor reiterated that Wong had “absolutely no burden” of proof. RP 267. He went on:

The State embraces the government's burden. It's a system we all want. We all want to live in the system where the government has the sole burden to prove a case beyond a reasonable doubt. That's – we all embrace, but when you're asked a question and you fail to answer, the State can certainly point

that out. And here he was talking to the officer when he said why are you in the stolen Honda, he didn't have a response and that should tell you something as well. ...

It's good that the defendant is presumed innocent. It's good that presumption continues, it is good that the State has the sole burden to prove this beyond a reasonable doubt and the defendant has absolutely no burden. That's why we're here. But I would submit to you, Mr. Wong has now had his trial. He has now had his moment, this has now been fulfilled. The evidence before you is pretty clear, it's a reasonable inference about the evidence, and I'm going to ask you to find him guilty.

RP 268-69.

b. The Prosecutor Did Not Express His Personal Opinion.

A defendant who alleges prosecutorial misconduct bears the burden of establishing that the conduct complained of was both improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only where there is a substantial likelihood that the misconduct affected the jury's verdict.

Id. The allegedly improper statement must be viewed in the context of the entire case. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Counsel are given latitude to argue the facts in evidence and reasonable inferences in their closing arguments. Dhaliwal, 150

Wn.2d at 577. They may not, however, make prejudicial statements that are not supported by the record. Id. Nor are prosecutors permitted to state their personal beliefs about the defendant's guilt or innocence or the credibility of the witnesses. Dhaliwal, 150 Wn.2d at 577-78; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact. In other words, *there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.*

State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (quoting State v. Armstrong, 37 Wash. 51, 54-55, 79 P. 490 (1905)) (emphasis supplied by McKenzie court). "Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*" McKenzie, 157 Wn.2d at 54 (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983) (emphasis supplied by McKenzie court). Any allegedly improper statements should be viewed within the context of the prosecutor's

entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. Dhaliwal, 150 Wn.2d at 578; State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Wong contends that the prosecutor improperly expressed his personal belief as to Wong's credibility and guilt by referring to Wong's statement to police as "bologna," "a made up story" and "nonsense." But the prosecutor tied these remarks to the evidence presented at trial, and the remarks were reasonable inferences from that evidence. The prosecutor argued that the jury could know that Wong made up the story about having been dropped off at 7-11 and having shaved keys because of his work as a mechanic "because you know what the officer saw[.]" RP 239. The prosecutor then described how Officer Luce's observations belied Wong's account.

Where the prosecutor shows that evidence contradicts a defendant's statement, it is not improper to characterize that statement as a lie. State v. Copeland, 130 Wn.2d 244, 291-92, 922 P.2d 1034 (1996). In this case, the prosecutor's argument that Wong's story was "made up," "bologna," and "nonsense" did no more than imply that Wong had lied in his statements to police, an inference supported by the State's evidence. Viewed in context,

the remarks do not make it “clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.” McKenzie, 157 Wn.2d at 54. Thus, there was no misconduct.

While Wong cites no Washington authority to support his position, he points to a handful of cases from outside of Washington that appear to hold that comments like those made in this case are improper. However, each of the cited cases involves multiple instances of egregious misconduct and is distinguishable on that basis. First, in State v. Acker, 627 A.2d 170 (NJ App. 1993), a twenty-year-old per curiam opinion from an intermediate court, the prosecutor characterized defense counsel and the defense as “outrageous, remarkable, absolutely preposterous and absolutely outrageous” in response to the objectively unremarkable argument that the jury could not convict when evidence indicated that any crime occurred outside of the charging period. Id. at 172. But that appears to have been the least objectionable part of the argument: the prosecutor also argued that the jury’s function was to protect young victims of sexual abuse as a group, an argument “considered to be among the most egregious forms of prosecutorial misconduct”; that the defendant was intoxicated, when the

evidence was to the contrary; and that the charges involving multiple victims were “inseparable” because “it’s hard to believe that one girl would be telling the truth about being sexually abused by Mr. Acker and the other one wouldn’t.” Id. at 173-74.

Likewise, in United States v. Sanchez, the prosecutor engaged in serious misconduct throughout the trial, forcing the defendant to call a U.S. Marshall a liar, eliciting an officer’s opinion of the defendant’s truthfulness, introducing inadmissible hearsay, commenting on the defendant’s assertion of marital privilege, impeaching the defendant with inadmissible evidence that he was the “largest drug dealer on the reservation,” vouching for government witnesses, denigrating the defense as a “scam,” making the forbidden argument that in order to acquit the defendant the jury must believe the State’s witnesses are lying; and arguing that the jury had a duty to convict. 176 F.3d 1214, 1219-25 (9<sup>th</sup> Cir. 1999). Similarly, in Ross v. State, the instances of erroneous and prejudicial arguments by the prosecutor were too numerous for the intermediate Florida court to describe. 726 So.2d 317, 319 (Fla. Dist. Ct. App. 1998).

Further, in State v. Holly, an unpublished case on which Wong principally relies, the intermediate court refused to grant a

new trial despite the prosecutor's arguments that disparaged the defense, because "the prosecutor's argument as a whole was proper[.]" 228 N.C. App. 568, \*9 (2013) (unpublished disposition).<sup>4</sup>

Here, the deputy prosecutor's remarks were reasonable inferences from the evidence and were explicitly tied to that evidence. Even if the words "nonsense," "bologna," and "made up story" were marginally improper, they clearly do not approach the repeated and varied misconduct that warranted reversal in the out-of-state cases on which Wong relies.

- c. The Prosecutor Did Not Argue That There Was "No Downside" To Conviction Or Diminish The Burden Of Proof.

Wong next argues that the deputy prosecutor committed misconduct by suggesting that there "might be no punishment at all" if Wong was convicted. Brief of Appellant at 12. Wong mischaracterizes the State's argument, which was that the jury need not and could not consider what punishment might be imposed. That argument responded directly to defense counsel's repeated efforts to highlight for the jury that the crime charged was a felony, and echoes the court's instruction to the jury.

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<sup>4</sup> In North Carolina, citation to unpublished opinions is disfavored. N.C. App. R. 30(e)(3).

As set forth above, defense counsel argued against the State's remark that the case was not the "crime of the century," by pointing out that "we're here because it's a felony ..." RP 260. In arguing the burden of proof, defense counsel immediately followed by arguing, "we don't guess [people] guilty of felonies." RP 262. The trial court overruled the State's objection, reiterating its practice to give counsel significant leeway in closing argument. The State then began its rebuttal by quoting from the jury instructions: "you have nothing whatever to do with any punishment that may be imposed as a violation of the law and you may not consider the fact that punishment may follow a conviction except insofar as it may tend to make you careful." RP 264; CP 20-21. In other words, "you're not supposed to even consider the level of downside, if there is a downside, to conviction." RP 264. Wong did not object.

Where there is a failure to object to improper statements, any error is waived unless the statement is so flagrant and ill-intentioned that it causes enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. Dhaliwal, 150 Wn.2d at 578. If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required. Id.

Reversal is not required here. The State's remark was not improper. It was an accurate paraphrase of the jury instruction, which the deputy prosecutor had already faithfully quoted. Wong contends the phrase "if there is a downside" implied that the jury's task was less important because there might be no punishment at all. Brief of Appellant at 12. But the jury instruction itself tells the jury to disregard "any punishment that *may be imposed*" and "the fact that punishment *may follow* conviction[.]" CP 20-21. It is unclear how the instruction materially differs from the prosecutor's remark.

The case is also unlike State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976). There, the State explicitly and repeatedly argued that the trial judge would decide the punishment "if any" from among many alternatives on the basis of "additional reports" and might choose to impose a deferred sentence. Id. at 261-62.

This Court observed that such comments "may distract the jury from its function of determining whether the defendant was guilty or innocent beyond a reasonable doubt by informing them, in substance, that it does not matter if their verdict is wrong because the judge may correct its effect." Id. at 262. Here, the prosecutor

simply and accurately informed the jury that whatever punishment might follow conviction was not their concern.

Further, even where the State makes an improper argument, it is not reversible error if made in direct response to a defense argument, went no further than necessary to respond to the defense, brought no matters outside the record before the jury, and was not so prejudicial that an instruction could not cure them. State v. LaPorte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961). Here, the State's argument was in direct response to defense counsel's repeated reference to the charged crime as a felony, which implied that the charges were serious, would carry serious consequences, and the jury should therefore hold the State to an especially rigorous standard: "we don't guess [people] guilty of felonies." RP 262.

Wong does not explain why no instruction could cure the alleged prejudice from the State's remark. Indeed, the prosecutor had accurately quoted the pertinent jury instruction, and the trial judge and the prosecutor had both emphasized that counsel's closing arguments were not evidence. RP 240, 262. Any conceivable prejudice (which Wong fails to articulate) could easily

have been cured by a quick reference to or reiteration of either of these jury instructions.

Wong also argues that the State trivialized the jury's decision by arguing that proof beyond a reasonable doubt was akin to knowing that the refrigerator light turns off when the door is closed. In context, this analogy was appropriate. The prosecutor correctly anticipated the defense argument that the jury should acquit because there was little direct evidence of Wong's guilt. He countered that argument by pointing out that the jurors could find facts beyond a reasonable doubt based exclusively on circumstantial evidence – just like they could be certain that the refrigerator light goes out when the door closes without direct evidence that the inside of a closed refrigerator is dark.

Again, Wong did not object to the State's argument and must therefore show that the remarks were flagrant and ill-intentioned and caused an enduring prejudice that could not be cured with an instruction. He cannot make this showing, because the trial court could have reiterated the reasonable doubt instruction to dispel any conceivable misunderstanding about the State's burden of proof. Indeed, even that action would have been unnecessary in this

case, because the deputy prosecutor went to great lengths to convey and embrace the burden. See RP 268-69.

Because the State's remarks were not improper, and because Wong has shown no prejudice attributable to those remarks, his argument fails.

**2. WONG RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

In addition to his argument that the prosecutor's closing argument constituted reversible misconduct, Wong contends that his trial counsel was constitutionally ineffective for failing to object. Because there was no error in the prosecutor's remarks and Wong has established no prejudice in any event, his ineffective assistance of counsel claim is similarly unavailing.

To prevail on a claim of ineffective assistance of counsel, the defendant must show both that his attorney's performance fell below a minimum objective standard of reasonable conduct; and that but for his counsel's errors, there is a reasonable probability that the trial's result would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If the defendant fails to establish either prong, the court

should deny the claim. Strickland, 466 U.S. at 697; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

To meet this standard, Wong baldly asserts that “the jury would have been far more likely to find reasonable doubt” had defense counsel objected to the State’s argument. But as argued above, the remarks were not improper and any objections would likely have been overruled. This is also clear given Judge McDermott’s repeated refusal to intercede to curtail either counsel’s argument.

Because Wong establishes neither deficient performance nor resulting prejudice, this Court should reject his ineffective assistance of counsel claim.

**3. APPELLATE COSTS SHOULD NOT BE FORECLOSED.**

Wong asks this Court to rule that, should the State prevail on appeal, he should not be required to repay appellate costs on the grounds that he is currently indigent. This claim should be rejected because the record contains no information from which this Court could reasonably conclude that Wong has no ability to pay.

As in most cases, Wong’s ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As

such, the record contains almost no information about Wong's financial status or employment prospects, and the State did not have the right to obtain information about his financial situation.

Wong obtained an ex-parte Order Authorizing Appeal In Forma Pauperis after presumably presenting an affidavit regarding his current financial circumstances. CP 54-56. The affidavit, if any, is not in the record. There is no other information about Wong's employment history, potential for employment, or likely future income, nor did the trial court make any findings regarding Wong's likely future ability to pay financial obligations.

In State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612, rev. denied, 185 Wn.2d 1034 (2016), this Court held that costs should not be awarded because the defendant was 66 years old and facing a 24-year sentence, meaning there was "no realistic possibility" that he could pay appellate costs in the future. This Court also recognized, however, that "[t]o 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." Id.

The record in this case is devoid of any information that would support a finding that there is "no realistic possibility" that

Wong will be able to pay appellate costs. In such circumstances, appellate costs should be awarded. State v. Caver, No. 73761-9-1, slip op. at 10-14 (filed Sept. 6, 2016).

Wong is only 31 years old, and received a no-jail First Time Offender Waiver sentence. CP 5, 49. He has the majority of his working years ahead of him and no confinement constrains his ability to work. Indeed, his defense in this case was, in part, that he was employed as an automotive technician. He is thus employable, if not presently employed. Because the record in this case contains no evidence from which this Court could reasonably conclude that the defendant has no future ability to pay appellate costs, any exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable and arbitrary.

Alternatively, this Court could require Wong to meet the requirements of Division Three's recently published general order, which would provide some additional factual basis on which to decide Wong's ability to pay costs. See [http://www.courts.wa.gov/appellate\\_trial\\_courts/?fa=atc.genorders\\_orddisp&ordnumber=021&div=III](http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=021&div=III).

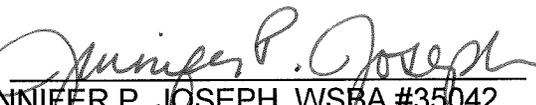
**D. CONCLUSION**

For the reasons expressed above, the State respectfully requests this Court affirm Wong's conviction.

DATED this 22<sup>nd</sup> day of September, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Sweigert, the attorney for the appellant, at Sweigertj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Andrew Yin Wong, Cause No. 74231-1, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 22 day of September, 2016.



\_\_\_\_\_  
Name:

Done in Seattle, Washington