NO. 48116-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN AQUINO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Phil Sorensen

No. 14-1-03964-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State adduce sufficient evidence for a jury to find defendant guilty of identity theft in the second degree when the State adduced evidence of all of the essential elements for each charge?

2. Was the charging document for the charges of bail jumping sufficient when it included all of the essential elements of the charges because the exact dates and locations of the required subsequent appearances were not essential elements?

3. Did the trial court properly deny defendant's motion to dismiss under CrR 8.3(b) and CrR 4.7 when the evidence at issue was not potential impeachment evidence, defendant was aware of its existence, and defendant failed to show he was prejudiced?

4. Should this court address the award of appellate costs when the issue is not ripe because the State has yet to substantially prevail and has not submitted a cost bill to which defendant may object?

B. STATEMENT OF THE CASE.

1. Procedure

On October 6, 2014, the Pierce County Prosecutor's Office (State) charged John Palacios Aquino (defendant) with one count of identity theft

in the second degree, and one count of forgery. CP 1-2. The State amended the information on May 11, 2015, adding two counts of bail jumping. CP 4-6. A CrR 3.5 hearing was conducted concerning statements defendant made to Officer Tracy post-***Miranda***[1]; the trial court admitted all of the statements. 1RP 32. On June 29, 2015, defendant moved to dismiss, arguing the State failed to disclose potential impeachment evidence against Officer Tracy in violation of ***Brady v. Maryland***[2]. CP 7-23. The trial court found the evidence in question was not potential impeachment evidence and denied defendant's motion to dismiss. 2RP 62-63.

Defendant failed to appear in court after the trial commenced and remained absent for the remainder of the trial. 2RP 65; 3RP 199, 236. Defense counsel moved for a mistrial due to defendant's absence which the trial court denied, having found defendant voluntarily absented himself. 2RP 67-69.

Following a jury trial, defendant was found guilty on all counts as charged. CP 78-81. On October 2, 2015, the trial court sentenced defendant to a standard range sentence and imposed mandatory legal financial obligations (LFOs) in the amount of $800. CP 98, 96. Defendant made no objection to the imposed LFOs. 3RP 248-49. Defendant filed a timely notice of appeal on October 2, 2015. CP 106.

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[1] ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602 (1966).
[2] ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194 (1963).

2. Facts

On October 3, 2014, defendant attempted to cash a check in the amount of $1,900.24 at the Emerald Queen Casino. 2RP 89-90; CP 116-118 Exhibit (EX) #1. Casino staff quickly noticed the check had a number of alterations on it, indicating it was fraudulent. 2RP 90, 100, 102-103. In the "pay to order" section of the check, defendant's name was typed over what appeared to be an area that had been erased. 2RP 102; CP 116-118 EX #1. The word "company" in the business name was misspelled on the check as "copmany." 2RP 10; CP 116-118 EX #1. Casino staff noticed, in addition to the payee name, that the date, amount, and part of the address had also been erased and typed over. 2RP 103; CP 116-118 EX #1.

Upon discovering the check was fraudulent, casino staff contacted law enforcement. 2RP 104. Officer Tracy arrived and contacted defendant at Emerald Queen Casino after speaking with casino security and reviewing the check. 2RP 113-14. Officer Tracy observed that the check had been erased in the "pay to order," date, and amount areas and that the word "company" was misspelled. 2RP 115. After having been read his rights and acknowledging he understood them, defendant told Officer Tracy that he worked for the Paint Smith Company, the company from which the check was issued. 2RP 117-18; CP 116-118 EX #1. Defendant then said he did not work for the Paint Smith Company, that he worked for

a contractor but he was not able to provide his last job site, his pay rate, or a supervisor's name. 2RP 118-19.

At trial, Marcia Cavender, the employee responsible for issuing checks at the Paint Smith Company, identified the check defendant attempted to cash as the check that had been written out to P.C.I. Performance Contracting for $498 and change. 2RP 132. Ms. Cavender confirmed that defendant did not work at the Paint Smith Company and had never been written a check from the company. 2RP 133.

During the CrR 3.5 hearing, defense counsel cross-examined Officer Tracy and asked him if he had ever been reprimanded for honesty, to which Officer Tracy replied, "No." 1RP 15. Immediately after the CrR 3.5 hearing, defense counsel raised the issue alleging a possible ***Brady***[3] violation based on a video involving Officer Tracy and a previous, unrelated case. 1RP 34; CP 115 EX #1. Defense counsel stated, "I believe this is going to be news to Ms. Vitikainen (Prosecutor)," before stating the issue. 1RP 34. Defense counsel informed the trial court of the existence of a surveillance video depicting an incident involving Officer Tracy and a previous client of defense counsel. 1RP 34. Defense counsel did not request a continuance to address this matter, but instead filed a motion to dismiss. 1RP 34-35; 2RP 50. Defense counsel stated that he did not "deny

[3] ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194 (1963).

that there's also imputed knowledge on me regarding this incident" because it was a case that he handled. 2RP 51. The trial court viewed the video at issue before finding it was not potential impeachment evidence. CP 115 EX #1; 2RP 62. The trial court was explicit in its finding that the video did not support a claim that Officer Tracy had lied under oath or made a false representation. 2RP 62.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR A JURY TO FIND DEFENDANT GUILTY OF IDENTITY THEFT IN THE SECOND DEGREE.

The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (*citing* ***State v. Green***, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* at 201. "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Id.* (*citing* ***State v. Partin***, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

Sufficiency of the evidence is reviewed de novo. ***State v. Berg***, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

RCW 9.35.020(1)(3) proscribes conduct constituting identity theft in the second degree. The jury was instructed to find the following elements had been proved in order to convict:

> (1) That on or about 3rd day of October, 2014, the defendant knowingly obtained, possessed, or transferred, or used a means of identification or financial information of another person; (2) That the defendant acted with the intent to commit or aid or abet any crime; (3) That the defendant obtained credit, money, goods, services, or anything else that is $1500 or less in value from the acts described in element (1) **or did not obtain any credit, money, goods, services, or other items of value**; and (4) That any of these acts occurred in the State of Washington.

CP 58 (emphasis added).

Testimony at trial indicates defendant was unsuccessful in his attempt to cash the forged check. Defendant presented the check to James Gardner, the cage cashier at the Emerald Queen Casino, in an attempt to cash it. 2RP 88, 90. Rather than cash the check, Mr. Gardner took the check back to his supervisor for approval. 2RP 90. This was always done before a check is cashed at Emerald Queen Casino. 2RP 89. The supervisor, Kathy Faucett, immediately spotted something suspicious on the check and took it to the manager on shift. 2RP 90. Law enforcement, surveillance personnel, and casino security were immediately contacted after Ms. Faucett took the check to the manager. 2RP 95, 100. Ms. Faucett was explicit during trial that she is "not going to approve a check" that she

believes is bad. 2RP 101. Additionally, during the trial the check is referred to as the check that defendant "tried to cash." 2RP 101. A jury could rationally infer that the check was not cashed because it was immediately called into question and subsequently confiscated for law enforcement, thereby preventing defendant from obtaining anything of value from the check.

Not only could the jury infer that the check was not cashed, they were able to see from the surveillance video admitted at trial that defendant was unsuccessful in his attempt to cash the check. CP 116-118 EX #2. The video depicts defendant presenting the check to the cashier, the cashier turning the check over to his supervisor, and after a period of time, officers contacting and arresting defendant. CP 116-118 EX #2. At no time in the video did casino staff hand defendant any cash nor return the check to him. CP 116-118 EX #2.

Additionally, the State adduced evidence that the check had not been cashed at all. The check itself was offered into evidence and contained no markings indicating it had been cashed, such as an endorsement or stamp from the casino or a bank. CP 116-118 EX #1. Mr. Gardner and Ms. Faucett both testified that the check appeared to be in substantially the same condition at trial as it did when defendant tried to cash it; there were no changes to it. 2RP 91-92, 101-02. This testimony further corroborates what the jury could see for themselves when viewing

the check, that it had not been cashed. A jury could reasonably infer the check had not been cashed, thus producing nothing of value to defendant.

Defendant argues that the State failed to prove defendant obtained nothing of value immediately after acknowledging the State presented evidence that the teller did not cash the check presented by defendant. Brief of App. 9. However, the fact that defendant failed to cash the very check on which the charge of identity theft in the second degree is predicated is sufficient for a jury to reasonably infer defendant obtained nothing of value.

Based on the testimony from Mr. Gardner and Ms. Faucett that the check was identified as fraudulent during the verification procedure, which is always done prior to cashing checks, and that law enforcement was immediately contacted, a rational trier of fact could conclude that defendant was unsuccessful in his attempt to cash the check and thus did not obtain any credit, money, goods, services, or other items of value in exchange for the forged check. Defendant does not challenge the other three elements. Brief of App. 5-9. Viewing the aforementioned evidence in the light most favorable to the State and the reasonable inferences drawn therefrom, a rational trier of fact could find defendant guilty beyond a reasonable doubt.

2. THE CHARGING DOCUMENT WAS SUFFICIENT BECAUSE IT CONTAINED ALL THE ESSENTIAL ELEMENTS OF THE CHARGES; THE EXACT DATE AND LOCATION OF THE REQUIRED SUBSEQUENT APPEARANCE WAS NOT AN ESSENTIAL ELEMENT OF THE CHARGE OF BAIL JUMPING.

Charging documents challenged for the first time on appeal are more liberally construed in favor of validity. ***State v. Kjorsvik***, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The liberally construed standard of review is appropriate when no challenge to the charging document is raised before or during trial because without it, a defendant has no incentive to timely make such a challenge which might only result in an amendment or dismissal and refiling of the charge. *Id.* at 103. Liberally construing the charging document involves consideration of the document as a whole to determine whether the elements "appear in any form, or by fair construction can they be found, in the charging document." ***State v. Nonog***, 169 Wn.2d 220, 227, 237 P.3d 250 (2010) (*citing* ***Kjorsvik***, 117 Wn.2d at 105). "A court should be guided by common sense and practicality in construing the language." ***State v. Campbell***, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995) (*quoting* ***State v. Hopper***, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)).

An Information is constitutionally sufficient if it includes all the essential elements, statutory and nonstatutory, of a crime. ***State v. Vangerpen***, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). An "essential

element" is an element whose specification is necessary to establish the very illegality of the act charged. ***State v. Zillyette***, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). The purpose of the essential elements rule is to apprise the defendant of the charges against him allowing him to prepare a defense. ***State v. Johnson***, 180 Wn.2d 295, 300, 325 P.3d 135 (2014) (*citing* ***Vangerpen***, 125 Wn.2d at 787).

Defendant bears the burden of showing prejudice by unartful charging language if, when the information is read as a whole, including facts that are implied, it "reasonably apprise[s] an accused of the elements of the crime charged." ***Nonog***, 169 Wn.2d at 227 (*citing* ***Kjorsvik***, 117 Wn.2d at 106, 109).

The mere fact that the State bears the burden of proving a fact at trial does not automatically make that fact an essential element of the crime. *See* ***State v. Allen***, 176 Wn.2d 611, 628-30, 294 P.3d 679 (2013) (holding, in a felony harassment case, that even though the State bore the burden of proving a "true threat" in order to obtain a conviction, the requirement of a "true threat" was not an essential element of the crime and need not be contained in the charging document); *see also* ***State v. Lorenz***, 152 Wn.2d 22, 31, 93 P.3d 133 (2004) (explaining, in a child molestation case, that even though touching for the purpose of "sexual gratification" must be proved beyond a reasonable doubt to sustain a conviction, it is not an essential element of the crime of child molestation and need not be included in the "to convict" instruction).

Courts have held that the elements of bail jumping were met when the defendant was held for, charged with, or convicted of a particular crime; released by court order or admitted to bail with the requirement of a subsequent personal appearance, and knowingly failed to appear as required. ***State v. Williams***, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007); ***State v. Pope***, 100 Wn. App. 624, 627, 999 P.2d 51 (2000); ***State v. Gonzalez-Lopez***, 132 Wn. App. 622, 632-33, 132 P.3d 1128 (2006).

Knowledge of the specific date of the required subsequent appearance is not an element of the crime of bail jumping. ***State v. Carver***, 122 Wn. App. 300, 305, 93 P.3d 947 (2004) (*citing* ***State v. Ball***, 97 Wn. App. 534, 536, 987 P.2d 632 (1999)). In ***Carver***, the defendant argued the State failed to prove the knowledge element of bail jumping because the State did not prove the defendant was aware of the precise date of the scheduled hearing. ***Carver***, 122 Wn. App. at 305. The court in that case, in rejecting the defendant's argument, relied on its holding in ***Ball*** that knowledge of the precise date is not an essential element because, "if there were such a requirement: '[t]he defendant could admit knowledge on every previous day but claim to have forgotten about his duty to appear on the hearing day.'" *Id.*

Defendant raises this issue for the first time on appeal, triggering the liberally construed standard of review.

The charging document contained the language found by courts to sufficiently apprise a defendant of the elements of the charge of bail jumping. The amended information stated:

> That JOHN PALACIOS AQUINO, in the State of Washington, on or about the 22nd day of January, 2015, did unlawfully and feloniously, having been held for, charged with, or convicted of Identity Theft in the Second Degree and/or Forgery, a class "B" or "C" felony, and been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court in this state, fail to appear as required, contrary to RCW 9A.76.170(1),(3)(c), and against the peace and dignity of the State of Washington.

CP 5. The wording is identical in counts three and four aside from the date. The date in count four was "18th day of March, 2015." CP 6. The charging document identified the particular crime, identity theft in the second degree and forgery, and alleged a corresponding bail jump violation similarly to that in ***Williams***, which was found to be sufficient. CP 5; ***Williams***, 162 Wn.2d at 185. The charging document included the nexus between the crime for which defendant was held and the later personal appearance which, as the court in ***Pope*** pointed out, is implicitly required by the statute for bail jumping. CP 5; ***Pope***, 100 Wn. App. at 627.

Additionally, the amended information tracked the language of the applicable statute for bail jumping, RCW 9A.76.170 which states:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility

> for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.
> (3) Bail jumping is:
> (c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony.

RCW 9A.76.170(1),(3)(c).

The plain language of the charging document sufficiently and reasonably apprised defendant that he was charged because he failed to appear in a required court appearance subsequent to his release on bail for the crimes of identity theft in the second degree and forgery. This language provides defendant the information necessary to present a defense to the charge of bail jumping, as contemplated by the essential elements rule. The statute proscribing conduct constituting the charge of bail jumping, and from which the language of the charging document was devised, is unambiguous and need not be construed. ***Gonzalez-Lopez***, 132 Wn. App. at 629. Nowhere in the statute or in the relevant case law interpreting the statute, is the implication that the exact date and location of the required, subsequent personal appearance are essential elements. As noted in ***Carver*** and ***Ball***, the State was only required to prove that defendant was aware of an obligation to appear by way of notice of his court date. Because the exact date and location of the required, subsequent appearances are neither express nor implied elements of bail jumping, the charging document was sufficient.

Further, because the bail jumping statute unambiguously contains all of the essential elements of bail jumping and the charging document in this case tracked the language of the statute, defendant fails to show he was prejudiced by the language of the charging document. The charging document sufficiently and reasonably apprised defendant of the elements of bail jumping, which allowed him to prepare a defense.

3. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS UNDER CrR 8.3(b) AND CrR 4.7 BECAUSE THE EVIDENCE AT ISSUE WAS NOT POTENTIAL IMPEACHMENT EVIDENCE, DEFENDANT WAS AWARE OF ITS EXISTENCE, AND DEFENDANT FAILED TO SHOW HE WAS PREJUDICED.

A trial court's decision on a motion to dismiss under CrR 8.3(b) is reviewed for an abuse of discretion. ***State v. Stein***, 140 Wn. App. 43, 53, 165 P.3d 16 (2007). An abuse of discretion exists when a court's decision is manifestly unreasonable or based on untenable grounds. *Id.* Dismissal under CrR 8.3(b) is permissible only when there has been a prejudice to the rights of the defendant resulting from governmental mismanagement. ***State v. Rohrich***, 149 Wn.2d 647, 655, 71 P.3d 638 (2003). "Washington courts have clearly maintained that dismissal is an extraordinary remedy to which the court should resort only in 'truly egregious cases of

mismanagement or misconduct.'" ***State v. Wilson***, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) (*citing* ***State v. Duggins***, 68 Wn. App. 396, 401, 844 P.2d 441, *affirmed*, 121 Wn.2d 524, 852 P.2d 294 (1993)).

Defendant bears the burden of proving "arbitrary action or governmental misconduct" and a resulting prejudice affecting his right to a fair trial. ***Wilson***, 149 Wn.2d at 9 (*citing* ***State v. Michielli***, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997)). The purpose of discovery rules is "to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government." ***State v. Cannon***, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996).

A trial court exercises its discretion when making discovery decisions based on CrR 4.7. ***State v. Blackwell***, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). A trial court's ruling on discovery under CrR 4.7 will not be disturbed absent a manifest abuse of that discretion. *Id.* (*citing* ***State v. Yates***, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)). CrR 4.7 provides in pertinent part:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court *may* order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order *as it deems just under the circumstances.*

CrR 4.7(h)(7)(i) (emphasis added).

The State's obligation to disclose is limited to evidence which is material and "within the knowledge, possession, or control of the prosecuting attorney's staff." ***Blackwell***, 120 Wn.2d at 826; CrR 4.7(a)(4). However, the existence simply of a possibility that the undisclosed evidence might have helped the defendant or affected the outcome of the trial does not make that evidence "material." *Id.* at 828. Mere speculation on the reliability of a witness is not adequate to satisfy the prejudice prong under CrR 8.3(b). ***Rohrich***, 149 Wn.2d at 659.

a. The video, which was disclosed and admitted in the pretrial hearing, did not contain potential impeachment evidence.

Defendant argues the State mismanaged evidence by failing to disclose a video defendant purports as "tending to show" that Officer Tracy was dishonest. Brief of App. 17. However, defendant has failed to show any factual evidence that Officer Tracy had lied under oath or made a material misrepresentation. There were no records in Officer Tracy's personnel file disciplining him for dishonesty for that incident or any other incident. 2RP 58. The video offered by defendant depicted Officer Tracy's perception of events that transpired with an unrelated defendant. CP 115 EX #1. It was based on this perception and the fact that another viewer of the video may have had a different perception of what transpired, that defendant suggested Officer Tracy is dishonest. However, this suggestion does not make the video "material" or factual in this case any more than

the suggestions by the defendant in ***Blackwell*** that the officers "might have been racially motivated." ***Blackwell***, 120 Wn.2d at 828-29 (holding defense counsel's assertion that the arresting officers might have been racially motivated insufficient to establish factual predicate demonstrating the officers' service records contained material information).

After viewing the video, the trial ruled on defendant's motion as follows:

> [I]n order for this to be impeachment evidence, it needs to be clear that somebody lied under oath, somebody made a false representation under oath, and I am not going to find, based on the video that I just saw, based on the report that I have read . . . I'm not going to find that this officer lied.
>
> [A]ny time there is video, the video is almost always at odds with at least somebody's description of the event. To find that everybody is lying who describes an event different than it appears in a video is, in my judgment, not something that's appropriate, and I'm not going to make that kind of a finding in this case. I don't find that it's potential impeachment evidence.

2RP 62.

The trial court properly found the video did not support a claim that Officer Tracy made a false report or lied under oath and therefore, was not potential impeachment evidence. 2RP 61-62.

b. <u>Defendant was able to adequately address the video as evidenced by his failure to request a continuance.</u>

Defendant demonstrated he was prepared to address the video as alleged impeachment evidence. In fact, he was already familiar with the

video from a separate, previous case, and did not raise the issue or make discovery requests earlier. 1RP 34. As soon as the State was notified, it located the video. 2RP 57. Defendant did not ask for a continuance to address the issue, he simply moved forward with his motion to dismiss. 1RP 34-35; 2RP 50. Defendant had also prepared and scheduled a witness to testify on the matter. 2RP 57-58. Further, defense counsel (1) questioned Officer Tracy about honesty during the 3.5 hearing, (2) admitted the video and issue alleged from it was likely unknown to the prosecutor, and (3) agreed that he (defense counsel) had imputed knowledge of the video. 1RP 15, 34-35; 2RP 50. It is apparent that defendant was well versed in the contents of the video and the manner in which he intended to use the information in the video based on the questions he asked Officer Tracy, requiring no delay in trial to adequately address the video. 1RP 15.

c. Defendant has failed to show he was prejudiced by the video.

Even if the video had been found to be potential impeachment evidence, defendant failed to show he was prejudiced by it because it was available to defendant and did not interfere with his ability to present a defense. It was defense counsel that brought the video to the attention of the court and subsequently moved to dismiss based on the video, or in the alternative, suppress the statements of Officer Tracy. 1RP 34; CP 7-23. The video was not a new fact interjected into the trial; defendant was not

compelled to choose between adequately preparing for trial and waiving his right to a speedy trial, a showing of which would be required to prove prejudice. ***State v. Price***, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (defendant must prove by a preponderance of the evidence that interjection of new facts into the case will compel him to choose between prejudicing the right to a speedy trial and the right to adequately prepare a defense). Defendant has not met his burden to prove he was prejudiced; there was no evidentiary surprise to defendant preventing him from adequately preparing a defense, as demonstrated in the preceding section.

The defendant's rights to a fair trial were not violated because the video at issue was not potential impeachment evidence and defendant was able to adequately address the video regardless; therefore, the trial court did not abuse its discretion in denying defendant's motion to dismiss.

4. THIS COURT SHOULD DECLINE TO ADDRESS THE AWARD OF APPELLATE COSTS BECAUSE THE ISSUE IS NOT RIPE; THE STATE HAS YET TO SUBSTANTIALLY PREVAIL AND HAS NOT SUBMITTED A COST BILL TO WHICH DEFENDANT MAY OBJECT.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *See* ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016); *see*

also ***State v. Nolan***, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); RAP 14.2. The question is not whether the Court can decide to order appellate costs but rather, when and how the Court will order appellate costs.

The legal principle that convicted offenders contribute toward the costs of the case, including the costs of appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). Requiring a defendant to contribute toward paying for appointed counsel under this statute does not violate or even "chill" the right to counsel. ***State v. Barklind***, 87 Wn.2d 814, 818, 557 P.2d 314 (1977).

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. RCW 10.73.160(1). In ***Blank***, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996). ***Blank***, 131 Wn.2d at 239.

Under RCW 10.73.160, the time to challenge the imposition of legal financial obligations (LFOs) is when the State seeks to collect the costs. *See* ***Blank***, 131 Wn.2d at 242; *see also* ***State v. Smits***, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009) (*citing* ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's

ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *See* ***Baldwin***, 63 Wn. App. at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). "A defendant's indigent status at the time of sentencing does not bar an award of costs." ***Crook***, 146 Wn. App. at 27. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *See* ***Blank***, 131 Wn.2d at 241–242; *see also* ***State v. Wright***, 97 Wn. App. 382, 965 P.2d 411 (1999).

It is only after the State has prevailed on appeal that RAP 14.2 affords the appellate court discretion in awarding costs. ***Nolan***, 141 Wn.2d at 626. In ***Nolan***, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.* at 622. The Court in ***Nolan*** was explicit in that disposition of the appeal is required prior to ruling on appellate costs. *Id.* at 625. "[T]he first step in determining if costs under Title 14 of the Rules of Appellate Procedure may be awarded in a criminal appeal is to determine if the State is the 'substantially prevailing party.'" *Id.* Defendant's objection to appellate costs in his opening brief prematurely raises an issue that is not before the Court. Brief of App. 23-24. Defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail and if the State files a cost bill.

The defendant has the initial burden to show indigence. *See* ***State v. Lundy***, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency "must do more than plead poverty in general terms" in seeking remission or modification of LFOs. ***State v. Woodward***, 116 Wn. App. 697, 704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *See* ***Woodward***, 116 Wn. App. at 703-04; *see also* ***Bearden v. Georgia***, 461 U.S. 660, 668, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976).

The imposition of LFOs has been much discussed in the appellate courts lately. In ***State v. Blazina***, the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *See Id.* at 835-837. The Court went on to suggest, but

did not require, lower courts to consider the factors outlined in GR 34[4]. ***Blazina,*** 182 Wn.2d at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. The majority of criminal defendants are represented at public expense at trial and on appeal.[5] To be represented at public expense in trial or on appeal, a defendant must be found to be indigent. *See generally* ***Griffin v. Illinois***, 351 U.S. 12, 76 S.Ct. 585, 100 L. Ed 891 (1956). Thus, the majority of the defendants taxed for costs under RCW 10.73.160 are indigent. Additionally, subsection 3 specifically includes "recoupment of fees for court-appointed counsel." RCW 10.73.160(3). It stands to reason then, that the defendants referenced by subsection 3 have been found indigent by the court.

Defendant argues that because he was found indigent at trial, there should be a presumption of indigency upon appeal and based on this, the Court should decline any future requests for costs. Brief of App. 24. Under

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[4] Rules of General Application, Rule 34. Waiver of Court and Clerk's Fees and Charges in Civil Matters on the Basis of Indigency. Factors include receiving assistance under a needs-based, means-tested assistance program, household income at or below 125 percent of the federal poverty guideline, and other compelling circumstances that demonstrate an inability to pay fees and/or surcharges.

[5] Carrie Dvorka Brennan, *The Public Defender System: A Comparative Assessment*, 25 IND. INT'L & COMP. L. REV. 237, 238 (2015).

defendant's argument, the Court should excuse any defendant found indigent at trial from payment of all costs at all stages, including appeal. This would, in effect, nullify RCW 10.73.160(3).

As ***Blazina*** instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, the court in ***Sinclair*** points out, the Legislature did not include such a provision in RCW 10.73.160. ***Sinclair***, 192 Wn. App. at 385. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *Id.* at 386 (*citing* RCW 10.73.160(4)).

In this case, the State has yet to "substantially prevail," nor has it submitted a cost bill to which the defendant may object on the grounds of manifest hardship. Therefore, this Court should wait until the cost issue is ripe before exploring it legally and substantively.

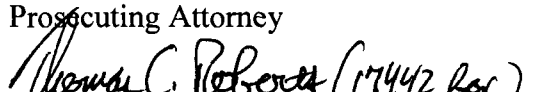
D. CONCLUSION.

The State adduced sufficient evidence of all the essential elements of identity theft in the second degree, the information alleging two counts of bail jumping was sufficient, and the trial court properly denied defendant's motion to dismiss under CrR 8.3(b) and CrR 4.7. Further, the issue of appellate costs is not ripe for review. For the foregoing reasons,

the State respectfully requests this Court to affirm defendant's conviction below and to decline to review defendant's objection to appellate costs until and if the State substantially prevails and the State submits a cost bill.

DATED: June 22, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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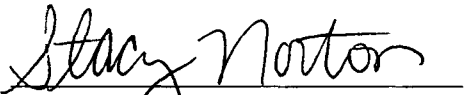

Stacy Norton
Rule 9 Legal Intern

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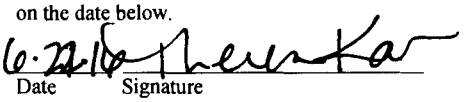

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