NO. 48619-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GERALD LEE CAMERON, JR.,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it allowed a state's witness to testify that the defendant threatened to kill her the day after the complaining witness claimed the defendant threatened to kill him because the evidence of that subsequent crime was more prejudicial than probative.

2. If the state prevails on appeal this court should exercise its discretion and refuse to impose appellant costs.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows a state's witness to testify that a defendant threatened to kill her the day after the complaining witness claimed that defendant threatened to kill him when the evidence of that subsequent crime is more prejudicial than probative?

2. If the state prevails on appeal this court should exercise its discretion and refuse to impose appellant costs?

STATEMENT OF THE CASE

Factual History

During June of 2015, Deanna Lentz was homeless and living in a tent just on Pearson Airport property off Highway 14 in Vancouver with her boyfriend, the defendant Gerald Cameron. RP 245-247. The defendant had been in jail for a while and returned on June 16th. RP 149-150. That day the defendant asked Ms Lentz to marry him and took her to a local Fred Meyer's Jewelers to try on wedding rings. RP 206-207. Ms Lentz responded to the proposal by saying that she would have to think about it as she had already been married on five prior occasions. *Id.*

A friend of Ms Lentz by the name of Gary Sommerville was also homeless and lived in a tent a few hundred yards away from Ms Lentz and the defendant. RP 145-146. Gary Sommerville went by the nickname of "Red." RP 106-108. He and the defendant had been acquainted for about four months. RP 145-146. In fact, just a few days previous while the defendant was in jail Ms Lentz had engaged in sexual intercourse with Mr. Sommerville on his birthday. RP 150, 179-180.

At about 9:00 pm on the evening of the 17th Ms Lentz and the defendant got into an argument while sitting outside their tent. RP 245-247. According to Mr. Sommerville, as they were arguing he walked up carrying a broken hoe handle, took Deanna by the hand, and said "Come on, Dee. Lets

go." *Id.* He had brought the hoe handle because he thought he might get into a confrontation with the defendant. RP 182. The defendant responded to Mr. Sommerville's actions and words by saying, "Do you mind - I'm talking with my old lady." RP 149-150. Once again, according to Mr. Sommerville, he said the following to the defendant: "Don't you mean your ex-old lady? She's been my old lady since you been in jail." *Id.* Mr. Sommerville later claimed that the defendant then asked if they were having sex together and Mr. Sommerville replied, "Yeah. She was on top and she was enjoying herself." RP 151. Mr. Sommerville claimed that at this point the defendant twice threatened to kill him, a threat he believed. *Id.*

Mr. Sommerville went on to claim that at this point he and Ms Lentz walked down the dark path, and that when they did the defendant came after them with a flashlight in one hand and some type of bar in the other. RP 152. Upon seeing this he told Ms Lentz to run down the path, which she did. *Id.* He then turned and swung the hoe handle at the defendant a few times and missed, after which the defendant hit him in the head with the bar he was carrying and knocked him to the ground with a scalp wound that bled heavily. RP 153-155. In Mr. Sommerville's version of events Ms Lentz was some 50 to 75 feet up the dark, unlit path when this confrontation occurred. RP 229. In Ms Lentz's version of events she was a few feet away watching everything happen, and the weapon with which the defendant repeatedly hit Mr.

Sommerville was a 60 pound bar that had previously been used as a trailer hitch. RP 256-258.

The defendant's version of events was similar to Mr. Sommerville's up to the point Mr. Sommerville approached him and Ms Lentz on the evening of the 16th. Trial Exhibit No. 18. His version of events, which he wrote the next day for the police, was as follows:

> My Girlfriend and I got in an argument, she went out on the trail from the tent. I went out in 5 min. We were listening to music. Red came up behind us with a shovel handle and threatened to hit me. I asked him to leave 5 times, my girlfriend started walking down the trail. Red then hit me with the shovel handle in the hand. We wrestled then he hit me in the ear with his shovel handle. I went out in a seizure. I came to and went down the trail because my girl was yelling saying "stay away." I feared for my life. I feared for my girl too so I went to protect her. I hit him in self-defense with a stick. I hit him two times that I know of.

Trial Exhibit 18 (spelling, punctuation and some syntax have been modified to make the statement more readable).

After this fight Mr. Sommerville walked out to Highway 14 where passing motorists called for assistance. RP 154-155. The police and medical aid arrived in about 15 minutes. *Id.* The medical aid personnel took Mr. Sommerville to the hospital where they put staples in his head to close his head wound. RP 155-157. Police then walked back up the trail to the two campsites looking for either a metal bar or any sticks or handles. RP 130-132, 138. They did not find anything. *Id.*

The next day an officer found the defendant a few blocks from the courthouse sitting on a curb. RP 114. Upon learning who the defendant was he placed him under arrest and took him to jail. RP 104-106. When he was booked into the jail the defendant had a wound behind one of his ears, he had some scrapes consistent with a physical confrontation, and he had a broken finger on one of his hands. RP 108-109. Once at the jail he gave the arresting officer both an oral statement as well as the written statement quoted above. RP 109-110; Trial Exhibit No. 18.

Procedural History

By information filed June 22, 2015, the Clark County Prosecutor charged the defendant Gerald Lee Cameron, Jr., with one count of first degree assault while armed with a deadly weapon against Gary Sommerville, and one count of felony harassment against Gary Sommerville. CP 1-2. This case later came to trial, during which the state called the officer who initially responded to the scene, the officer who arrested the defendant the next day, Mr. Sommerville, and Ms Lentz. RP 103, 124, 244. The defense then called a Physician's Assistant who worked at the jail and was familiar with the defendant's jail medical records. RP 283. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History, *supra.*

In addition, during a defense interview a number of months after the alleged crimes Ms Lentz claimed for the first time that later that night after

the confrontation the defendant returned to their tent, assaulted her, raped her and threatened to kill her if she testified against him. CP 51-57, 1-36. After this interview the defense brought a motion to exclude any of this testimony on the basis that it was far more prejudicial than probative. *Id.* After fairly extensive argument on the motion the court ruled that the state could present all of Ms Lentz's claims during trial except the claim of rape. RP 34-36. Based upon this ruling the state elicited the following from Ms Lentz's on redirect:

> Q. Is it fair to say you were very shaken up by events that night?
>
> A. Very.
>
> Q. Okay. You dropped –
>
> A. Still am.
>
> Q. – you dropped the flashlight. You had to stop and take a breather because of your asthma?
>
> A. Yeah.
>
> Q. When the defendant attacked you in the tent later that night, did he tell you not to talk to police about this?
>
> A. Yes, he did.
>
> Q. Okay.
>
> A. He said because if I did, he'd kill me.
>
> MR. PASCOE: Objection. Leading. I'd ask – move to strike.
>
> THE COURT: Overruled.

Q. (By Mr. Vaughn) And were you still afraid of the defendant the next day?

A. Yes, I was.

Q. All right.

RP 262-263.

After the close of testimony the court instructed the jury on both crimes charged, the deadly weapon enhancement, as well as on the lesser included offenses of second and fourth degree assault. CP 102-134; RP 102-134. The court also instructed the jury on self-defense. CP 127. Following argument from counsel and deliberation the jury returned verdicts of not guilty to first and second degree assault, guilty to fourth degree assault, and guilty to felony harassment. CP 153-158. The jury did not find for the enhancement. CP 156. The court later sentenced the defendant within the standard range on the felony harassment, as well as 364 days concurrent on the misdemeanor assault. CP 160-168, 169-182. However, the court did not impose any discretionary legal financial obligations given its finding"[t]hat the defendant is indigent and is not anticipated to be able to pay financial obligations in the future." CP 171. The defendant then filed timely notice of appeal. CP 183-197.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT ALLOWED A STATE'S WITNESS TO TESTIFY THAT THE DEFENDANT THREATENED TO KILL HER THE DAY AFTER THE COMPLAINING WITNESS CLAIMED THE DEFENDANT THREATENED TO KILL HIM.

While due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does not guarantee every person a perfect trial. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

> the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior

convictions or prior bad acts, is not admissible to prove the commission of a new offense. *See* 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tegland puts this principle as follows:

> Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a "criminal type," and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.
>
> Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.
>
> . . .
>
> The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the

defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

> The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In addition, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the

relevance of the criminal history. The court then held:

> Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a

defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

> In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the

inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

> There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.
>
> While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," *[State v.] Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917)), the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue, Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed a crime, particularly one similar to the crime charged. The admission of this evidence is such a strong inducement to the jury to simply find the defendant guilty based upon his propensity to criminal conduct that its admission denies the defendant a fair trial.

In the case at bar, the trial court erred when it denied the defendant's motion in limine and allowed the state to elicit evidence that within hours of allegedly assaulting and threatening to kill Gary Sommerville, he allegedly assaulted and threatened to kill Deana Lentz. The state presented the latter evidence of threats on redirect during the following exchange:

> Q. Is it fair to say you were very shaken up by events that night?
>
> A. Very.
>
> Q. Okay. You dropped –
>
> A. Still am.
>
> Q. – you dropped the flashlight. You had to stop and take a breather because of your asthma?
>
> A. Yeah.
>
> Q. When the defendant attacked you in the tent later that night, did he tell you not to talk to police about this?
>
> A. Yes, he did.

Q. Okay.

A. He said because if I did, he'd kill me.

MR. PASCOE: Objection. Leading. I'd ask – move to strike.

THE COURT: Overruled.

Q. (By Mr. Vaughn) And were you still afraid of the defendant the next day?

A. Yes, I was.

Q. All right.

RP 262-263.

As the court noted in *Escalona*, evidence that the defendant had previously committed an assault was unfairly prejudicial in a case in which the defendant was currently charged with an assault. Similarly, in the case at bar, the evidence that the defendant allegedly threatened to kill Ms Lentz just shortly after allegedly threatening to kill Mr. Sommerville was prejudicial to the defendant's ability to get a fair trial on the felony harassment charge against Mr. Sommerville. This unfair prejudice was exacerbated by the paucity of evidence on both this charge as well as on the first degree assault charge.

In her testimony Ms Lentz did not even claim that the defendant had threatened Mr. Sommerville even though Mr. Sommerville claimed she was present when the defendant uttered the threats. In addition, it was not until

a defense interview many months after the event that Ms Lentz first made the claim that the defendant had assaulted her, raped her and then threatened to kill her. In addition, there were a number of other inconsistencies in the state's evidence. For example, according to Mr. Sommerville, Ms Lentz was 50 to 75 feet down a dark path when the defendant assaulted him. By contrast, Ms Lentz claimed that she was just a few feet away when the defendant assaulted Mr. Sommerville with a 60 pound metal bar. Given these weaknesses in the state's case it is likely that the trial court's erroneous admission of this evidence affected the jury's verdict on the felony harassment charge. As a result, this court should reverse and remand for a new trial on this count.

II. IF THE STATE PREVAILS ON APPEAL THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO IMPOSE APPELLANT COSTS.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra*. In the case at bar the trial court found the defendant indigent and entitled to the appointment of counsel at both the trial and

appellate level. CP 3, 165-166. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan*, *supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts ***may*** require an adult offender convicted

of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair,* 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra.* The imposition of costs against indigent defendants raises

problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant's indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. The trial court did not impose discretionary legal financial obligations at the trial level based upon its finding "[t]hat the defendant is indigent and is not anticipated to ba able to pay financial obligations in the future." CP 171. In fact, the defendant is a 43-year-old homeless man with

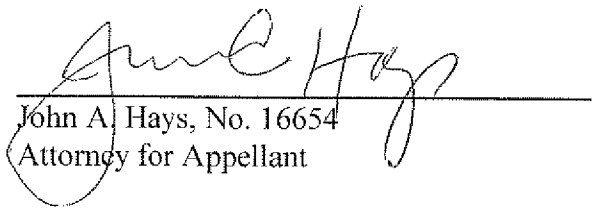
significant physical and mental difficulties. Given the trial court's finding, it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

The trial court's admission of unfairly prejudicial evidence that the defendant had committed another instance of felony harassment hours after his alleged felony harassment charge denied the defendant a fair trial because the evidence was far more prejudicial than probative. As a result, this court should order a new trial on this charge. In the alternative, if the state substantially prevails on appeal this court should exercise its discretion and not impose costs on appeal.

DATED this 5th day of August, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

ER 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 404

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

COURT OF APPEALS OF WASHINGTON, DIVISION II

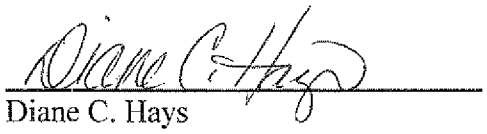
STATE OF WASHINGTON, **Respondent,** **vs.** **GERALD LEE CAMERON, JR.,** **Appellant.**	**NO. 48619-9-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik
   Clark County Prosecuting Attorney
   1013 Franklin Street
   Vancouver, WA 98666-5000
   prosecutor@clark.wa.gov

2. Gerald Lee Cameron, Jr., No.758028
   Stafford Creek Corrections Center
   191 Constantine Way
   Aberdeen, WA 98520

Dated this 5th day of August, 2016, at Longview, WA.



Diane C. Hays

HAYS LAW OFFICE

August 05, 2016 - 2:39 PM

Transmittal Letter

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Case Name: State v. Gerald L. Cameron, Jr.
Court of Appeals Case Number: 48619-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

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Statement of Arrangements

Motion: ____

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Comments:

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