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Court of Appeals
Division I
State of Washington

NO. 74310-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMEEL L. PADILLA,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The defendant was convicted of four counts of using the internet to intentionally view depictions of minors engaged in sexually explicit conduct. The jury was instructed that in order to convict it must be convinced beyond a reasonable doubt that the defendant intended to, and did, view depictions of minors. Were those instructions, which contained every element of the crime, constitutionally sufficient?

2. The charging document notified the defendant of the intent element of the crimes. Were they, too, constitutionally sufficient?

3. A community custody condition that prohibits visiting places where minor congregate as defined by a defendant's CCO is unconstitutionally vague and should be stricken or rewritten.

II. STATEMENT OF THE CASE

Between January 1, 2011, and September 12, 2012, during four separate internet sessions, the defendant Jameel Padilla intentionally viewed depictions of minors engaged in sexually explicit conduct, including in two instances, children engaged in actual or simulated sexual intercourse.

In April 2012, the Arroyo Grande, California, Police Department (AGPD) contacted Everett Police Det. deFolo. They had acquired information about an Everett resident, the defendant.¹ During their investigation, they traced the defendant's IP address to an Everett apartment. 2 RP 62-63.

Det. deFolo verified the defendant's information and, in September 2012, executed a search warrant on the defendant's apartment. He seized, among other things, the defendant's laptop computer. Afterwards, he called the defendant and later interviewed him at his Boeing workplace. 2 RP 64, 66-72, 74.

During the interview, the defendant admitted that he was the only one who lived at the apartment and the only one who had access to his computer and the accounts on it and to his Internet service. He said his computer had adult pornography on it. He said it also contained images of pre-pubescent girls in bathing suits. He said it was perverted but that he had never acted on his perversions. He said he mother would be ashamed of him. 2 RP 75-78.

¹ AGD were investigating a complaint that the defendant had communicated via Facebook with an Arroyo Grande 9-year old for immoral purposes. This jury did not hear the nature of the complaint.

Everett Police Detective Klingman did a forensic evaluation of the defendant's computer. A forensic evaluation begins with a physical examination of the computer. A "write-blocking" device is then applied to the hard drive so that it can be read but cannot be altered in any way during the examination. Thereafter software is applied which clones the hard drive to produce an exact duplicate. From there, various software is used to look at every file on the computer, both active and deleted, and to bookmark and sort the files into categories (for example images, searches, ownership, or history). 2 RP 103, 106.

Det. Klingman focused his investigation on media and social media artifacts, in both allocated and unallocated space. Unallocated space is the space to which information moves when it is deleted or emptied from a folder. Those files are no longer accessible by use of the computer's operating system and may be overwritten. The files in allocated space have not been deleted and are still available to the user. 2 RP 107-08, 112.

In the allocated space, the defendant had a folder of files of "scantily dressed" young girls in bathing suits. Those images were similar to photographs that the defendant had deleted but which still existed in his unallocated space. The detectives collected

examples that filled several pages with multiple images on each page. 2 RP 114-16.

Detective Klingman also collected ownership information from the computer. He found multiple pictures of the defendant as well as the defendant's PUD and Comcast bills. Det. Klingman found no evidence anywhere on the computer that showed it had been accessed by anyone other than the defendant. Evidence of another person using a computer is usually "really clear" and would include another person's account, photos, addresses, news articles, social media accounts, or other interests. 2 RP 119-20; 122-23.

Detective Klingman collected the search terms the defendant had used in two categories, Google searches and other searches. In order for a Google or other search to occur, the computer user must intentionally type a term into a search engine. One of the defendant's searches was for "12 child porn FrostWire". FrostWire is a peer-to-peer file sharing program. Others were Everett child porn arrest; six year old; child porn FrostWire; how to delete stuff from unallocated space; preteen pics; free preteen model; preteens suck; pedophile advocacy group; what makes you a pedophile;

preteen models suck; 11 year old raped by 20 men; 11 year old rape cell video; little girl love; little girl sucking. 2 RP 125; 129-30.

Det. Klingman also found multiple conversations in the form of chats and emails that related to child pornography. In his chats, the defendant sought content of naked little girls performing simulated sex acts. He communicated with others with a similar interest in juvenile girls and discussed how young they would go. He communicated with others who claimed to be selling their children or pictures of their children or displaying child pornography pictures as their profile pictures. Sometimes he directly requested child pornography. Some of his chat partners claimed to be juveniles or to be able to produce child pornography. Like searches, the chats and conversations could not have existed without the defendant's conscious actions. 2 RP 129-132; 225.

The defendant used several aliases during his chat sessions, most often "Brian Petes". He used the Petes alias when chatting with grown women on the computer. The defendant attributed to Petes his own birthday, work place, and ethnicity. 2 RP 137-42.

Det. Klingman found other media in cached folders and unallocated space. He bookmarked those that were relevant to his

investigation. He categorized the media into different groups: children being raped or performing sex acts (oral and/or graphic sex) or naked children posed in ways that highlighted their nudity, not engaged in actual sex acts. 2 RP 133-34; 137.

The hundreds of photographs were cached images in deleted, unallocated space. Det. Klingman collected them as Exhibit 15 and 16.² Some of the pictures were of a preteen naked girl with her legs spread. That particular image was also included as part of one of the defendant's chat sessions. The existence of that photograph in two places meant that the person with whom the defendant was chatting likely displayed that photograph as his profile image. There were other images on Exhibit 15 that had been displayed as profile pictures by the defendant's chat partners. The data available with some of the photographs indicated that they had been viewed on more than one occasion. 2 RP 140-46; 152.

² The State has referred to exhibits 15, 16, 21, and 24. It has not designated these exhibits because each contains illegal images of children and/or infants engaged in sexually explicit conduct. The legislature has expressed its intent to prohibit reproduction of child pornography in criminal cases to avoid the repeated abuse of victims. RCW 9.68A.001. Images such as these must remain in the custody of law enforcement or the court. RCW 9.68A.170(1). And RAP 9.8(b) prohibits transport of "weapons, controlled substances, hazardous items, or currency" unless directed by the appellate court. These images likely fall under that prohibition and the State will transmit them if directed by this court.

Det. Klingman also found child pornography videos from FrostWire. The FrostWire program permits a user to install software and set up a shared folder. Files dropped into the shared folder can then be accessed by other users. A FrostWire user can search for other users or servers that link to FrostWire. Any file a person downloads on FrostWire can be shared by other users as it downloads. When the download is complete, the file can be removed or left in a folder to be shared. 2 RP 153-55.

In order to obtain a FrostWire file, a user types into a search box what he is looking for. If a file appears with that name, the user clicks on the file and begins the download. It can be previewed only when it has been downloaded in part. 2 RP 156.

Det. Klingman saw examples of files that the defendant had started downloading and previewing which he collected as Exhibit 21. The defendant would have had to type in the name of each file in order to receive it. One video was entitled "2008 – 8 year old look move listen – so horny cute – pthc.mpg". PTHC stands for preteen hardcore. The word pedo also appeared in some titles. 2 RP 157-59.

Det. Klingman found Google searches about FrostWire including FrostWire can you get busted for using FrostWire; FrostWire and child porn; child porn FrostWire. 2 RP 161-62.

Det. Klingman used his computer to search using the same terms. When he entered PTHC into the FrostWire search engine, he received 40-50 files. 2 RP 220.

Det. Klingman found on the defendant's computer playable videos showing children engaged in sexually explicit conduct which he collected on a CD, saved as Exhibit 24. The videos were fragmented, a product of being overwritten. He collected screen shots of the children from each video, sometimes more than one. It was obvious that the infants and children in the videos were minors. To suggest that they were adults was "foolish". 2 RP 233-34

Det. Klingman also found some "link" files connected to videos. The "link" showed that a file had been accessed. The titles of just some of the linked files were 11 year old Cleveland; preteen hardcore pedo LE 2010 through 2012; OMG Asian pedo girl; preteen hardcore 2010 5 year old Katherine. Det. Klingman reconstructed some of the websites the defendant had visited. They were without question child pornography sites. 2 RP 248-250.

Det. Klingman found evidence that the defendant used an external storage device. 2 RP 242-44. He could have moved pornography to that device. Det. Klingman believed his in part because of a chat the defendant had with another on-line user. The defendant explained to him how to collect images and then delete them from his computer. The defendant also searched for information related to deleting files from unallocated space. 2 RP 242-46.

The State charged the defendant with two counts of first degree viewing depictions of minors and two counts of second degree viewing depictions of minors.³ The information was amended twice but eventually alleged that the defendant had used the internet on four separate occasions to intentionally view depictions of minors engaged in sexually explicit conduct. CP 104-05.

The case was tried to a jury on September 21-23, 2016. Detectives deFolo and Klingman testified, as did a defense expert, Larry Randall Karstetter.

Karstetter criticized detectives for not having seized the defendant's router. It might have provided information regarding

someone else connecting to the defendant's computer. He described how the defendant could have inadvertently downloaded many files with only a few keystrokes. He described how someone could have hacked the defendant's computer to try to tie him to illegal activity. He said the FrostWire titles could have been inaccurate. He said the defendant's usage was not typical in that he had not saved images or viewed them frequently. 3 RP 287-90, 297; 299; 302-310.

Karstetter admitted that it was unlikely that someone had gone into the defendant's computer to frame him for viewing child pornography. He admitted that anyone downloading the FrostWire files had to have read the titles. He agreed that the user in this case had to have taken affirmative steps to search for and chat about child pornography. He acknowledged that there were multiple searches and link files that showed an affirmative choice to seek out those files, download them, and view them. He had no criticism of Klingman's work and no concern about his integrity. He acknowledged that it was extremely rare to find a hacker who went into someone else's computer to look at pornography. He said it

³ The defendant was also charged in Count I with Communicating with a Minor for Immoral Purposes, a count that was tried separately.

was not really worth the trouble to cover your tracks. 3 RP 319-20; 327; 329; 331-32.

The defendant did not testify. After he rested, the defendant proposed only one instruction, WPIC 6.13, which the court gave. CP 102; 83. The State proposed four identical to-convict instructions based on the language of the statute for each of the four counts. CP __ (sub. no. 88, Plaintiff's Proposed Instructions); 86-89. The elements were:

- (1) That on or about the 1st day of January 2010 through the 12th day of September, 2012, in an internet session separate and distinct from that alleged in [the other three counts], the defendant intentionally viewed over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct;
- (2) That the viewing was initiated by the defendant; and
- (3) That the viewing of the visual or printed material occurred in the State of Washington.

The defendant said he had no objection to the instructions. 3 RP 338.

The court gave the State's proposed to-convict instructions. CP 86-89. It gave two different definitions of sexually explicit conduct, one as related to the first degree counts and one as related to the second degree counts.

The defendant did not disagree that the images found on his computer were of minors in sexually explicit conduct. Rather, he argued that someone else had hacked into his computer, that the ratio of illegal pornography to legal pornography was small, that anyone who would download such images would hoard them for later viewing, that his computer automatically and inadvertently downloaded child pornography, and that he immediately deleted any illegal images he inadvertently received. He argued that the State had not disproved any of his alternative explanations. 3 RP 372-92.

The jury returned four guilty verdicts. CP 74-77.

III. ARGUMENT

A. THE TO-CONVICT INSTRUCTIONS CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF INTENTIONALLY VIEWING DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT.

Due process requires that in order to obtain a conviction the State prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 22; State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002); State v. Garbaccio, 161 Wn. App. 716, 732, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010). "Accordingly, a trial court errs by failing to accurately instruct the jury as to each element of a

charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt.” State v. Williams, 136 Wn. App. 486, 493, 160 P.3d 111 (2007) (citations omitted). Jury instructions are sufficient if they inform the jury of the law and allow parties to argue their theories of the case. Garbaccio, 161 Wn. App. at 732.

In the present case, the defendant was charged with four counts of viewing depictions of minors, two in the first degree and two in the second. The statute provides:

- (1) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the first degree, a class B felony punishable under chapter RCW 9A.20 RCW.
- (2) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the second degree, a class C felony punishable under chapter 9A.20 RCW.
- (3) For the purposes of determining whether a person intentionally viewed over the internet a visual or printed matter depicting a minor engaged in sexually explicit conduct in subsection (1) or (2) of this section, the trier of fact shall consider the title, text, and content of the visual or printed matter, as

well as the internet history, search terms, thumbnail images, downloading activity, expert computer forensic testimony, number of visual or printed matter depicting minors engaged in sexually explicit conduct, defendant's access to and control over the electronic device and its contents upon which the visual or printed matter was found, or any other relevant evidence. The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

- (4) For the purposes of this section, each separate internet session of intentionally viewing over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct constitutes a separate offense.

RCW 9.68A.075.

To-convict instructions contained each of the statutory elements of the crime. Each required the State to prove beyond a reasonable doubt that the defendant, on a separate occasion from the other counts, "intentionally viewed over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct." CP 86-89. No additional knowledge instruction regarding knowledge was required because the statute required an intentional act.

"A person acts with intent... when he or she acts with the objective or purpose to accomplish a result which constitutes a

crime.” RCW 9A.08.010(1)(a). Here, the criminal objective was the viewing of unlawful depictions of minors. The jury was so instructed. The jury was directed not to determine, as the defendant suggests, whether the defendant intentionally viewed *any* depiction, but rather whether he intentionally viewed illegal depictions of minors.

This statute, unlike the possession statute, applies only to crimes committed on the internet. It applies only when a user specifically looks, finds, and views illegal depictions of children, as evidenced by a user’s searches, downloads, and other internet activity. The statute actually lists some of the types of evidence that the trier of fact “shall” consider when determining intent. Those include “the title, text, and content of the visual or printed matter, as well as the internet history, search terms, thumbnail images, downloading activity... number of visual or printed matter depicting minors engaged in sexually explicit conduct, defendant’s access to and control over the electronic device and its contents upon which the visual or printed matter was found, or any other relevant evidence.” RCW 9.68A.075(3).

Statutes must be interpreted to give effect to the legislature’s intent. State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013).

If possible, the intent must be taken solely from the plain language of the statute, the context of the statute, related provisions, and the statutory scheme as a whole. Unambiguous, plain language does not need to be construed. Only if more than one construction is reasonable is a statute ambiguous. Id. at 192-93.

The plain language of the statute, read as a whole, shows the legislative intent that the word "intentional" refers to the viewing of depictions of minors engaged in sexually explicit conduct.

The legislative intent as voiced in RCW 9.68A.001, also bears that out:

The legislature further finds that due to the changing nature of technology, offenders are now able to access child pornography in different ways and in increasing quantities. By amending current statutes... it is the intent of the legislature that intentional viewing of and dealing in child pornography over the internet is subject to a criminal penalty without limiting the scope of existing prohibitions on the possession... of electronic depictions of a minor...

The defendant has cited to several cases construing the possession statute that are not on point. See Garbaccio, 161 Wn. App. 716; State v. Rosul, 95 Wn. App. 176, 974 P.2d 916 (1999).

The possession statute reads:

A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly

possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).

RCW 9.68A.070.

The Rosul court found that a grammatical reading of the statute required the application of the scienter, knowingly, to the act of possession and to the "general nature of the material" possessed. 95 Wn. App. at 181. Without that implicit element of knowledge of the nature of the material, a person might, in certain circumstances, violate the statute if he knowingly possessed illegal materials without knowing that they images were, in fact, of minors. Id. at 184-85.

The Garbaccio court reviewed a conviction under the same statute. It said that requiring a showing of knowledge of the general nature of the material in possession cases avoided "the imposition of criminal liability against individuals engaged in otherwise innocent conduct who happen merely to possess contraband (e.g., possession of second-hand computer hardware or a used digital camera containing illicit data files)." 161 Wn. App. at 733-34.

That reasoning does not apply here for a simple reason: this is an intentional crime. The statute criminalizes intentional viewing of child pornography. That is an express, not an implied, element.

That is an element contained in Paragraph (1) of each of the four to-convict instructions given.

While possession may unwitting, an intentional act is not. The viewing statute requires more than that the defendant knew the general nature of the images he viewed. It requires not only intent but also that the defendant initiated the viewing, an element about which the jury was instructed. RCW 9.68A.075(3). Thus, the jury was instructed that the State was required to prove that the defendant intended to view, initiated the viewing of, and did view images of unlawful child pornography.

There is no additional knowledge element. A person who intends to view, initiates a search, and actually views illegal depictions of minors necessarily knows that he is viewing illegal material. No additional element exists or is necessary.

There is an attempted possession case whose reasoning is helpful, State v. Luther, 157 Wn.2d 63, 134 P.3d 205 (2006). There, the defendant was convicted of attempting to possess unlawful depictions of minors after detectives found on his computer images of what appeared to be minors engaged in sexually explicit conduct and on-line chats relating to them. The defendant complained that attempted possession charge was

unconstitutionally broad because it criminalized possession of images that might be of actors portraying minors. The Supreme Court disagreed. The attempt statute was not overbroad because the defendant's intent was to possess unlawful images of minors, images that have no constitutional protection. Id. at 189-90.

The same is true here. The defendant here could not have been found guilty if the jury had not determined that he intentionally searched for, found, and viewed depictions of minors. The instructions contained each element of the crime.

But even if the jury instructions should have contained a knowledge element, the error was harmless. Omission of an essential element is harmless error when it is clear that the omission did not contribute to the verdict, for example, when the omitted element is supported by uncontroverted evidence. State v. Schaler, 169 Wn.2d 274, 288, 236 P.3d 858 (2010).

Here, the uncontroverted evidence that the defendant knew or should have known that he was viewing child pornography is overwhelming. A person acts with knowledge when:

- (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
- (ii) he or she has information which would lead a reasonable person in the same situation to believe

that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b). Knowledge is also established when a person acts with intent. RCW 9A.08.010(2).

Det. Klingman found hundreds of photographs and videos that showed children engaged in sexually explicit conduct. He said it was obvious that the children and the infants in them were minors. To suggest otherwise, he said, was foolish. No one challenged that testimony or suggested that the images were not of small children and infants. The defense was that the defendant had not downloaded them, intended to view them, or viewed them.

Any argument that the defendant may not have known that these images existed in his unallocated space should fail. The jury has already settled that question in its verdicts when they found that he sought out and intentionally viewed the images of children engaged in sexually explicit conduct.

B. THE CHARGING DOCUMENT MIRRORED THE LANGUAGE OF THE STATUTE AND CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIMES.

The court reviews a challenge to the sufficiency of a charging document *de novo*. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). If the challenge is first raised after a

guilty verdict, the court will construe the charging document liberally and in favor of validity. Id. at 185; State v. Kiorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The court must use common sense and can find an essential element from facts that are necessarily implied. The first question is whether the “necessary facts appear in any form, or by fair construction they can be found, in the charging document.” State v. Pineda-Pineda, 154 Wn. App. 653, 670, 226 P.3d 165 (2010). The court need not look at each charge in isolation. State v. Nonog, 169 Wn.2d 220, 230-32, 237 P.3d 250 (2010). If the essential elements cannot be found in the information itself, prejudice is presumed and the inquiry is over. Pineda-Pineda, 154 Wn. App. 670. If the answer is yes, the essential elements do exist in the information, the defendant must show that he was so prejudiced by the inartful language that he had no notice of the charge. Id.

Here, because there is no implied element of knowledge, the information, like the instructions, contained every element of the crimes. The charging language mirrored the language of the statute and contained every essential element, as discussed above.

C. THE COMMUNITY CUSTODY CONDITION THAT PROHIBITED VISITING PLACES WHERE MINOR CONGREGATE AS DEFINED BY THE CCO WAS UNCONSTITUTIONALLY VAGUE.

The court imposed several community custody conditions including:

5. Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.

CP 36-37. The defendant's argument that this is unconstitutionally vague is well taken.

A law is unconstitutionally vague if it does not (1) provide ordinary people fair warning of proscribed conduct and (2) does not have standards to avoid arbitrary enforcement. The same analysis applies to community custody conditions which are not presumed to be constitutional. State v. Irwin, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). A pre-enforcement challenge is ripe for review. Id. at 655.

The Irwin court addressed a virtually identical community custody condition and found it unconstitutional under both prongs. First, it did not give an ordinary person sufficient notice of what was prohibited. Second, permitting the community corrections officer to determine what those places were not only highlighted its

vagueness but also made the condition susceptible to arbitrary enforcement. Thus, the condition was void for vagueness. Id.

Irwin applies here. The condition is unconstitutionally vague, the challenge is ripe for review, and the condition should be stricken.

D. THE COURT SHOULD IMPOSE APPELLATE COSTS.

The defendant's argument that costs should not be imposed because the trial court found him indigent ignores the language and history of RCW 10.73.160. The statute authorizes the court to exercise its discretion to require an adult offender to pay appellate 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 statute expressly applies to indigent persons and 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.

"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 and civil cases were the same. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, “[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).

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.2d 392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case and refused to award costs because the case involved not a personal consequence to either party but instead an issue of public interest. NECA, 66 Wn.2d at 23.

In Moore, the Supreme Court reversed a lower court’s judgment because the action was brought prematurely and refused to award costs: “While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of

the premature action and will not be permitted to recover costs on this appeal.” Moore, 65 Wn.2d at 393.

Each case illustrates and appellate courts denying costs because of an issue-based unusual circumstance that renders an award inequitable, not because of a litigant’s financial situation. That makes practical sense since 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. 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). The Blank court said that costs could be awarded without a prior determination of the defendant’s ability to pay. *Id.* at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal, something to which the Legislature silently acquiesced for almost 20 years.

Applying that reasoning to the present case, this court should deny the defendant’s motion and impose costs. The case presents a routine issue that was litigated for the defendant’s 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.

But even if this court focuses on the defendant's ability to pay, the award of costs is appropriate. Although the defendant was indigent when he filed his appeal, the current ability to pay costs is not the only relevant factor to be considered in the imposition of costs. State v. Sinclair, 192 Wn. App. 380, 389, 367 P.3d 612 (2016). The future ability to pay is important as well and if costs are imposed and a defendant is unable to repay in the future, the statute contains a mechanism for relief. Blank, 131 Wn.2d at 250.

This defendant is in a very different position from the defendant in Sinclair. Sinclair was 66-years old, indigent, and unlikely to ever be released or to be able to find employment. 192 Wn. App. at 393.

The defendant in the present case was 39 years old and sentenced to a total of 84 months in jail. CP 25. If he serves every day of his sentence, he will be only 46 years old when he is released. He was ordered to pay only mandatory costs totaling \$600. CP 28.

At the time of his offense, the defendant had a record of successful military service, a job at Boeing, his own apartment, cell

phones and a computer. Although unemployed and indigent at the time of sentencing, there was no indication that the defendant would be forever unable to work. He claimed no health or other issues that would prevent him from becoming a productive and earning member of society.

This court should not assume that the defendant will be indigent forever. If it turns out that he cannot find profitable work and/or that payment creates manifest hardship, he can move for remission under RCW 10.73.160(4). If interest accrual creates a hardship, the court can reduce or waive interest under RCW 10.82.090.

IV. CONCLUSION

For the foregoing reasons, the conviction should be affirmed.

Respectfully submitted on September 27, 2016.

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By:



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

THE STATE OF WASHINGTON,

Respondent,

v.

JAMEEL L. PADILLA,

Appellant.

No. 74310-4-I

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of September, 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, swiftm@nwattorney.net; and 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 27th day of September, 2016, at the Snohomish County Office.



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