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Court of Appeals
Division I
State of Washington

NO. 73923-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

LEROY RUSSELL,

Appellant.

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

The Honorable Millie Judge, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel.

Issues Pertaining to Assignment of Error

Where the evidence supported a voluntary intoxication defense, did appellant receive ineffective assistance of counsel where his attorney wrongly conceded appellant was not entitled to a voluntary intoxication instruction?

B. STATEMENT OF THE CASE¹

1. Pretrial Proceedings

On May 28, 2015, the Snohomish county prosecutor charged appellant Leroy Russell with one count of felony harassment for allegedly threatening to kill another on or about May 8, 2015. CP 75-76. Russell was 59 years old, 5'9" and 165 pounds. CP 76.

In the affidavit of probable cause, the state alleged Russell drove into a residential parking lot in Everett and caused residents concern because of his pit-bull; one of the residents also had a pit-bull. CP 71. When Adrian Hammond told Russell to leave, Russell

¹ This brief refers to the transcripts as follows: "1RP" – pretrial hearing held July 24, 2015; "RP" – jury trial held July 27-29; and "2RP" – sentencing on July 30, 2015.

reportedly told Hammond he was going to come back and shoot Hammond and his friends. CP 71.

According to the state's affidavit, Russell drove off but came back ten minutes later on foot with his pit-bull. CP 71. Reportedly, he told the people there he was going to shoot and kill them. CP 71. Police were called. CP 71.

When police arrived, Russell said he was the one who was threatened. CP 72. Police told him to leave. CP 72.

After speaking with Dominique King, officer Christopher Olsen caught up with Russell and arrested him. CP 72. Russell reportedly threatened to kill Olsen and Officer Everett. CP 72. Russell permitted the officers to search his car. There was no firearm, but police found a half-full can of "Four Loko" in the cup holder. CP 72.

The state subsequently amended the information to include Hammond as the person threatened for count one and added: a second count of felony harassment of Dominique King; a third count of attempted felony harassment of officer Olsen; and a fourth count of attempted felony harassment of officer Everett. CP 69-70. When King did not appear for trial, the count concerning him was dismissed with prejudice. CP 50-51; RP 5.

On July 24, 2015, the court held a CrR 3.5 hearing. 1RP. Olsen testified about his interactions with Russell when he responded to the 911 call. 1RP 6. Olsen testified when he first spoke to Russell, he had to direct Russell to tie up his dog more than once. 1RP 11. Olsen testified: "He just wasn't following what I was asking." 1RP 11.

After Olsen spoke to Hammond, Olsen told Russell he was free to leave; Hammond apparently did not wish to press charges. RP 12. Russell wandered over to a second group of people. 1RP 12. After speaking to this second group, Olsen decided to arrest Russell. 1RP 13.

Olsen testified Russell had difficulty again (although less than before) tying up the dog. 1RP 14-15. When asked if Russell seemed confused, Olsen responded: "I don't know if I would say confused. He was intoxicated." 1RP 14. In Olsen's estimation, Russell was "fairly heavily intoxicated." 1RP 14.

When Olsen put Russell in the patrol car, Russell expressed concern for his dog. 1RP 16. Olsen said they would transport it to animal control if no one could pick it up. 1RP 16. It was at that point Russell reportedly threatened Olsen. 1RP 16.

In its oral and written findings, the court found Russell was “highly intoxicated.” CP 10, 12; 1RP 52. The court found Russell’s intoxication may account for the discrepancy between Olsen’s account of Russell’s arrest and Russell’s own account:

Having been intoxicated, there is no question but that his recounting of events could well have been impaired as a result of the alcohol that must have been in his system. If he was, as everyone says, very intoxicated at the time, he would have needed his brain to record these events into his memory.

Partly as a result of his state of intoxication and partly as a result of the fact that he’s been demonstrated to have committed a crime of dishonesty within the last ten years, the defendant’s credibility is actually lower than Officer’s Olsen’s, notwithstanding the fact that Officer Olsen was vague on some things and very tired while he testified.

1RP 52.

Despite Russell’s obvious intoxication, the state sought to exclude evidence of voluntary intoxication at trial. CP 68; RP 9-10. The state argued that if the defense was not raising a voluntary intoxication defense, evidence of intoxication was irrelevant. RP 13. Alternatively, the state argued the defense had the burden to show substantial evidence of mental impairment in order to obtain the instruction. RP 12-13; see e.g. State v. Walters, 162 Wn. App. 74, 55 P.3d 835 (2011) (instruction appropriate where there is

evidence the intoxication affected the individual's ability to form the requisite intent or mental state).

The defense confirmed its defense was general denial, not voluntary intoxication, but argued the fact everyone involved – including Russell – had been drinking was relevant as part of the event itself:

The State appears to be requesting that the Court prohibit any argument that intoxication affects behavior. To be clear, the Defense is not raising a defense of voluntary intoxication. However, "Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious." State v. Gabryschak, 83 Wn. App. 249, 254 (1996).^[2] A person can have the capability of forming a specific mental intent and yet not form that intent for a variety of reasons.

All of the civilian witnesses in this case had been drinking. The state's witnesses, officer and civilians alike, nearly all expressed the opinion that the Defendant appeared to have been under the influence of alcohol or drugs. Various witnesses describe Mr. Russell as speaking gibberish, as having difficulty understanding instructions, and as manifesting physical signs of impairment. All of this is highly relevant to the facts at hand, as is the fact that the State's civilian witnesses were consuming alcohol and therefore their judgment, memory and other faculties may have been impaired.

Evidence regarding alcohol and drug consumption has always been considered relevant so long as it relates to the time of the crime in question. There is no reason in this case to treat such evidence any differently than is always permitted.

² State v. Gabryschak, 83 Wn. App. 249, 921 P.2d 549 (1996).

CP 68.

Defense counsel appeared to concede there was not sufficient evidence for an instruction, but argued intoxication still was relevant:

Counsel [for the state] is essentially as I understand it saying that alcohol has no relevance whatsoever unless it is a mental defense, and that's just simply not been the case law in any case that I've ever heard of, nor is he citing any case law that says you can't bring in the effects of alcohol just because it doesn't reach the legal level.

RP 13.

The state clarified it did not object to testimony alcohol may have impacted Russell's memory or that of the witnesses, but that any argument alcohol impacted Russell's behavior should be excluded:

To be clear, the Defendant takes the stand and the Defendant wishes to say, I don't remember everything that happened or for addressing his memory of events and they're unclear and the like because of alcohol, I have no objection to that. That is affecting his ability to remember, you know, his cognitive memory. That I agree. That is not anywhere near a voluntary intoxication defense. However, Counsel used the term affect his behavior, and then in the – in her motions said "judgment." Well, that is where we get into involuntary [sic] intoxication.

If there is an argument that his behavior in this case was caused by alcohol, or was impacted by his consumption of alcohol, if not a perfect defense, it is

an imperfect defense. It is a mitigation of why his behavior was what it was. Again, it isn't relevant for the purposes in this case of proving that he knowingly threatened Mr. Hammond or intentionally threatened Officer Olsen or Everett, so there is a distinction between those things. If the Court were to rule simply that there – there is not going to – that there is insufficient evidence of alcohol impacting the mens rea in this case and that the parties shall not argue that, as far as alcohol coming into what people remember, that's fine. I don't have an objection to that.

RP 15-16.

The court initially ruled that because the defense was not seeking a voluntary intoxication instruction that it would preclude argument about alcohol affecting Russell's behavior, although the defense could inquire about intoxication as it pertained to the witnesses' ability to remember. RP 16-17.

In response, the defense asked the court to exclude all reference to Russell's intoxication in the absence of his testimony:

Your Honor, in that case I would ask that the Court exclude testimony from any witness in the absence of my client testifying that they felt in any way, shape or form he was impaired or under the influence of any substance, including drugs or alcohol, because the State has said it is not relevant unless it has to do with memory, so therefore, it is not relevant.

RP 17.

The prosecutor expressed concern that if Russell testified he was impaired, but none of the state's witnesses testified about his impairment, it, it would look like the state's witnesses were hiding something. Therefore, the state argued it should be allowed to elicit limited testimony on the subject, unless defense counsel confirmed she would not ask Russell about intoxication. RP 17-18. Defense counsel confirmed she would not ask Russell about intoxication and asked to exclude reference to the Four Loko can in his car. RP 18.

The court granted the motion to exclude any mention of alcohol consumption by Russell as well as the presence of alcohol in his car. RP 19.

2. Trial Testimony

Adrian Hammond lives at 9502 4th Avenue West in Everett with his roommates David Stout and "Louie."³ RP 53. The evening of May 8, 2015, Hammond was outside by the fire pit with his roommates and girlfriend Lindsay. RP 54, 56. Stout has a pit-bull named Bubba. RP 54, 179-80.

According to Hammond, Russell pulled into the turn lane in front of his house and just idled there. RP 56. Hammond noticed

³ Louie did not testify and no last name was ever referenced.

there was a big dog in the back and his “roommates and everybody else was screaming at him to – to go somewhere else.” RP 56. Stout’s dog and Russell’s dog were barking at each other. RP 58.

Hammond testified, Russell “just, like, looked over at us and sat there like he was in a daze.” RP 58.

At some point, Russell pulled into the driveway and reportedly got out of his truck. RP 59, 62. Stout took his dog into the house. RP 59, 102. Hammond admitted he and his friends were yelling profanities at Russell and telling him to leave. RP 62. According to Hammond, Russell said: “I’m going to shed your blood all over the property.” RP 65. Hammond testified Russell also said he “was going to come back and kill us all.” RP 63, 65, 69.

Hammond “was pretty upset” and pushed his girlfriend into the house. RP 64. Hammond testified he was “afraid something could have happened if he really had a gun or not.” RP 64.

Russell drove away and parked his truck at a nearby bowling alley. RP 60, 65. Hammond called 911.⁴ RP 66.

Hammond testified that when Russell walked back to the property with his pit-bull mix, he and his friends ran into the house.

RP 67-68. Hammond claimed, Russell “mumbled something.” RP 70. Hammond couldn’t “understand what he said, but it sounded like sic ‘em.” RP 70.

Hammond testified he was fearful because Russell was acting crazy:

Because we didn’t know what he – if he really had a gun or what he had, because he was rambling all kinds of stuff and you don’t know if somebody is doing crazy stuff like that, they’re unpredictable.

RP 70. Russell left after Hammond said he was calling the police.⁵

RP 71.

When officer Olsen arrived, Hammond indicated he did not want to press charges because of his busy schedule. RP 72. While testifying, however, Hammond admitted, “I’m very mad and I want to attack him.” RP 73.

Stout noticed Russell in the turn lane on the street in front of Hammond’s house. RP 181-82. According to Stout, “[h]e was gesturing towards us, pointing a finger like he knew us.” RP 182.

⁴ On cross, the defense introduced Hammond’s 911 call, redacted to remove the drug/alcohol references. RP 95.

⁵ Hammond was admittedly confused about the order of the encounters. RP 76, 81, 157. On redirect, after listening to his 911 call, he agreed the order might have been: (1) Russell pulled into the driveway, took a step out of the car and made threats; (2) Russell idled on the street; (3) Russell parked at Glacier Lanes and walked up with his pit-bull but Hammond and his friends had called police and gone inside at that point. RP 163-69.

Stout testified Russell had an average-sized pit-bull in the passenger seat. RP 182, 205.

Stout testified Russell hesitated before turning into the driveway. RP 182. Stout figured Hammond must know Russell and took Bubba into the house, because he and Russell's dog were barking at each other a little. RP 184. But as Stout described, neither dog was behaving aggressively and no one was particularly afraid. RP 184, 197-98.

When Stout came back outside, Russell was gone. RP 184. Stout testified neither Hammond nor his girlfriend appeared frightened or angry. RP 201.

Stout testified about 15 minutes later, Russell drove back by the house and idled on the street. RP 185. Stout testified, "If he was trying to say something, it was inaudible to me." RP 185. Stout reiterated, "If it was, it was gibberish. I couldn't make out much of anything if he was trying to say anything at all." RP 187. Hammond and his girlfriend were asking Russell to leave. RP 187. Russell left about a minute later. RP 188.

A few minutes later, Russell walked up with his dog on a leash. RP 188. Stout testified they all went into the house upon seeing him. RP 189. According to Stout, Russell's dog was

behaving normally, but Russell was “egging the dog on to get him to bark.” RP 191. But to Stout, it did not appear the dog knew how to be aggressive. RP 210. Stout never heard Russell utter any threats. RP 211.

Hammond was on the phone with 911 when Russell walked back. He told the operator he had a pellet gun and could shoot Russell but decided he would leave it to the police to resolve. RP 311. On the stand, Hammond said his mom would have shot Russell. RP 81.

Officer Chris Olsen responded to Hammond’s 911 call at approximately 8:30 p.m. RP 220-21. Olsen spoke briefly to Hammond and then Russell, whom Hammond pointed out. RP 223.

Olsen asked Russell multiple times to tie up his dog. RP 226. Olsen remembered the dog “being excited, not necessarily aggressive.” RP 226. When the officer explained why he was there, Russell said he was the one who had been threatened with a rifle. RP 227, 254.

When officer Everett arrived, Olsen went to speak with Hammond further. RP 227. Hammond indicated he was not

interested in pressing charges. RP 236. Olsen returned to Russell and told him he could leave – but not to drive. RP 236.

Russell left heading south on the sidewalk towards a second group of people having a barbecue outside. RP 237-38. Olsen testified he observed Russell interact with this second group who then looked shocked and waived Olsen over. RP 238. Olsen spoke to Dominique King, who was with the second group. RP 238. Olsen testified King said Russell “had just made threats to shoot them.” RP 238.

Olsen caught up with Russell and officer Everett at Glacier Lanes parking lot. RP 239. Olsen asked Russell to tie up his dog a second time. RP 240. Following his arrest, Russell started calling Olsen “a bitch, saying that, you know, he doesn’t care if he has to do the time, he’ll come after me.” RP 240. According to Olsen, Russell “later gets more specific saying he’s going to kill me and Officer Everett as well.” RP 240.

However, Russell allowed Olsen to search his car. RP 256. Olsen found no weapons of any kind. RP 256.

Olsen acknowledged Russell was concerned about his dog. RP 257. Olsen explained another officer would take it to animal control. RP 258.

By the time Olsen arrived with Russell at the jail, Russell had ceased making threats. RP 260. Olsen did not book him on any charge relating to Olsen. As Olsen explained, it is somewhat of an "occupational hazard" that he is threatened from time to time. RP 260. At trial, Everett was on medical leave and did not testify. CP 67.

Russell was convicted of the lesser included offense of misdemeanor harassment of Hammond and of attempted felony harassment of Olsen, but acquitted of harassing Everett. CP 22-24. Russell timely appeals. CP 1-8.

C. ARGUMENT

1. COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO REQUEST A VOLUNTARY INTOXICATION INSTRUCTION.

It is clear defense counsel wanted to elicit evidence of Russell's voluntary intoxication. However, defense counsel wrongly conceded there was insufficient evidence for an instruction on it. As a result, the court never ruled one way or the other whether there was sufficient evidence for the instruction. Rather, because the defense was not pursuing a voluntary intoxication defense, the court ruled evidence of intoxication could be elicited only as it pertained to witnesses' memories and precluded any argument

intoxication impacted Russell's judgment or behavior. As a result, defense counsel resorted to her back-up strategy to eliminate any reference to Russell's intoxication. This amounted to ineffective assistance of counsel as – contrary to defense counsel's unwarranted concession – there was sufficient evidence to support Russell's first line of defense.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

a. Russell Was Entitled to the Voluntary Intoxication Instruction.

The defense is entitled to a jury instruction on its theory of the case when that theory is supported by substantial evidence. State v. Kruger, 116 Wn. App. 685, 693, 67 P.3d 1147 (2003).

Evidence of intoxication and its effect may be used to negate the element of intent. RCW 9A.16.090; State v. Carter, 31 Wn. App. 572, 575, 643 P.2d 916 (1982). The standard voluntary intoxication instruction provides:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [*acted*][*or*][*failed to act*] with (fill in requisite mental state).

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.10, at 282 (3d ed. 2008). “Intoxication” means “an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug.” State v. Dana, 73 Wn.2d 533, 535, 439 P.2d 403 (1968).

The trial court must instruct on voluntary intoxication when (1) the charged crime includes a mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence the intoxication affected the individual’s ability to form the requisite intent or mental state. Kruger, 116 Wn. App. at 691. A trial court’s refusal to give a proffered voluntary intoxication instruction is reversible error when these three elements are met. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

In evaluating whether substantial evidence supports a defense-proposed instruction, the court must interpret the evidence “most strongly” in the defendant’s favor and “must not weigh the proof, which is an exclusive jury function.” State v. Douglas, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005).

The first element is met here. The crimes of felony harassment, harassment and attempted felony harassment require the accused to “knowingly” threaten and to act with the intent to commit felony harassment. CP 41-42, 46; RCW 9A.46.020(1). The state did not dispute the charges required it to prove a mental state. RP 10.

The second element is also met here. Olsen described Russell as “heavily intoxicated.” 1RP 14. A half-empty can of Four Loco was found in the cup holder of Russell’s truck. CP 72. At the CrR 3.5 hearing, the court found Russell was “highly intoxicated” to the point it affected his memory of being arrested. 1RP 52; CP 10, 12. As defense counsel recounted at the pretrial hearing, nearly all the witnesses expressed the opinion that Russell was under the influence of either drugs or alcohol. CP 68. Hammond’s 911 call included reference to drugs and alcohol. RP 95. At trial, Hammond testified Russell looked like “he was in a daze.” RP 58. Stout

described him as speaking “gibberish.” RP 187. Viewing all this in Russell’s favor, there is substantial evidence of his intoxication.

Lastly, the third element is met. The case law is inconsistent on this factor. State v. Walters, 162 Wn. App. at 283. For instance, an intoxication instruction was necessary where the defendants drank beer all day, ingested several Quaaludes, spilled beer and were uncoordinated while playing ping pong, and one of them felt no pain when he was hit by a car. Rice, 102 Wn.2d at 122-23. By contrast, Gabryschak was not entitled to an instruction where he was obviously intoxicated and angry, but there was no sign of the alcohol’s impact on his reasoning abilities. State v. Gabryschak, 83 Wn. App. 249, 253-55, 921 P.2d 549 (1996). Similarly, Priest’s intoxication did not affect his mental state where he was able to operate a motor vehicle, communicate with a state trooper, purposefully provide false information, and attempt to reduce his charges by becoming an informant. State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2000).

Comparing these cases, the Walters court concluded that, “physical manifestations of intoxication provide sufficient evidence from which to infer that mental processing also was affected, thus

entitling the defendant to an intoxication instruction.” 162 Wn. App. at 283.

Several facts recited above are physical manifestations of Russell’s intoxication, such as his inability to follow officer Olsen’s directions, Hammond’s description “he was in a daze” and Stout’s description of Russell speaking “gibberish.” 1RP 11; RP 58, 187. And when Olsen first told Russell he was free to go, Olsen specifically told Russell not to drive. RP 236.

The record reflects substantial evidence of Russell’s intoxication. And there is ample evidence of the alcohol’s effect on his mind and body. He was entitled to the voluntary intoxication instruction.

b. Counsel’s Deficiency in Failing to Request the Instruction Prejudiced the Outcome of Russell’s Trial.

Counsel’s performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. If counsel’s conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance claim. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a reasonable probability that but for counsel’s deficiency, the result

would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

Counsel is constitutionally ineffective for failing to request jury instructions on the law supporting the defense theory. See, e.g., Thomas, 109 Wn.2d at 229 (failure to request voluntary intoxication instruction); State v. Kruger, 116 Wn. App. at 688 (same); see also State v. Powell, 150 Wn. App. 139, 155-57, 206 P.3d 703 (2009) (failure to request reasonable belief instruction). For instance, in Kruger, the court held counsel to be ineffective for failing to request a voluntary intoxication instruction where there was substantial evidence of Kruger's intoxication. 116 Wn. App. at 692-93. Because the defense theory was lack of intent, the court concluded there was no strategic reason for not requesting the instruction. Id. at 693-94. Prejudice resulted because "[e]ven if the issue of Mr. Kruger's intoxication was before the jury, without the instruction, the defense was impotent." Id. at 694-95. Reversal was required. Id. at 695.

Here, counsel was ineffective in failing to request a voluntary intoxication instruction. It is clear from defense counsel's objection to the state's motion to exclude evidence of intoxication that

defense counsel wanted to elicit evidence of Russell's intoxication before the jury. Moreover, counsel's failure to request the instruction was not tactical. On the contrary, it was based on an incorrect assumption the bar to obtaining the instruction was insurmountably high, which also explains why defense counsel resorted to arguing evidence of intoxication is always relevant, even if not establishing a legal defense. Thus, the circumstances show counsel's failure to request the instruction was not based on legitimate strategy – but an incorrect view of the law. As such, counsel performed deficiently.

Counsel's deficient performance prejudiced Russell. As a result of defense counsel's unwarranted concession and subsequent motion to exclude all evidence of Russell's intoxication, Russell was presented to the jury as utterly sober. The jury therefore was given no reason to doubt whether he acted "knowingly" or whether he would foresee his statements to be interpreted as a serious expression of intention to carry out the threat, rather than as something just said in jest or idle talk. CP 35. In other words, defense counsel's unwarranted concession and last-minute change of strategy no doubt led to Russell's convictions.

The defense essentially was left to argue that because Hammond was confused about the sequence of the events, he was not credible regarding anything. See e.g. RP 307, 310-12. Not surprisingly, considering Hammond's 911 calls and Stout's corroborating testimony, the jury was not persuaded by counsel's argument. But had the jury been allowed to hear of Russell's extreme intoxication, and had the jury been instructed properly on the defense of voluntary intoxication, there is a reasonable probability the jury would have had a doubt about whether Russell acted knowingly or acted with intent to commit felony harassment or whether he understood his threats would be perceived as true threats. In other words, it is reasonably likely the outcome would have been different.

Counsel's deficiency in failing to request a voluntary intoxication instruction prejudiced the outcome of Russell's trial. Reversal is required. Kruger, 116 Wn. App. at 695.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Russell was represented below by appointed counsel. Supp. CP __ (sub. no. 44, Motion and Declaration for Order Authorizing Defendant to Seek Review at Public Expense, 9/1/15).

The trial court found him indigent for purposes of this appeal. Supp. CP __ (sub. no. 45, Order Authorizing the Defendant to Seek Review at Public Expense, 9/1/15). Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, defense counsel explained Russell had merely been looking for an address and was unfamiliar with the area when the whole incident occurred. 2RP 5. Russell described his dog as gentle and did not understand "why the people reacted the way they did." 2RP 5.

Regardless, the incident and Russell's incarceration had taken a financial toll. There was a risk his SSI had been cut off while he was in jail. 2RP 6. His truck was towed and it was not until recently he was "finally able to get ahold of somebody who can rescue the dog and is residing with that person until he is released." 2RP 6. The court imposed only the \$500 VPA. CP 18; 2RP 13.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to

the State if the State is the substantially prevailing party on review, “*unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this 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 appellant’s brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94.

Based on Russell’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

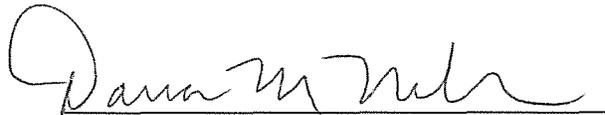
D. CONCLUSION

Because Russell received ineffective assistance of counsel, this Court should reverse his conviction. Alternatively, this Court should deny any request for costs.

Dated this 6th day of May, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson", written over a horizontal line.

DANA M. NELSON, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73923-9-I
)	
LEROY RUSSELL,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF MAY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LEROY RUSSELL
DOC NO. 713291
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF MAY 2016.

X *Patrick Mayovsky*