

NO. 73701-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW FAST,

Appellant.

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FILED  
Apr 25, 2016  
Court of Appeals  
Division I  
State of Washington

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

The Honorable Timothy Bradshaw, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's adjudication of guilt for the second charged count of harassment violates the First Amendment because the State failed to prove his statements amounted to a true threat.

Issue Pertaining to Assignment of Error

To avoid violating the First Amendment's protection of free speech, statutes proscribing threatening speech must be limited to true threats that would, considering the circumstances, reasonably be foreseen as serious expressions of intent to carry out the threat. Appellant was charged with one count of felony harassment for statements made in the presence of Jacob Altinger. Altinger asked appellant how he could be certain that appellant would not harm the complaining witness after leaving Altinger's apartment. Based on a lack of trust between the two men, appellant responded that Altinger could not be certain. Altinger acknowledged that it was the complaining witnesses' prior statements to him, not appellant's statement, which made him fear the alleged threat would be carried out. Was the evidence insufficient to show that a reasonable person under these circumstances would have foreseen that appellant's comments were a serious expression of intent to harm the complaining witness, rather than idle talk or hyperbole?

B. STATEMENT OF THE CASE

1. Procedural History.

The King county prosecutor charged appellant Andrew Fast with two counts of felony harassment – domestic violence, for incidents that occurred on February 2, 2015. CP 10-11. The State further alleged that Fast was armed with a firearm during the second charged incident. CP 11; 2RP<sup>1</sup> 27; 3RP 1338-39.

The first charged incident of felony harassment alleged that Fast threatened to kill his wife, Andrea Fast,<sup>2</sup> and placed Andrea in reasonable fear that the alleged threat would be carried out. In contrast, the second charged incident of felony harassment alleged that Fast threatened to kill Andrea and placed Jacob Altinger in reasonable fear that the alleged threat would be carried out. CP 10-11, 64, 66.

A jury found Fast not guilty of both counts of felony harassment. CP 39, 41. The jury also found Fast was not armed with a firearm. CP 43-44. The jury found Fast guilty of two lesser counts of harassment – domestic violence. CP 40, 42.

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<sup>1</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP – April 20, 2015; 2RP – April 22, 2015; 3RP – May 5, 6, 7, 11, 12, 13, 14, 18, 2015; 4RP – June 26, 2015.

<sup>2</sup> To avoid confusion, this brief will refer to Andrea Fast by her first name. No disrespect is intended.

The trial court sentenced Fast to consecutive prison sentences of 180 days on the first harassment count, with credit for time already served, and a suspended 364 days on the second harassment count. CP 173-76; 4RP 20-23. Fast timely appeals. CP 182-87.

2. Trial Testimony.

Fast was married to Andrea and they had two children together. 3RP 399-400. Fast was in the military and deployed oversea four times. 3RP 402-04, 906. The time Fast and Andrea spent away from one another, as well as, financial difficulties caused a strain in their marriage. 3RP 404-06, 1229-30.

Andrea's financial dependence on Fast persuaded him to keep the marriage intact despite Andrea's infidelity. 3RP 704-05, 925. In the summer of 2015, Andrea began having an affair with Fast's friend, Jacob Altinger. 3RP 227-30, 283, 291-93, 409-12, 933. Altinger had served in the military with Fast and moved into the same apartment complex as the Fasts. 3RP 211-13, 290-91, 295. Altinger told Fast about the affair with Andrea. 3RP 230-31, 293.

Feeling guilty about the affair, Altinger ceased most contact with the Fasts until February 2, 2015. 3RP 233-34, 294. On that date, Andrea called Altinger and explained that she and Fast had been arguing. 3RP 235-38, 304, 306, 661-62, 749. Andrea asked Altinger to distract Fast so

that she could pack up her things and leave the apartment with the children. 3RP 238, 662.

The events that led to the February 2 argument between Andrea and Fast had actually started two days earlier. It was then, that Andrea took the children, left the apartment, and spent the weekend with her classmate, Reece Cabe. 3RP 472-77, 931-32, 936. Andrea was having an affair with Cabe at the time. 3RP 464, 472. Fast was scheduled to work that weekend. 3RP 476. When Andrea returned home with the children two days later however, Fast was at the apartment. 3RP 477. Fast explained he had quit his job and asked Andrea where she and the children had been. Andrea told Fast she had spent the weekend at Cabe's house. 3RP 477-78. Fast and Andrea then had an amicable discussion about their marriage and Fast's job. 3RP 944-45. Both Andrea and Fast went to bed after the conversation. 3RP 478-79.

The next morning, Fast asked his daughter where she and Andrea had been. 3RP 480-81, 946. Fast's daughter told him they were at one of Andrea's girlfriend's houses for the weekend. Andrea had previously told their daughter to lie to Fast about being at Cabe's house. 3RP 481.

Fast confronted Andrea about the lie and told her to do a wall sit for encouraging their daughter to lie to him. 3RP 482, 949-51. Andrea did a wall sit for about 10 minutes. 3RP 484-87. Fast then asked Andrea

to do a mirror exercise wherein she would explain her behavior that Fast found upsetting. 3RP 487-88, 955-59. Andrea did not take the exercise seriously. 3RP 488, 960. As a result, Fast remarked “what’s the point of all of this,” and commented to Andrea that he hated their broken relationship and her behavior. 3RP 960. Andrea interpreted Fast’s remarks as an indication that he was “hopeless.” 3RP 490.

Fast also asked Andrea why they had another child, explaining that he should have died in combat so that she could collect the life insurance policy money and start her own life. 3RP 960-61, 1253. Fast denied that his statements were intended to mean that he was suicidal, or would hurt Andrea or the children. Fast also denied that he threatened to stab or kill Andrea. 3RP 963-64, 1273. Andrea however, said that Fast threatened to stab her in the chest, roll her body up in a carpet, and throw her in the garbage. 3RP 491-92, 693. Andrea feared for her life. 3RP 491-92, 772. Fast believed Andrea was shocked by his speech. 3RP 963.

Andrea described Fast as preventing her from leaving the apartment by holding her up against a wall and tapping on her head. 3RP 492-93. Andrea eventually left the apartment to go to school. 3RP 655-56. She did not call police because Fast had previously threatened to commit suicide by police. 3RP 663.

At school, Andrea told Cabe about her argument with Fast. 3RP 612-14, 656-57. Andrea also called Altinger and left a “detailed” voice message, explaining that she and Fast had been arguing. 3RP 662. Altinger did not get a sense of urgency from Andrea’s voice message. 3RP 305.

Cabe took Andrea back to the apartment after school. 3RP 614-16, 665. When Andrea entered the apartment she saw Fast asleep on the couch. 3RP 666-67, 758-59, 965. Andrea saw that the children’s diaper bag had been cut up, that other items had been broken and were strewn about the apartment. 3RP 666-67, 681-82. Andrea’s journal was lying near Fast on a coffee table. 3RP 668-70. Andrea saw a pistol in Fast’s hand. 3RP 671. Fast did not waive the pistol around or point it at Andrea. 3RP 672, 761-62. Fast made no threats toward Andrea. 3RP 672, 762. Fast tried to grab Andrea’s coat as she walked by but was unable. 3RP 671-72, 760. Andrea left the apartment and went upstairs to Altinger’s apartment. 3RP 241, 244, 673. Fast did not follow her. 3RP 673-74.

Andrea told Altinger she planned to leave the apartment immediately and needed Altinger’s help in distracting Fast. 3RP 244-45, 662. Andrea told Altinger that Fast seemed angry and unstable. 3RP 235-38, 304, 306. Andrea also told Altinger that Fast had destroyed items in their apartment and had threatened to kill her, the children, and himself.

3RP 244-45. Altinger had witnessed arguments between Fast and Andrea before. 3RP 219-21, 294. Several months before the February 2 incident, Altinger saw a picture of Fast and Andrea stuck to the wall with a knife. 3RP 221-22, 225. Around the same time, Fast had also told Altinger that he would kill himself before allowing himself to be arrested by police. 3RP 223, 329. Altinger also saw that Andrea once had a black eye. She told Altinger that Fast had caused the black eye. 3RP 218-19, 297. Altinger acknowledged however, that it was possible Andrea had created the black eye with makeup. 3RP 298. Altinger agreed to intervene, and asked his friends, Brian DeMarco and Ryan Dundon, to help him distract Fast. 3RP 239-40, 246, 503-04, 567. DeMarco and Dundon arrived at Altinger's apartment shortly after Fast did. 3RP 247-48, 254, 507-08, 571.

When Fast arrived, he explained that he had found Andrea's diary. 3RP 248-49, 303-04, 1035. Fast had his pistol with him. 3RP 1026, 1032-33. Altinger described Fast as upset, loud, and waiving around Andrea's diary. 3RP 248-49, 303-04. DeMarco and Dundon however, sensed no tension when they arrived at the apartment. Fast's mood seemed to be normal and they sensed no hostility. 3RP 511-12, 571-73.

The four men sat and talked inside Altinger's apartment for about one hour. 3RP 260-61. Altinger exchanged text messages with Andrea who updated him as to her progress in packing up the apartment. 3RP

257, 678, 758. Altinger decided he would try and “disarm” Fast and asked to see his pistol. Altinger told Fast he was thinking about getting a pistol of his own. 3RP 261, 318-19. Fast had never met DeMarco before that day and told Altinger he did not feel comfortable showing off his pistol. 3RP 262, 319-20, 503, 508, 1045-47.

Shortly thereafter, Fast said he needed to leave Altinger’s apartment and go clean up his own apartment. 3RP 262-63, 322. By that point, Andrea had already told Altinger she was finished packing. 3RP 262-63, 322. As Fast walked toward the door, Altinger blocked his path. 3RP 262-64, 312-13, 574-75, 1048-50. Altinger also grabbed an empty liquor bottle and tossed one to DeMarco, telling Fast he needed to stay. 3RP 266-70, 515-17, 525, 576-80. When Fast asked why, Altinger explained that Andrea was packing up her belongings. 3RP 270, 277, 516, 532, 542-43, 574-75, 582.

Altinger pushed Fast when he continued moving toward the door. 3RP 271-72, 519-21, 548, 1049-50. Altinger then raised the liquor bottle above his head. 3RP 271-72, 526-28, 576-80. In response, Fast put his hand on his pistol. He did not point the pistol at anyone. 3RP 271-72, 577, 581-82, 1051, 1266. Altinger told Fast he did not want to shoot anyone. Fast responded, “you don’t want to be so sure of that.” 3RP 275,

1062. Altinger took that as a threat against himself. 3RP 275. Altinger admitted Fast never made any threats to harm him or his family. 3RP 320.

Altinger confronted Fast about Andrea's allegations that he had threatened to kill her and the children. 3RP 1050-51, 1059. Fast responded, "so that's what she told you, huh?" 3RP 1059. Fast acknowledged to Altinger that he had damaged some of Andrea's belongings. 3RP 1061.

Altinger continued to question Fast about his relationship with Andrea, telling him that if he continued down the path he was on, he would have no one left to support him. Fast responded, "so be it." 3RP 278, 522, 536, 543-44. Altinger explained that he feared if Fast was let out of the apartment he would hurt Andrea or the children. 3RP 279-80. When Altinger asked how he could be certain Fast would not hurt Andrea or the children if let out of the apartment, Fast responded, "you don't know, you can't know." 3RP 273-75, 381. Fast explained his statement was meant to convey the lack of overall trust between him and Altinger; not a threat to Andrea. 3RP 1026, 1032-33, 1060.

Altinger nonetheless took Fast's comment as a potential threat toward Andrea and the children. 3RP 273-74, 284, 381. Fast however, never told Altinger he was going to hurt Andrea or the children. 3RP 322. Altinger acknowledged that what put him in fear for Andrea's life was not

what Fast said, but rather, what Andrea had previously told him about the argument that morning. 3RP 289. Altinger also later told a defense investigator that he did not Fast's statement a "legitimate threat." 3RP 288. DeMarco likewise never told police that he believed Fast would harm Andrea or the children. 3RP 557-58.

After about 20 minutes, Altinger let Fast leave the apartment. 3RP 275, 278, 1063. Altinger then called Andrea, told her what happened, and encouraged her to call police. 3RP 280. Andrea called police and reported that Fast had "implied" a threat to kill her. 3RP 825-26, 829. Altinger did not call police. 3RP 280-81.

Fast returned to the apartment and cleaned up the items that were strewn about. 3RP 1065, 1175. He also wrote a letter to Andrea. 3RP 1138-44, 1174-75. Fast then left the apartment and was arrested several days later when he returned to collect some of his belongings. 3RP 439, 40, 1177.

Andrea and Altinger returned to the apartment after Fast's arrest. 3RP 281-82, 681-84. Inside they saw damage to the apartment, including broken objects, marks on the walls, a tracing of a gun, and knife damage to the bed mattress and couch. 3RP 281-82, 684-88, 692, 865-67. Andrea destroyed the diary after it was returned to her. 3RP 310, 711-12.

Fast acknowledged that he had some anger issues but denied making any threats to harm or kill Altinger, Andrea, or the children. 3RP 1255, 1274-75. Fast explained that he did not hit or push Andrea when he was upset with her. 3RP 1212. Fast acknowledged he destroyed some of Andrea's belongings during the course of the marriage, but that his intention was to hurt her feelings, not scare her. 3RP 1270-75. Fast also denied ever threatening to commit suicide by police. 3RP 1180, 1189.

C. ARGUMENT

1. THE STATE FAILED TO PROVE FAST'S STATEMENT TO ALTINGER WAS A TRUE THREAT.

Due process requires the State to prove each element of a charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012), cert. denied, 133 S. Ct. 991, 184 L. Ed. 2d 770 (U.S. 2013). Crimes that have a threat to commit bodily harm as an element require the State to prove the threat was a "true threat" so as not to violate the First Amendment's free speech clause. State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001).

A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the

statement would be interpreted as a serious expression to inflict bodily harm or to take a life. Kilburn, 151 Wn.2d at 43. Communications that “bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole” are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Whether a true threat has been made is determined under an objective standard that focuses on the speaker, not the listener. State v. Johnston, 156 Wn.2d 355, 361, 127 P.3d 707 (2006).

Here, the jury was instructed that, “to be a threat, a statement or act must occur in the context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.” CP 59 (instruction 9). The to-convict instruction for the second charged count of felony harassment required each of the following elements to be proved beyond a reasonable doubt:

- (1) That on or about February 2, 2015, the defendant knowingly threatened to kill Andrea Fast immediately or in the future;
- (2) That the words or conduct of the defendant placed Jacob Altinger in reasonable fear that the threat to kill would be carried out;
- (3) That the defendant acted without lawful authority;  
and

(4) That the threat was made or received in the State of Washington.

CP 64 (instruction 14).<sup>3</sup>

During closing argument, the prosecutor specifically articulated for the jury which act they should rely on to find Fast guilty of the harassment charge involving Altinger. The prosecutor explained:

The second count is for the implied threats he [Fast] made in Jacob Altinger's apartment, when he had his gun out, when he was determined to leave, and Jacob said how can I be sure you're not going to kill someone – how can I be sure you're not going to hurt someone, excuse me – and Andrew said you can't; you don't know.

3RP 1315.

In light of these jury instructions, and the prosecutor's election, the State was required to prove that Fast's comment to Altinger that he could not be certain Andrea would not be hurt once he left the apartment, was a true threat. Considering the context in which the comment was made, Fast's statement was not a true threat.

When the First Amendment true threat analysis is implicated, reviewing courts independently examine the record to ensure that protected speech is not penalized. Kilburn, 151 Wn.2d at 50-52 (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505,

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<sup>3</sup> The to-convict instruction for the lesser included misdemeanor harassment replaced the language "threatened to kill" with "threatened to cause bodily injury". CP 66 (instruction 16).

104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). This analysis demands more than the application of the standard of review for examining the sufficiency of the evidence. Kilburn, 151 Wn.2d at 48-49. While not amounting to full de novo review, the court has a “special responsibility” to independently review the crucial facts relating to whether speech is protected. Id. The true threat analysis includes consideration of the entire context of the statement, including facts ignored by a lower court. Kilburn, 151 Wn.2d at 47, 51.

Even if the plain meaning of the words used may appear to be a threat, the words may not amount to a true threat based on the context. For example, in N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the court held the N.A.A.C.P. chairman’s speeches, although the words purported to threaten violence, were protected speech because no harm actually resulted and because they were part of the passionate and highly charged political rhetoric of the civil rights movement. Id. at 926-29.

Similarly, in the case that gave rise to the definition of a true threat, Watts v. United States, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), Watts declared during a group discussion at an antiwar rally, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” Watts and the others laughed after he made his statement.

The U.S. Supreme Court reversed Watts' conviction for threatening the president, concluding that taken in context and considering the reaction of the listeners the statement was not a true threat. Id. at 706-08.

More recently, in Kilburn, the Washington Supreme Court reversed a conviction for harassment based on a threat made to a school classmate. 151 Wn.2d at 38-39. In that case, K.J. came to school and told a friend, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you . . . maybe not you first." Id. at 39. The friend thought he might be joking but was not sure. Id. As she thought about it more, she began to fear he was serious and told her parents, who called 911. Id. Despite the inherently alarming nature of K.J.'s statements, the court found insufficient evidence of a true threat. Id. at 54.

First, the court noted that K.J. had stated he was only joking and the trial court found him credible. Id. at 52. He testified that when he made the statement, he was with a group of students standing around chatting and giggling about a book involving guns and the military. Id. at 52. The friend confirmed that after he made the statement, K.J. began giggling as if he were not serious. Id. at 52. The friend testified that, at the time, she was not scared, but only surprised because, in the two years she had known him, K.J. had always treated her nicely. Id. at 52. Based on these facts, the court concluded that a reasonable person in K.J.'s

position would not reasonably foresee that the threat would be taken seriously. Id. at 53.

Kilburn mandates that courts consider the context in which the statements were made, the person or persons to whom the statements were made, and the relationships between the persons. 151 Wn.2d at 47, 51. When these facts are taken into account here, the evidence shows a reasonable person would not foresee that Fast's innocuous statement to Altinger included a serious expression to inflict bodily harm on Andrea.

Altinger had served in the military with Fast, and knew that Fast had a dark sense of humor. 3RP 290, 382. Altinger also knew the Fast's marriage was difficult. 3RP 218. On the day of the incident, Fast had come to Altinger's apartment with Andrea's diary, upset by what he had read inside it. From Fast's perspective, Altinger could reasonably be counted on to understand that he was merely venting his irritation about his marriage and not actually threatening Andrea. Fast also made the comment in response to Altinger's questioning. By his own admission, Altinger provoked the response from Fast. 3RP 303, 312. At the same time, Altinger was physically preventing Fast from leaving the apartment. That tensions between Altinger and Fast were elevated at the time does not render the otherwise innocuous statement a true threat. See Williams, 144

Wn.2d at 209-10 (recognizing that speech does not necessarily fit under the “narrow category” of a “true threat” simply because it conveys anger).

Also significant is the fact that Altinger did not view Fast’s comment as a “legitimate threat” expressing an actual intent to cause physical harm. 3RP 288-89; See State v. Alvarez, 74 Wn. App. 250, 260–61, 872 P.2d 1123 (1994) (evidence of the victim’s subjective fear is a necessary but not sufficient component of the prosecution’s proof), aff’d., 128 Wn.2d 1 (1995). As Altinger explained, it was what Andrea had told him previously, not what Fast said, that made him fear for her safety. 3RP 289. Here, the State failed to show Altinger subjectively feared that Fast would carry out his alleged threat.

Finally, Fast’s statement to Altinger is not an express threat of immediate or future harm. As Fast explained, the statement was meant to convey the lack of overall trust between him and Altinger; not a threat to Andrea. 3RP 1060. Fast was aware that Altinger was having an affair with Andrea. Altinger was similarly aware that Fast knew about the affair. This expression of distrust, rather than plan or intent, could reasonably be interpreted as merely an expression of Fast’s dislike of what was occurring between Altinger and Andrea. A reasonable person in Fast’s position would not foresee that Altinger would take his innocuous statement as a true expression of intent to cause bodily injury to Andrea.

An independent review of these facts leads to the conclusion that Fast's comment to Altinger was not a true threat. "It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more." Kilburn, 151 Wn.2d at 49. Reversal is required because the State failed to prove beyond a reasonable doubt that Fast made a true threat that was unprotected speech.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Fast was entitled to seek review at public expense, "by reason of poverty," and therefore appointed appellate counsel at public expense. Supp. CP \_\_\_\_ (sub no. 80, Order Authorizing Appeal in Forma Pauperis, Appointment of Counsel and Preparation of Record, dated 7/2/15). If Fast does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2016 WL 393719 \*2 (slip op. filed January 27, 2016) (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. State v. Sinclair, \_\_ Wn.

App. \_\_, \_\_ P.3d \_\_, 2016 WL 393719 \*4 (slip op. filed January 27, 2016).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Fast’s ability to pay must be determined before discretionary costs are imposed.

In Sinclair, this Court exercised its discretion, and denied appellate costs. Slip op. at 14. Sinclair’s motion set forth several facts supporting his inability to pay appellate costs, including; the trial court’s lack of determination that he was able to pay any amount of trial court LFOs, the trial court’s waiver of all nonmandatory LFOs in the judgment and sentence, and the appointment of appellate counsel because of Sinclair’s indigency. Sinclair, slip op. at 12-13. Noting RAP 15.2(f) established a “presumption of continued indigency throughout review,” this Court concluded no facts or trial court order supported a determination that Sinclair’s financial condition had improved or was likely to improve. Sinclair, slip op. at 13-14. This Court therefore concluded an award to the State of appellate costs was inappropriate. Sinclair, slip op. at 14.

As in Sinclair, here several facts show Fast does not have the present, or future ability, to pay appellate costs. Fast listed no monthly income and no ownership in any real or personal property as part of his declaration in support of an order of indigency. Fast noted he could contribute nothing towards the expense of his appeal. Supp. CP \_\_\_ (sub no. 79, Declaration of Defendant, dated 7/1/15). The resulting order authorizing appeal indicates that Fast is indigent and entitled to review at public expense, “by reason of poverty[.]” Supp. CP \_\_\_ (sub no. 80, Order Authorizing Appeal in Forma Pauperis, Appointment of Counsel and Preparation of Record, dated 7/2/15). Moreover, the trial court waived all non-mandatory LFOs, on the basis that Fast’s priority should be completing treatment rather than seeking employment. 4RP 21.

As in Sinclair, here the State has failed to submit any evidence which would rebut the “presumption of continued indigency throughout review.” Slip. op. at 13-14 (citing RAP 15.2(f)). Without a basis to determine that Fast has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

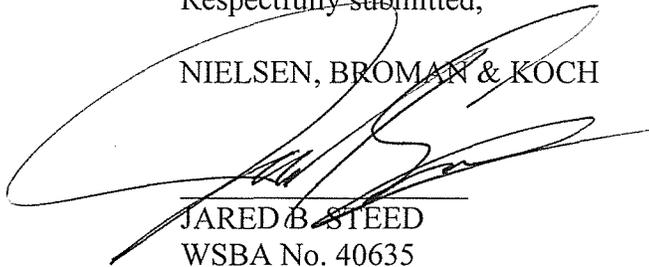
D. CONCLUSION

For the reasons discussed above, this Court should reverse Fast's conviction and remand for a new trial. This Court should also exercise its discretion and deny appellate costs.

DATED this 25<sup>th</sup> day of April, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over the printed name and extends upwards into the 'Respectfully submitted' line.

JARED B. STEED

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