

**NO. 48261-4-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**THOMAS JEFFERSON KEYS,**

Appellant.

---

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

The Honorable Robert Lewis, Judge

---

**BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

	Page
<b>ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>1. Mr. Keys’s constitutional right to present a defense was violated when the trial court excluded evidence of complaining witness Officer Skeeter’s reputation for untruthfulness in violation of ER 608(a).....</b>	<b>1</b>
<b>2. The trial court erred in not dismissing the three counts of assault in the second degree after finding they were double jeopardy given Mr. Keys’s conviction for three counts of assault in the first degree for the same acts.....</b>	<b>1</b>
<b>3. The trial court erred in vacating the three counts of assault in the second degree.....</b>	<b>1</b>
<b>4. The trial court erred in failing to delete all references to the three counts of assault in the second degree dismissed for double jeopardy. ....</b>	<b>1</b>
<b>5. The trial court erred when, because of a scrivener’s error, it failed to note dismissal of counts 6 and 7 on the judgment and sentence. ....</b>	<b>1</b>
<b>6. The trial court erred when, because of a scrivener’s error, it failed to strike the discretionary jury demand fee from the judgment and sentence. ....</b>	<b>1</b>
<b>7. The trial court erred when, because of a scrivener’s error, it failed to strike counts 3, 5, 6, 7, and 9 from the list of persistent offenses on the judgment and sentence. ....</b>	<b>1</b>
<b>8. The trial court erred when, because of a scrivener’s error, it listed count 6 instead of count 8 on the warrant of commitment as being served consecutively. ....</b>	<b>2</b>

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2**

**1. Whether the trial court denied Mr. Keys’s his constitutional right to present a defense when it refused to allow him to impeach complaining witness Officer Skeeter with her reputation for dishonestly under ER 608(a)...... 2**

**2. Whether the trial court erred in failing to delete all references to the three counts of assault in the second degree in the judgment and sentence after recognizing each was double jeopardy as to the three assaults in the first degree convictions. .... 2**

**3. Whether Mr. Keys’s case should be remanded to the trial court to correct the scrivener’s errors on the judgment and sentence? .... 2**

**4. Whether Mr. Keys should have to pay appellate costs if he does not substantially prevail on appeal and the State requests costs? .... 2**

**C. STATEMENT OF THE CASE..... 2**

**1. Procedural Facts ..... 2**

**2. Trial Evidence ..... 4**

**ARGUMENT..... 6**

**1. Mr. Keys’s constitutional right to present his defense was violated when the trial court excluded evidence of complaining witness Officer Skeeter’s reputation for dishonesty. .... 6**

*a. A party may attack a witness’s credibility by introducing evidence of the witness’s reputation for dishonesty. .... 7*

*b. The trial court erroneously excluded evidence of Officer Skeeter’s reputation for dishonesty..... 8*

*c. Mr. Keys’s conviction must be reversed. .... 10*

**2. All reference to the assault in the second degree must be stricken from the judgment and sentence. .... 12**

3.	<b>The court should remand for correction of the various scrivener’s errors in the judgment and sentence.....</b>	<b>13</b>
	<i>a. Scrivener’s errors may be challenged. ....</i>	<b>13</b>
	<i>b. The many errors in the judgment and sentence should be corrected on remand.....</i>	<b>13</b>
	<b>4. If the State substantially prevails on appeal, any request for appellate costs should be denied. ....</b>	<b>15</b>
	<b>CONCLUSION .....</b>	<b>16</b>
	<b>CERTIFICATE OF SERVICE .....</b>	<b>17</b>

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Chapman v. California</i> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	11
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).....	6
<i>In re Personal Restraint of Mayer</i> , 128 Wn. App. 694, 117 P.3d 353 (2005).....	13
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	13
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	15, 16
<i>State v. Calle</i> , 125 Wn. 2d 769, 888 P.2d 155 (1995).....	12
<i>State v. Carol M.D.</i> , 89 Wn. App. 77, 948 P.2d 837 (1997), <i>reversed and remanded on other grounds</i> , 136 Wn.2d 1019 (1998).....	9
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	7
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006) .....	8
<i>State v. Gresham</i> , 173 Wn.2d 405, 269 P.3d 207 (2012) .....	12
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	6, 11
<i>State v. Land</i> , 121 Wn.2d 494, 851 P.2d 678 (1993).....	7, 8
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.3d 808 (1996).....	6
<i>State v. Naillieux</i> , 158 Wn. App. 630, 241 P.3d 1280 (2010).....	13
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	15, 16
<i>State v. Turner</i> , 169 Wn.2d 448, 238 P.3d 461 (2010).....	12

<i>State v. York</i> , 28 Wn. App. 33, 621 P.2d 784 (1980).....	7
---	---

**Statutes**

RCW 9.94A.729(3)(c).....	15
RCW 10.73.160(1).....	15

**Other Authorities**

Const. art. 1, § 9.....	12
Const. art. I, § 22.....	6
CrR 7.8(a) .....	13
ER 608(a).....	1, 2, 7
Rules of Appellate Procedure Title 14 .....	15
RAP 15.2(f).....	16
U.S. Const. Amend. V .....	12
U.S. Const. Amends. VI.....	6
U.S. Const. Amends. XIV.....	6

## ASSIGNMENTS OF ERROR

1. Mr. Keys's constitutional right to present a defense was violated when the trial court excluded evidence of complaining witness Officer Skeeter's reputation for untruthfulness in violation of ER 608(a).

2. The trial court erred in not dismissing the three counts of assault in the second degree after finding they were double jeopardy given Mr. Keys's conviction for three counts of assault in the first degree for the same acts.

3. The trial court erred in vacating the three counts of assault in the second degree.

4. The trial court erred in failing to delete all references to the three counts of assault in the second degree dismissed for double jeopardy.

5. The trial court erred when, because of a scrivener's error, it failed to note dismissal of counts 6 and 7 on the judgment and sentence.

6. The trial court erred when, because of a scrivener's error, it failed to strike the discretionary jury demand fee from the judgment and sentence.

7. The trial court erred when, because of a scrivener's error, it failed to strike counts 3, 5, 6, 7, and 9 from the list of persistent offenses on the judgment and sentence.

8. The trial court erred when, because of a scrivener's error, it listed count 6 instead of count 8 on the warrant of commitment as being served consecutively.

#### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court denied Mr. Keys's his constitutional right to present a defense when it refused to allow him to impeach complaining witness Officer Skeeter with her reputation for dishonestly under ER 608(a).

2. Whether the trial court erred in failing to delete all references to the three counts of assault in the second degree in the judgment and sentence after recognizing each was double jeopardy to the three assault in the first degree convictions.

3. Whether Mr. Keys's case should be remanded to the trial court to correct the scrivener's errors on the judgment and sentence?

4. Whether Mr. Keys should have to pay appellate costs if he does not substantially prevail on appeal and the State requests costs?

#### STATEMENT OF THE CASE

##### 1. Procedural Facts

By its original information, the State charged Mr. Keys with various crimes: robbery in the first degree, assault in the first degree on police officers (four counts), malicious mischief in the second degree for

disabling a police vehicle, attempting to elude, hit and run injury, and theft of a motor vehicle. CP 1-4. By the time Mr. Keys went to trial, the State amended the information to add four counts of second degree assault as to each officer for the same conduct already charged as the assault in the first degree, and a single count for attempting to harm a police dog. CP 10-14.

At the end of the State's case, the court dismissed counts 6 and 7, the alleged assault against Officer Tim Lear, for insufficient evidence. RP Vol. 4 at 446.

Mr. Keys did not testify. RP Vol. 5 at 491. He attempted to present a defense by offering evidence of Officer Miranda Skeeter's reputation for dishonesty in the Clark County law enforcement community, but the court disallowed the testimony. RP Vol. 5 at 479-84.

The jury found Mr. Keys guilty of all counts and also answered "yes" to an aggravating factor on all the assault counts. CP 15-32. The aggravating factor alleged Mr. Keys acted against a law enforcement officer performing his or her official duties. CP 27-32.

Mr. Keys's offender score exceeded 9 points on each count.<sup>1</sup> CP 35. The court sentenced him to 486 months. CP 36. In imposing the sentence, the court chose not to rely on the law enforcement aggravating

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<sup>1</sup> The attempt to harm a police dog is a gross misdemeanor. CP 14, 49-53.

factor. RP Vol. 6 at 602. The court vacated and dismissed each assault in the second degree as double jeopardy. CP 40. The court did not strike each reference to assault in the second degree from the judgment and sentence. CP 33-48.

The court found Mr. Keys had no present and future ability to pay discretionary legal financial obligations. CP 36.

Mr. Keys appeals all portions of his judgment and sentence. CP 54-55.

## 2. Trial Evidence

Kevin Hughes went to bed early one morning while a party was going on at his apartment. RP Vol. 2 at 184-85; RP Vol. 3 at 195-95. The next morning, he took the dog for a walk and discovered his Honda CR-V missing from its designated parking place. RP Vol. 2 at 184; RP Vol. 3 at 195-96. Mr. Keys, an acquaintance, had been at the party. RP Vol. 2 at 185. Mr. Hughes did not give Mr. Keys permission to take his car. RP Vol. 3 at 194.

About a week later, armed with a BB pistol, Mr. Keys robbed a Vancouver AM/PM Arco convenience store of about \$200.<sup>2</sup> RP Vol. 2 at 106-123. Mr. Keys drove Mr. Hughes's Honda during the robbery. RP Vol. 2 at 107, 134, 178; RP Vol. 3 at 193-97.

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<sup>2</sup> Mr. Keys's counsel conceded guilt on this count in closing argument. RP Vol. 5 at 531.

The same evening, someone driving Mr. Hughes's Honda drove over Joshua Ramsey's foot in Ramsey's yard. RP Vol. 2 at 153, 157. The Honda drove away without stopping. Mr. Ramsey yelled at the driver that they had run over his foot. RP Vol. 2 at 157. Mr. Ramsey had a sore foot for three days. RP Vol. 2 at 163-64.

After the robbery, Vancouver police kept an eye out for the suspect Honda CR-V. RP Vol. 3 at 267-71. They spotted it after a time. RP Vol. 3 at 270. At least five marked police cars driven by uniformed officers fell in line behind and signaled the car to stop with the use of their sirens and lights. RP Vol. 3 at 270, 326. Several police cars followed the Honda into a cul-de-sac. RP Vol. 3 at 219, 270. The Honda went to the far end of the cul-de-sac and the officers initially kept their distance. Officer Jaime Haske pulled out her gun and started to approach the Honda on foot to perform a felony traffic stop on the Honda's driver. RP Vol. 3 at 327. The Honda accelerated. RP Vol. 3 at 222. Officers Haske and Miranda Skeeter, afraid they were going to be struck by the car, ran out of the way. RP Vol. 3 at 289; RP Vol. 4 at 341. Corporal Ryan Starbuck, a K9 officer, grabbed his dog Ivar from his car, and also fearfully ran to safety. RP Vol. 3 at 220-22. Officer Tim Lear felt he was not in harm's way and stayed where he was. RP Vol. 3 at 255. The Honda struck the driver's side doors on Corporal Starbuck's patrol car causing the air bags to

inflate and the car to become disabled. RP Vol. 3 at 223, 228. Officer Haske, fearful that the Honda would run her over, shot at the Honda. RP Vol. 4 at 341.

The abandoned Honda was found a few blocks away. RP Vol. 4 at 357-59. A backpack left in the car had Mr. Key's identification card in it. RP Vol. 4 at 413. Mr. Keys was arrested the next day at a Vancouver bus stop. RP Vol. 4 at 351-52. Mr. Key's DNA was on the Honda's steering wheel and on a BB pistol was left in the Honda. RP Vol. 4 at 380, 385-87, 426, 442.

#### ARGUMENT

- 1. Mr. Keys's constitutional right to present his defense was violated when the trial court excluded evidence of complaining witness Officer Skeeter's reputation for dishonesty.**

A criminal defendant has the constitutional right to meaningful opportunity to present a complete defense. U.S. Const. Amends. VI, XIV; Const. Art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006); *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.3d 808 (1996). This includes the right to present relevant evidence and cross-examine the State's witnesses. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). A claim that the defendant's

constitutional right to present a defense is violated is reviewed de novo. *Id.* at 719.

A trial court's decision regarding the admission of evidence is reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Even where a court has discretion regarding the admission or exclusion of evidence, however, that discretion may not be exercised to violate a defendant's constitutional rights. *State v. York*, 28 Wn. App. 33, 36-37, 621 P.2d 784 (1980).

*a. A party may attack a witness's credibility by introducing evidence of the witness's reputation for dishonesty.*

ER 608 permits a party to attack or support the credibility of a witness with evidence of the witness's reputation for honesty or dishonesty. The rule reads:

(a) The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

ER 608(a). The purpose of the rule is to "facilitate testimony from those who know a witness's reputation for truthfulness so that the trier of fact can properly evaluate witness credibility." *State v. Land*, 121 Wn.2d 494, 851 P.2d 678 (1993).

The foundational requirement for evidence under ER 608 is a community that is both neutral and general. *Land*, 121 Wn.2d at 500. “[R]elevant factors might include the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community.” *Id.* The community is not limited to the witness’s residential community. In *Land*, for example, the State established a community comprised of a small group of business associates in which the defendant worked as a salesman for several years and developed a reputation for untruthfulness among his business contacts. *Id.* By contrast, two family members are not a community for purposes of the rule, because the proposed group was too small and family members are not neutral. *State v. Gregory*, 158 Wn.2d 759, 804-05, 147 P.3d 1201 (2006).

*b. The trial court erroneously excluded evidence of Officer Skeeter’s reputation for dishonesty.*

Mr. Keys sought to introduce evidence of Officer Skeeter’s reputation for dishonesty. RP Vol. 4 at 449-50. Officer Skeeter joined the City of Vancouver Police Department in 2006. RP Vol. 3 at 285. Clark County senior prosecuting attorney Rachel Probstfeld worked for the Clark County Prosecutor’s Office since 2008. RP Vol. 5 at 475. Because

she had been in the office for eight years, prosecutor Probstfeld knew a wide variety of the participants in the Clark County criminal justice system to including other prosecutors, advocates, support staff, police officers, defense attorneys, and attorneys with various other civil roles and practices. RP Vol. 5 at 476-77. Over time, she talked to about 30 persons about Officer Skeeter and believed, based on her overarching knowledge of Officer Skeeter, that she had a poor reputation for truthfulness in the broader criminal justice community. RP Vol. 5 at 477-78.

The trial court excluded the evidence, ruling that Ms. Probstfeld's opinion was based on a collection of other community members' bad experiences with, and misconduct of, Officer Skeeter which differed from the court's understanding of reputation. The court questioned whether the concept of reputation in the community even existed anymore. RP Vol. 5 at 484. The court hearkened back to the rule's inception "when people knew everybody in town and everybody knew everybody else." RP Vol. 5 at 483.

The court did not distinguish how the historic meaning of a community differed from a work community today. The Clark County law enforcement community is a relevant community for purposes of the rule. For example, the court has found the Boy Scouts a community for purposes of reputation evidence. *State v. Carol M.D.*, 89 Wn. App. 77, 94-

95, 948 P.2d 837 (1997), *reversed and remanded on other grounds*, 136 Wn.2d 1019 (1998). The trial court improperly excluded prosecutor Probstfeld's testimony about Officer Skeeter's reputation for dishonesty in a relevant community for a prosecutor, i.e., her work community. Reputation evidence, is after all, developed by a community over time based on numerous acts by a disreputable member. Surely, a single act of dishonesty disseminated over time in a community does not make for a well-founded and well-deserved reputation but that is what the court's ruling seems to require when it disallowed the evidence of Officer Skeeter's reputation because it was based on multiple acts collectively known by her work community.

*c. Mr. Keys's conviction must be reversed.*

Mr. Keys's defense to the assault in the first degree charges was to challenge the State's ability to prove his intent. Assault in the first degree require proof that Mr. Keys acted with the specific intent to inflict great bodily harm. CP 10-12. Any evidence of his intent in addition to his driving forward at the officers who were near their own cars and in front of him, would be telling to the jury. Even though Officer Skeeter was running to get out of the street, she testified that she looked back and saw Mr. Keys laughing. RP Vol. 3 at 291. Under the circumstances, that physical display of emotion could be interpreted as heartless and

menacing. None of the other three officers at the scene noted anything specific about the driver as he passed the officers. As such, Officer's Skeeter's testimony was important. It was equally important for the jurors to know that Officer Skeeter was known in the Clark County law enforcement community as an officer who did not always tell the truth.

When constitutional error is identified on appeal, the conviction must be reversed unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to the conviction. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *Jones*, 168 Wn.2d at 724. Without Ms. Probstfeld's testimony, defense counsel had the difficult task of convincing the jury to doubt Officer Skeeter's credibility. The prosecutor recognized that when, between filing its original Information and the Second Amended Information, it amended the charges to provide jurors with an alternative of finding Mr. Keys guilty of second degree assault for the incident in the cul-de-sac. CP 11-13. Second degree assault requires only proof of an intentional assault. The prosecutors had their doubts about Officer Skeeter's testimony and her odd-one-out clear view of Mr. Key's alleged mirth.

**2. All reference to assault in the second degree must be stricken from the judgment and sentence.**

The trial court recognized, and the parties agree, the three counts of assault in the second degree (counts 3, 5, and 9) were for the same conduct Mr. Keys was found guilty of under the three counts of assault in the first degree (counts 2, 4, 8). RP Vol. 6 at 582; *State v. Calle*, 125 Wn. 2d 769, 772, 888 P.2d 155 (1995) (the double jeopardy clauses of the Fifth Amendment and Const. art. 1, § 9 protect a defendant against multiple punishments for the same offense). The court properly dismissed counts 3, 5, and 9 as double jeopardy. CP 40. However, the court's failure to excise all references to the second degree assault convictions still leave Mr. Keys in jeopardy. The references must be stricken from the judgment and sentence.

A court may violate double jeopardy *either* by reducing to judgment both the greater and the lesser of two convictions for the same offense *or* by conditionally vacating the lesser conviction while directing, in some form, that the conviction nonetheless remains valid. *State v. Turner*, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010). To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction. *Id.*

Similarly, no reference should be made to the vacated conviction at sentencing. *Id.* at 464-65.

The “vacated” counts 3, 5, and 9, must be stricken from Mr. Keys’s judgment and sentence. See CP 33, 35, 41, 44, 45.

**3. The court should remand for correction of scrivener’s errors in the judgment and sentence.**

*a. Scrivener’s errors may be challenged.*

A defendant may challenge an erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Scrivener’s errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any party. The remedy for a scrivener’s error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010).

*b. The many errors in the judgment and sentence should be corrected on remand.*

First, the court failed to note on the judgment and sentence the dismissal of counts 6 and 7 (first and second degree assaults of Officer

Tim Lear). CP 12, 36 (judgment and sentence section 3.2). The court dismissed both charges for insufficient evidence at the end of the State's case. RP Vol. 5 at 446.

Second, the court held Mr. Keys had no ability to pay discretionary legal financial obligations but overlooked striking the discretionary jury demand fee from the judgment and sentence. CP 36, 38.

Third, at judgment and sentence section 5.9, the trial court erred in failing to strike counts 3, 5, and 9, and counts 6 and 7 as persistent offenses. CP 41. As argued in Issue 2, all reference to the three second degree assaults must be stricken from the judgment and sentence (counts 3, 5, 9). Counts 6 and 7 were dismissed for insufficient evidence. They have no relevancy on the judgment and sentence as persistent offense. RP Vol. 5 at 446.

Fourth, and last, in the warrant of commitment, the court erred in listing count 6 as consecutive to counts 2 and 4. Count 8 is the third of three consecutive convictions of assault in the first degree (joining counts 2 and 4). CP 33, 45. Count 6 was dismissed for insufficient evidence and is irrelevant to the warrant of commitment. RP Vol. 5 at 446.

**4. If the State substantially prevails on appeal, any request for appellate costs should be denied.**

If Mr. Keys does not prevail on appeal, he requests that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612 (2016); RCW 10.73.160(1) (the “court of appeals . . . may require an adult . . . to pay appellate costs.”). Imposing costs against indigent defendants raises problems well documented in *Blazina*: “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). *Sinclair* recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

The trial court imposed a 486 month sentence with credit for only 393 days served. CP 37. Because the first degree assaults are serious violent offenses, he can only earn up to 10 percent off his sentence as earned early release while in DOC. RCW 9.94A.729(3)(c). Mr. Keys was 42 years old at sentencing. CP 33. Given the best case scenario, he might be released at age 78. Mr. Keys qualified for indigent defense services at

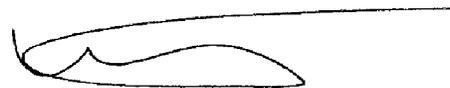
trial. Supplemental Designation of Clerks Papers, Order Appointing Attorney (sub. nom. 1). He continues to qualify for indigent defense on appeal. Supp. DCP, Order of Indigency (sub. nom. 188C). Importantly, there is a presumption of continued indigency through the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Mr. Keys's financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393. Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise its discretion by denying the State's request for appellate costs in this appeal involving an indigent appellant.

#### CONCLUSION

Mr. Keys's convictions should be reversed and remanded for retrial.

In the alternative, all references to assault in the second degree should be stricken from the judgment and sentence, the scrivener's errors should be corrected, and no appellate costs imposed.

Respectfully submitted July 11, 2016.



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LISA E. TABBUT/WSBA 21344  
Attorney for Thomas Jefferson Keys

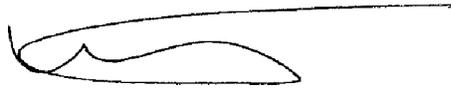
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Thomas Jefferson Keys/DOC# 347059, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed July 11, 2016, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Thomas Jefferson Keys, Appellant

**LISA E TABBUT LAW OFFICE**

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