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Court of Appeals
Division I
State of Washington

NO. 74713-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

TERRI HUIZENGA,

Appellant.

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

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel where her attorney failed to argue at sentencing that appellant's third degree assault and felony harassment convictions were the same criminal conduct.

2. The trial court violated appellant's Fifth Amendment right against self-incrimination when it denied her request for a first-time offender waiver based on her refusal "to acknowledge any responsibility whatsoever."

Issues Pertaining to Assignments of Error

1. Appellant's convictions for third degree assault and felony harassment involved the same objective criminal intent, occurred at the same time and place, and involved the same victim. Was appellant denied effective assistance of counsel where her attorney failed to argue at sentencing the two offenses constituted same criminal conduct?

2. At sentencing, the trial court relied on appellant's refusal "to acknowledge any responsibility whatsoever" for the offenses in rejecting her request for a first-time offender waiver. Did this improperly punish appellant for the lawful exercise of her Fifth Amendment right against self-incrimination, which continues through sentencing and the appeal?

B. STATEMENT OF THE CASE

On April 28, 2015, the State charged Terri Huizenga with second degree assault and felony harassment, contrary to RCW 9A.36.021(1)(a), as

well as RCW 9A.46.020(1)(a)(i) and (2)(b)(ii).¹ CP 1-2. The State alleged that on April 19, 2015, Huizenga threatened to kill and intentionally assaulted Rachel Zima, thereby recklessly inflicting substantial bodily harm. CP 1-2. The case proceeded to trial in December 2015.

Terri and Albert Huizenga² married in 2006 and separated in 2014. RP 95-100. During the divorce proceedings, Huizenga lived at the marital home in Lynden, Washington, while Albert moved to their 32-foot boat, moored in Squalicum Harbor in Bellingham, Washington. RP 97-102. At the time of trial, Albert had been dating another woman, Rachel Zima, for two years. RP 121.

On the evening of April 18, 2015, Albert and Zima had several drinks with friends, then returned to the marina, where they had several more drinks at a local bar and on the boat before going to bed. RP 122-29. Albert explained by the end of the night they were intoxicated enough to be “in no shape to drive.” RP 127. Around 1:30 a.m. on April 19, they heard rustling on the boat and knew it was Huizenga. RP 132-33. Albert announced he and Zima were there and asked Huizenga to leave. RP 135-36. They did not get out of bed because they were naked. RP 137. Huizenga called 911 and asked police to remove Zima from the boat. RP 140.

¹ The State also charged Huizenga with first degree vehicle prowling, but later agreed to dismissal of the charge without prejudice. CP 1-2, 7.

² This brief refers to Albert by his first name to avoid confusion.

Albert testified Huizenga then started using her phone to take photos him and Zima in bed together. RP 144. Zima became angry and grabbed the phone from Huizenga's hand. RP 146, 202-03. Albert and Zima testified Huizenga then grabbed Zima's hair. RP 147-48, 204. Albert punched Huizenga several times in the face, knocking one of her teeth out. RP 70, 149-53, 268. Zima testified Huizenga then pulled her out of bed and Zima felt as pain in her arm as the two fell into the water. RP 206-11. Zima and Albert testified Huizenga then repeatedly pushed Zima's head under water and told Zima she wanted to kill her. RP 155-56, 212-14, 276.

Officers Craig Johnson and Andrea Fountain arrived at the marina approximately 10 minutes after Huizenga's 911 call. RP 54-56, 246. They followed the sound of yelling and found Huizenga and Zima fighting in the water. RP 60-63, 252-56. Johnson recalled they "were kind of engaged in some sort of hand to hand kind of combat, kind of flailing their arms and yelling at each other." RP 62. As they approached, Albert told the officers Huizenga was trying to kill them. RP 68, 254. Fountain testified everyone appeared "highly intoxicated." RP 257.

The officers ordered everyone out of the water. RP 255-56. Zima fell back in the water several times as she tried to get on the dock. RP 159, 259-60. Fountain testified Zima said she could not get out of the water because her arm was hurt. RP 286. But Fountain did not include this detail

in her police report, only that Zima was embarrassed about getting out of the water naked. RP 287-88. Johnson also included in his report that Zima started complaining of her arm hurting only after she finally got out of the water and fell on the cement dock. RP 259-60, 318. Radiologist David Kahalan later concluded Zima's elbow was dislocated. RP 113. He believed the injury resulted from "extremity fall trauma," which was consistent with falling on the cement dock. RP 119.

Officer Fountain walked Huizenga to the marina entrance to separate the parties and arrested Huizenga soon thereafter. RP 262. Huizenga remained agitated as Johnson transported her to jail. RP 81. She told Johnson the other two should go to jail because they punched her in the face and threw her in the water. RP 81-82.

The jury was instructed on self-defense as well as the lesser degree offenses of third and fourth degree assault. CP 32-42. In closing argument, defense counsel emphasized the many inconsistencies in Albert's and Zima's stories. For instance, Albert initially told Officer Johnson it was a "mutually combative fight." RP 321, 419. Albert also testified Huizenga opened the cabin doors with a large knife, but never told officers that, and the officers never found a knife aboard the boat. RP 135-36, 289, 321, 420-22. Albert also said he found Huizenga's jacket on the boat, but Huizenga discarded her jacket on the dock. RP 435. Likewise, Zima testified Huizenga ripped a

necklace and bracelet off her, but also said she removed all her jewelry before bed that night. RP 162, 179, 199, 206, 420-22.

The jury found Huizenga guilty as charged of harassment. CP 52. However, the jury did not return a verdict on second degree assault, instead finding Huizenga guilty of third degree assault.³ CP 53.

Huizenga has no prior felony history. CP 61-62. Based on her two current offenses, the State calculated her offender score to be one, with a standard sentence range of three to eight months for both. CP 66; RP 468. At sentencing, defense counsel requested a first-time offender waiver, which the court rejected because Huizenga refused “to acknowledge any responsibility whatsoever for these crimes.” RP 474, 488. The court imposed six months of confinement and 12 months of community custody. RP 488-89. Huizenga filed a timely notice of appeal. CP 81.

C. ARGUMENT

1. HUIZENGA’S COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE THE ASSAULT AND HARASSMENT CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT.

When a person is sentenced for two or more current offenses, “the sentence range for each current offense shall be determined by using all

³ The jury was instructed that a person commits third degree assault “when he or she with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” CP 33; accord RCW 9A.36.031(1)(d).

other current and prior convictions as if they were prior convictions for the purpose of the offender score” unless the crimes involve the “same criminal conduct.” RCW 9.94A.589(1)(a). “Same criminal conduct” means crimes that involved the same intent, were committed at the same time and place, and involved the same victim. Id.

Whether two crimes constitute the same criminal conduct involves a determination of fact as well as the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000 (2000). Defense counsel waived a direct challenge to the same criminal conduct determination by not arguing it below. Id. However, the issue of same criminal conduct may be raised for the first time on appeal as an ineffective assistance of counsel claim. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004); see also State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007) (“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.”). Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That

right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused . Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. Failure to argue same criminal conduct when such an argument is warranted constitutes ineffective assistance. Saunders, 120 Wn. App. at 824-25.

Defense counsel's performance fell below an objective standard of reasonableness because there was no legitimate reason not to ask the court to find the offenses were the same criminal conduct, as an alternative to the first-time offender waiver. Huizenga would have only benefited from such a request. Lowering Huizenga's offender score from one to zero would have lowered the standard sentence range for both offenses from three to eight

months to one to three months.⁴ CP 61-62, 66; RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness level of offenses); RCW 9.94A.525 (offender score); RCW 9.94A.589(1)(a) (sentence range for each current offense determined by using other current convictions as if they were prior convictions for offender score).

In requesting a first-time offender waiver for Huizenga, defense counsel asked the court to impose 90 days or less of confinement, the same maximum Huizenga could receive with an offender score of zero. RP 474; RCW 9.94A.650(2) (allowing the trial court to waive a standard range sentence for first-time offenders and “impose a sentence which may include up to ninety days of confinement”). This demonstrates there could be no legitimate reason to not make the alternative same criminal conduct argument. In addition, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” In re Pers. Restraint of Wilson, 169 Wn. App. 379, 390, 279 P.3d 990 (2012).

Counsel’s deficient performance prejudiced Huizenga because there is a reasonable likelihood the trial court would have found same criminal conduct had counsel made the argument below. The crimes involved the same victim: Zima. CP 35 (to-convict for third degree assault); CP 46 (to-

⁴ The trial court also expressed a preference for imposing a midrange sentence, which would have been only two months with an offender score of zero, rather than six months with an offender score of one. RP 488-89.

convict for harassment). The crimes also occurred at the same time and place: at the boat dock in the early morning hours of April 19, 2015.

The two offenses also involved the same criminal intent. In making this determination, courts consider the extent to which the individual's criminal intent, objectively viewed, changed from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This includes whether the crimes are linked, whether the objective substantially changed between the crimes, whether one crime furthered the other, and whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Intent in this context is not the mens rea element of the particular crime, but rather the offender's objective purpose in committing the crime.⁵ State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088, review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014).

Crimes may involve the same criminal intent if they were part of a "continuing, uninterrupted sequence of conduct." State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997). But when an individual has time to "pause,

⁵ The supreme court's recent decision in State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016), does not change the objective criminal intent standard. There, the court held first degree incest and third degree child rape were not the same criminal conduct because "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child." Chenoweth, 370 P.3d at 9. But those crimes are strict liability offenses with no mens rea elements. RCW 9A.64.020(1)(a); RCW 9A.44.079(1). The Chenoweth court therefore did not create a new rule that courts must look to the statutory mens rea elements in determining criminal intent for the purposes of same criminal conduct.

reflect, and either cease his criminal activity or proceed to commit a further criminal act,” and then makes the decision to proceed, he or she has formed a new intent to commit the second crime. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

In Grantham, for instance, Grantham raped L.S. Id. at 856. When L.S. did not move afterward, Grantham began kicking her. Id. He threatened her not to tell and she begged for him to stop and take her home. Id. Grantham then forced L.S. to perform oral sex on him. Id. The Grantham court held there was evidence of new objective intent between the two rapes. Id. at 859. In so holding, the court reasoned Grantham had time to pause and reflect on what he did, threaten L.S., and then use new force to commit the second rape: “The crimes were sequential, not simultaneous or continuous.” Id.

Similarly, in State v. Wilson, 136 Wn. App. 596, 614, 150 P.3d 144 (2007), Wilson broke down the door to Saunders’s home, pulled her out of bed by her hair, and kicked her in the stomach. When Saunders said she was going to call the police, Wilson left the house to warn his friends outside. Id. at 614-15. He then reentered the house, picked up a stick of wood from the broken door, and threatened to kill Saunders. Id. at 615. The trial court found Wilson’s resulting assault and felony harassment convictions to be same criminal conduct. Id. at 603. The State appealed. Id.

The appellate court reversed, holding Wilson reentered Saunders's home "with a newly formed and separate intent to harass Saunders verbally." Id. at 615. The court explained the two crimes "were separated in time, providing opportunity for completion of the assault and ending Wilson's assaultive intent, followed by a period of reflection and formation of a new, objective intent upon reentering the house to threaten Sanders and to harass her." Id.

The evidence demonstrated Huizenga assaulted and threatened Zima simultaneously. Huizenga grabbed Zima by the hair, they fell into the water, and then Huizenga repeatedly pushed Zima's head under water, all while Huizenga was threatening to kill Zima. RP 155, 212-23, 276. The assault and harassment furthered one another by putting Zima in fear Huizenga was going to kill her. Indeed, Officer Fountain explained:

[Zima] told me that she thought she was going to die, that she thought the defendant was going to kill her. Especially because her elbow was injured she couldn't swim very well and she couldn't fight back and she just couldn't get away from her grip and she just kept dunking her under the water.

RP 276-77. Albert likewise testified the entire sequence of events happened "[v]ery quickly." RP 154. At no time did Huizenga stop to reflect on the assault and then form new objective intent to threaten Zima, or vice versa, making Grantham and Wilson distinguishable.

Had defense counsel argued same criminal conduct, the trial court could have concluded Huizenga's criminal objective in committing the offenses was the same: making Zima fear she would die that night. The trial court could have also determined that assaulting Zima both legitimized and furthered the threat, particularly when there was no temporal break between the two crimes. This is not a case where the defendant had an opportunity to pause and reflect after completing one offense and then formed a new intent before committing another. Rather, the assault and harassment were a "continuing, uninterrupted sequence of conduct." Porter, 133 Wn.2d at 186; see also State v. Mandanas, 168 Wn.2d 84, 86-87, 228 P.3d 13 (2010) (second degree assault and felony harassment were same criminal conduct were defendant punched victim in the face, hit him in the head with a gun, and then pointed the gun at him and threatened to kill him).

Given the facts of this case, there is a reasonable probability that had counsel argued same criminal conduct, the trial court would have found the third degree assault and felony harassment encompassed the same criminal conduct. Furthermore, there was no legitimate reason for defense counsel not to pursue a lower offender score for Huizenga, which a same criminal conduct finding would achieve. Consequently, this Court should hold counsel was ineffective for failing to argue same criminal conduct, and remand for resentencing. Saunders, 120 Wn. App. at 825 (finding

ineffective assistance and remanding for resentencing where co-defendant's intent to rape was "arguably similar to the motivation for the kidnap").

2. THE TRIAL COURT VIOLATED HUIZENGA'S RIGHT AGAINST SELF-INCRIMINATION BY REJECTING A FIRST-TIME OFFENDER WAIVER BASED SOLELY ON HUIZENGA'S REFUSAL TO ACKNOWLEDGE RESPONSIBILITY FOR THE OFFENSES.

Under the Sentencing Reform Act of 1981 (SRA), a standard range sentence is not appealable. RCW 9.94A.585(1); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). However, "constitutional challenges to a standard range sentence are always allowed." Mail, 121 Wn.2d at 712. "The imposition of a penalty for the exercise of a defendant's legal rights violates due process," and is therefore an "error[] of constitutional magnitude" that "necessarily overcome[s] the SRA's statutory prohibition." State v. Sandefer, 79 Wn. App. 178, 181, 184, 900 P.2d 1132 (1995).

The federal and state constitutions guarantee the accused the right against compelled self-incrimination. U.S. CONST. V; CONST. art. I, § 9. The Fifth Amendment right may be asserted in any proceeding, "civil or criminal, formal or informal, where the answers might incriminate [the individual] in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973). No State may penalize an individual for exercising her rights under the Fifth Amendment. Minnesota v. Murphy, 465 U.S. 420, 434, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).

The right against self-incrimination extends to sentencing procedures and continues throughout the direct appeal. Mitchell v. United States, 526 U.S. 314, 325-27, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999); State v. Dictado, 102 Wn.2d 277, 287, 687 P.2d 172 (1984), overruled on other grounds, State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986); State v. McCullough, 49 Wn. App. 546, 550, 744 P.2d 641 (1987).

“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). A few Washington cases have acknowledged this basic rule where the sentencing court has imposed a harsher sentence (or refused to impose a more lenient sentence) because the defendant exercised his or her right to trial.

In Sandefer, for instance, after being convicted of child molestation by a jury, Sandefer contested the State’s recommendation of an exceptional sentence. 79 Wn. App. at 179-80. Sandefer asked for a standard range sentence, noting he rejected two earlier plea offers. Id. at 180. The sentencing court responded that it often gave defendants in such cases more lenient sentences when they pleaded guilty because it saved the victims from having to testify. Id. The court continued:

Mr. Sandefer, if you entered a plea of guilty, I very possibly would have given you a more lenient sentence towards the lower end of the range, because of saving the

victim being victimized by going through this court process.
You didn't, and I'm not going to give you that break.

Id. The court rejected the State's recommendation, but sentenced Sandefer to the maximum standard range sentence. Id.

This Court concluded the sentencing court's remarks did not indicate improper consideration of Sandefer's right to stand trial:

Instead, we read the court's remarks as nothing more than a fair response to Sandefer's objection to the State's recommendation. Apart from correctly explaining why Sandefer could no longer demand the benefit of a plea offer he earlier rejected, nothing in the court's remarks affirmatively indicates that the court improperly considered Sandefer's decision to stand trial.

Id. at 184. The key point in Sandefer was the court acknowledged it routinely *decreased* sentences for individuals who pleaded guilty to child molestation, rather than *increased* them for going to trial.

By contrast, in State v. Richardson, 105 Wn. App. 19, 22, 19 P.3d 431 (2001), the sentencing court *increased* the penalty for going to trial by imposing costs it would not have imposed had Richardson pleaded guilty. This Court held the sentencing court improperly penalized Richardson's exercise of his jury trial right and reversed the cost portion of his judgment and sentence. Id. at 22-23. Together, Sandefer and Richardson make clear that a sentencing court is not permitted to increase punishment based on a defendant's lawful exercise of a constitutional right.

No Washington case has directly addressed this issue in the Fifth Amendment context when a defendant maintains her innocence at sentencing. However, a Montana decision persuasively captures the infirmity of considering a defendant's lack of remorse in imposing a higher sentence where she maintains her innocence.

In State v. Shreves, 313 Mont. 252, 255, 60 P.3d 991 (2002), Shreves maintained his innocence during trial and wished to remain silent at sentencing. The presentence investigator recommended a 100-year sentence in part because Shreves did not admit to committing premeditated murder. Id. at 254. Defense counsel pointed out admitting guilt could be contrary to Shreves's future interests, so "it's unfortunate that he is placed in the position . . . that he either has to admit doing something he still currently says he did not do or he pays a greater price for that." Id. at 255 (quoting sentencing transcript).

Nevertheless, the trial court used Shreves's silence against him, stating, "And as we sit here, you've given us nothing as to why this happened. So what we've got is what appears to be the premeditated killing of an individual with no remorse or responsibility shown on your part." Id. at 255-56 (emphasis omitted) (quoting sentencing transcript). The trial court imposed the recommended 100-year sentence. Id. at 256.

In addressing whether the trial court violated Shreves's right against self-incrimination, the Montana Supreme Court discussed several federal and out-of-state cases that held a sentencing court "may consider lack of remorse as a basis for a sentence, but may not punish a defendant for refusing to admit guilt." Id. at 260 (collecting cases). "However, the cases all also note that 'it is difficult to distinguish between punishing a defendant for remaining silent and properly considering a defendant's failure to show remorse in setting a sentence.'" Id. (quoting Bergmann v. McCaughtry, 65 F.3d 1372, 1379 (7th Cir. 1995)). The court remanded for resentencing because it was "unable to make such a distinction." Id.

The Shreves court further explained, "a sentencing court may not draw a negative inference of lack of remorse from the defendant's silence at sentencing where he has maintained, throughout the proceedings, that he did not commit the offense of which he stands convicted—i.e. that he is actually innocent." Id. at 261. The court continued,

To allow sentencing courts to do otherwise would force upon the defendant the Hobson's choice . . . specifically, that the defendant must either incriminate himself at the sentencing hearing and show remorse (with respect to a crime he claims he did not commit) or, in the alternative, stand on his right to remain silent and suffer the imposition of a greater sentence. To compel that of a defendant is constitutionally impermissible.

Id.

This Court should follow Shreves's sound reasoning. Huizenga qualified for and requested a first-time offender waiver, which allows the trial court to "waive the imposition of a sentence within the standard sentence range" when the offender has no prior felonies. RCW 9.94A.650; RP 474-75. The State opposed the waiver, arguing it was not "an appropriate resolution in this case," because:

In my mind that resolution and that opportunity that a court would afford a defendant is for one who has taken some accountability for what has happened . . . It would send a message I believe to Ms. Huizenga that she has continued to avoid responsibility for this event, both in her own mind of how she interprets her own actions, and also in the legal sense of avoiding any real responsibility.

RP 478. Contrary to the State's assertions, the first-time offender waiver statute does not specify any criteria the trial court should consider in determining whether to grant the waiver. RCW 9.94A.650(2).

The trial court nevertheless adopted the State's faulty reasoning and rejected the first-time offender waiver based solely on Huizenga's lack of accountability for the crimes:

I do not believe this is an appropriate case for a first offender waiver. Nothing I have seen thus far, and clearly nothing I have heard today, shows in any way that Ms. Huizenga has taken any action to acknowledge any responsibility whatsoever for these crimes which she has been convicted by a jury. Clearly, in my opinion not a case for a first offender waiver.

RP 488. The court went on to impose a “sentence mid point of the standard range.” RP 489.

Because Huizenga did not “acknowledge any responsibility” for the crimes—which would have required her to incriminate herself—the trial court imposed a higher sentence. The court articulated no other reason for rejecting the first-time offender waiver. This violated Huizenga’s Fifth Amendment right against self-incrimination. Huizenga was required to either incriminate herself by acknowledging guilt or maintain her innocence and suffer the imposition of a greater sentence—a “due process violation of the most basic sort.” Bordenkircher, 434 U.S. at 363.

This Court should hold it was unconstitutional for the trial court to punish Huizenga for exercising her Fifth Amendment right against self-incrimination and remand for resentencing.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Huizenga does not substantially prevail on appeal, she asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts “may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State’s request for

appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State’s request for costs).

Huizenga’s ability to pay must be determined before discretionary legal financial obligations (LFOs) are imposed.⁶ She was 55 years old at the time of sentencing and explained she was unable to pay LFOs because she was unemployed and on disability. RP 474, 491-92. The trial court accordingly waived all discretionary LFOs and believed it was “more important” for “any funds she has to be directed towards restitution.” RP 492; CP 69-70. The State initially requested Huizenga pay \$4,362 in restitution and later sought an additional \$2,350. CP 74, 94.

The trial court also entered an order finding Huizenga indigent for purposes of the appeal. CP 78-80. There has been no order finding Huizenga’s financial condition has improved or is likely to improve. RAP 15.2(f) specifies “[t]he 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

⁶ See State v. Duncan, 185 Wn.2d 430, 436, 74 P.3d 83 (2016) (recognizing “[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations,” and a “constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements,” including “[t]he financial resources of the defendant must be taken into account” (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992))).

longer indigent.” This Court must therefore presume Huizenga remains indigent and give her the benefits of that indigency. RAP 15.2(f).

For these reasons, this Court should not assess appellate costs against Huizenga in the event she does not substantially prevail on appeal.

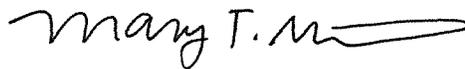
D. CONCLUSION

For the aforementioned reasons, this Court should reverse Huizenga’s sentence and remand for resentencing.

DATED this 17th day of August, 2016.

Respectfully submitted,

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