

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

NO. 74122-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO OTERO,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DONALD J. PORTER  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u> .....	6
1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY EXPRESSING HIS PERSONAL OPINION OF OTERO’S CREDIBILITY .....	6
a. The Trial Court’s Rulings On Objections During Cross-examination Of Otero .....	6
b. By Asking The Trial Court To Allow Expanded Cross-examination The Prosecutor Did Not Express His Personal Opinion Of Otero’s Credibility And Did Not Commit Flagrant And Ill-intentioned Misconduct.....	10
2. APPELLATE COSTS SHOULD BE IMPOSED.....	18
D. <u>CONCLUSION</u> .....	21

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Belgarde, 110 Wn.2d 504,  
755 P.2d 174 (1988)..... 16

State v. Blank, 131 Wn.2d 230,  
930 P.2d 1213 (1997)..... 19

State v. Brett, 126 Wn.2d 136,  
892 P.2d 29 (1995)..... 12

State v. Caver, No. 73761-9-1, slip op.  
(filed Sept. 6, 2016) ..... 20

State v. Emery, 174 Wn.2d 741,  
278 P.3d 653 (2012)..... 11

State v. Fisher, 165 Wn.2d 727,  
202 P.3d 937 (2009)..... 10, 11

State v. Lindsay, 180 Wn.2d 423,  
326 P.3d 125 (2014)..... 16, 17

State v. Lord, 117 Wn.2d 829,  
822 P.2d 177 (1991)..... 13

State v. McKenzie, 157 Wn.2d 44,  
134 P.3d 221(2006)..... 12

State v. Reed, 102 Wn.2d 140,  
684 P.2d 699 (1984)..... 16

State v. Sargent, 40 Wn. App. 340,  
698 P.2d 598 (1985)..... 12

State v. Sinclair, 192 Wn. App. 380,  
367 P.3d 612, review denied,  
185 Wn.2d 1034 (2016) ..... 20

<u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	11
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	12

Constitutional Provisions

Federal:

U.S. CONST. amend. V .....	10
U.S. CONST. amend. VI.....	10

Washington State:

CONST. art. I, § 3 .....	10
--------------------------	----

Rules and Regulations

Washington State:

ER 608 .....	15
ER 611 .....	13

A. ISSUES

1. When a defendant fails to object at trial to a prosecutor's alleged misconduct, reversal is required only when it is shown that the misconduct was flagrant and ill-intentioned, that no curative instruction would have neutralized the prejudice, and that there was a substantial likelihood that the misconduct affected the jury's verdict. Here, for the first time on appeal, Otero alleges that the prosecutor committed reversible misconduct by expressing his personal opinion of Otero's credibility. The two instances of alleged misconduct occurred not in closing argument, but when the prosecutor was, in good faith, asking the trial court to allow him to inquire into Otero's credibility on cross-examination. Has Otero failed to show that the prosecutor committed reversible error by expressing his personal opinion of Otero's credibility?

2. Otero is 35 years old and was sentenced to 45 months in custody. The record contains no information that would support a finding that there is no realistic possibility that Otero will be able to pay appellate costs. Should this Court require Otero to pay appellate costs?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Roberto Otero was charged by amended information with residential burglary (count 1) and three counts of identity theft in the

second degree (counts 2 through 4). CP 10-11. It was alleged that Otero unlawfully entered Alissa Dare's downtown Seattle apartment, stole her credit card, and then used the credit card at three businesses. CP 3-7; 1RP<sup>1</sup> 4.

The jury failed to reach a verdict on count 1, residential burglary, but convicted Otero of the three counts of identity theft in the second degree. CP 85-88. Otero had an offender score of 9, and the trial court imposed a standard range sentence of 45 months on each count to be served concurrently. CP 123, 125.

## 2. SUBSTANTIVE FACTS

In February of 2015, Alissa Dare, an employee of Amazon, lived on the 12<sup>th</sup> floor of an apartment building called Via6 in Seattle's Belltown neighborhood. 1RP 515-19. The apartment building is secured at night, requiring a key fob to enter. 1RP 519. The elevator is also secured, in that it requires a key fob to get off on the residential floors. 1RP 520. When Dare awoke on February 28<sup>th</sup> she noticed that her purse and work bag were not where she had left them when she went to bed. 1RP 534. She saw that things had been moved around in her bag and that credit cards and other items were missing from her purse. 1RP 546-47.

---

<sup>1</sup> Following the convention established by the Appellant, this brief refers to the verbatim report of proceedings as follows: 1RP — August 17, 18, 19, 20, 24, 26, and September 15, 2015; 2RP — August 25, 2015.

Dare's apartment door shuts and locks automatically, but she saw that the strap from a backpack she had left near the door may have prevented the door from locking when she had come in from walking her dog the night before. 1RP 552, 576. There were no signs of forced entry into the apartment. 1RP 580-81.

Dare called 911, met with the police, and by late morning had canceled her credit cards. 1RP 555-58. Dare testified that her Boeing Employees Credit Union (BECU) Visa card had been used for three unauthorized transactions: at a QFC on Capitol Hill, a Walgreens in Renton, and The Finish Line in Southcenter Mall. 1RP 565-66.

The operations manager for the apartment building provided video footage from the early morning hours of February 28<sup>th</sup> that showed the front entrance, the main lobby entrance, and the elevator. 1RP 370-74, 363. The Walgreens store manager was provided the date and amount of the questioned transaction and was able to locate corresponding surveillance footage. 1RP 318-19. Similarly, a loss prevention manager from QFC provided video from the time and location of that unauthorized transaction. 1RP 345, 351-61.<sup>2</sup> Video footage from the apartment building, and showing the transactions at Walgreens and QFC, was played for the jury. 1RP 372-73, 328-35, 353-58.

---

<sup>2</sup> No surveillance video was available from The Finish Line. 1RP 512, 630.

A detective produced a law enforcement bulletin that included still photos of Otero taken from the apartment video and the QFC video. 1RP 624-26. Michelle Brown is a probation officer for the Department of Corrections. Because of prior convictions, Brown monitored Otero for compliance with drug and alcohol treatment. 1RP 461. Over a five-month period starting in October 2014, Brown met face-to-face with Otero about 25 times. 1RP 462-64. Brown saw the law enforcement bulletin and recognized Otero in the still shots from the QFC and apartment videos. 1RP 466-67. A second officer who worked with Brown, Lisa Tavarez, also recognized Otero from the photos in the bulletin.<sup>3</sup> 1RP 679-82. She recognized Otero “immediately” and was “one-hundred percent” certain it was him. Id.

There was no security video from The Finish Line. However, Giovanni Dumas, an assistant manager of The Finish Line was present when the questioned transaction occurred and was shown a photo montage by police. He identified Otero’s photograph with “one hundred percent” certainty as the person who had made the unauthorized purchase of shoes. 1RP 669-70. Dumas also identified Otero in court as the person who had

---

<sup>3</sup> To avoid prejudice to the defendant, the trial court granted a defense motion that Brown and Tavarez testify without identifying themselves as Department of Corrections officers. 1RP 23-30.

used the Visa card for the purchase. 1RP 672-73. Dumas recognized Otero as a frequent customer of the shoe store. 1RP 673.

The apartment manager testified that Otero was not a resident of the building. 1RP 369. In a brief direct examination by his attorney, Otero testified that he had been at the apartment building on the night in question but denied entering Dare's apartment. 1RP 708-09. He said he was "hanging out with a few people I had known." 1RP 708. On cross-examination, Otero said that he had only been at the apartment on one occasion, the night in question, and said he had entered the building with two people, whose names he did not know, whom he had met that night while walking down the street. 1RP 710-12. Otero also said he had entered the elevator with the two. 1RP 717. Otero acknowledged that the video showed that he and the two women exited the elevator on Dare's floor and that the women went to the left and he went to the right. 1RP 727-28. He also acknowledged that the video showed him re-entering the elevator at 12:24 a.m., after having been on the 12<sup>th</sup> floor for 21 minutes. 1RP 728.

C. ARGUMENT

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY EXPRESSING HIS PERSONAL OPINION OF OTERO'S CREDIBILITY.

Otero asserts that the prosecutor committed reversible misconduct by expressing his personal opinion of Otero's credibility as a witness during his cross-examination of Otero. Otero's claim is without merit. First, Otero has waived his right to appeal the alleged misconduct because at trial he did not object that the prosecutor's questions or comments constituted his personal opinion on Otero's credibility, and he did not ask for a curative instruction. Otero cannot meet the heightened standard of review that applies when the appellant has failed to object at trial.

Moreover, the prosecutor did not express his personal opinion as to Otero's credibility, but rather argued to the trial court that expansion of the cross-examination should be allowed because Otero's credibility, as with any witness, was at issue. If the prosecutor committed any misconduct, the error was harmless.

a. The Trial Court's Rulings On Objections During Cross-examination Of Otero.

On direct examination, Otero's attorney asked Otero only whether he had been at the apartment building on the night in question, whether he had entered Alissa Dare's apartment, and whether he had gotten off the

elevator on the 12<sup>th</sup> floor. 1RP 708-09. The entire direct examination consists of less than two pages of transcript. 1RP 708-09.

On cross-examination, Otero said that he had only been at the apartment on one occasion, the night in question, and said he had entered the building with two people, whose names he did not know, whom he had met that night while walking down the street. 1RP 710-12. Otero also said he had gotten into the elevator with the two. 1RP 717. As cross-examination continued, the prosecutor began questioning Otero on topics other than his actions in the apartment building, and Otero's counsel repeatedly objected that the questions were beyond the scope of direct examination. Several times the trial court overruled the objections and required Otero to answer, including the following instances:

- The trial court twice overruled objections to questions relating to whether witnesses Brown and Tavaréz would be able to recognize him. 1RP 712-13.
- The trial court overruled the objection in response to the prosecutor's question about whether Otero had been wearing the same clothes at the time of his arrest that were depicted in Exhibits 7 and 17 (still photos from the QFC and apartment videos). Supp. CP \_\_ (Exhibit List); 1RP 403, 624, 713-14.

- The court overruled the objection to the prosecutor's question as to where Otero went when he left the apartment building. 1RP 718.
- The court overruled the objection to the prosecutor's question as to how long it took Otero to walk downtown after he left the apartment. 1RP 719.
- The court overruled the objection when the prosecutor asked Otero to identify his picture in the photo montage, Exhibit 28, that was shown to witness Giovanni Dumas of The Finish Line. 1RP 721, 660-63.

However, the trial court also repeatedly sustained objections that the prosecutor's questions were beyond the scope of direct, including when:

- The prosecutor asked the defendant whether it was him depicted in Exhibit 5, a still photo taken from the Walgreens surveillance footage. 1RP 722-23, 342-43.
- The prosecutor asked the defendant whether it was him depicted in the photograph admitted as Exhibit 4 (another still photo from the Walgreens video). 1RP 723, 623-24, 339-40.
- The prosecutor asked the defendant whether it was him depicted in the photograph admitted as Exhibit 3 (another still photo from the Walgreens video). 1RP 723, 339-40.

- The prosecutor asked Otero if he knew the locations of Walgreens and The Finish Line. 1RP 723-24.
- The prosecutor asked whether Otero had a credit card number that ended with 5177. 1RP 725

At this point, the prosecutor said to the trial court: “Your Honor, the State argues that all of these go to Mr. Otero’s credibility.” 1RP 725. The trial court maintained its ruling. Id.

When the prosecutor asked Otero, “Why did you take [Dare’s] bus pass?”, the trial court sustained an objection that the question was beyond the scope of direct examination even though the bus pass was taken from Dare’s purse in her apartment. 1RP 730.

After questioning Otero further regarding his movements at the apartment building, the prosecutor prepared to show Otero Exhibit 1, a video that the prosecutor acknowledged depicted a location other than the apartment building.<sup>4</sup> 1RP 732. Otero objected that this would be outside the scope of direct examination. Id. The court asked what the prosecutor’s question would be. Id. The prosecutor explained that he was going to ask Otero if the person in the video was wearing the same set of clothes that Otero had in testimony identified himself as wearing. 1RP 732-33. The court then sustained the objection that the question would be

---

<sup>4</sup> Exhibit 1 is the Walgreens surveillance video. Supp. CP \_\_ (Exhibit List).

beyond the scope of direct examination. 1RP 733. The prosecutor then said: “Is the witness’s credibility not at issue?” Id. The court then took its morning recess and, with the jury excused, the court and the prosecutor discussed the distinctions between scope of direct examination and questions relating to credibility. 1RP 733-34.

After the recess, the prosecutor asked only two questions, including whether Otero had used Dare’s credit cards. 1RP 735. The trial court overruled Otero’s objection that the question was beyond the scope of direct and required Otero to answer. Id.

- b. By Asking The Trial Court To Allow Expanded Cross-examination The Prosecutor Did Not Express His Personal Opinion Of Otero’s Credibility And Did Not Commit Flagrant And Ill-intentioned Misconduct.

The United States and Washington Constitutions guarantee every defendant a fair trial. U.S. CONST. amend. V, VI; WA CONST. art. I, § 3. A defendant who claims on appeal that prosecutorial error or misconduct deprived him of a fair trial bears the burden of establishing that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In order to establish prejudice, a defendant who objected to allegedly improper prosecutorial remarks at trial must show that the prosecutor’s comments resulted in prejudice that

had a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

A defendant who did not object to an allegedly improper comment has waived any claim on appeal unless the comment was so flagrant and ill-intentioned that it caused an enduring prejudice that could not have been neutralized by a curative instruction. Fisher, 165 Wn.2d at 747. Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Otero did not object that the prosecutor's questions constituted misconduct, nor did he object that the prosecutor commented on or gave his personal opinion of Otero's credibility. Otero did not move to strike the prosecutor's comments or ask for a curative instruction. If there was any error at all by the State, Otero cannot meet the heightened standard.

The prosecutor did not express a personal opinion as to Otero's credibility. To determine whether a prosecutor improperly expressed a personal opinion of the defendant's guilt or credibility as a witness, independent of the evidence, a reviewing court views the challenged comments in context:

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is **clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.**

State v. McKenzie, 157 Wn.2d 44, 53-54, 134 P.3d 221(2006) (emphasis in original). Reviewing courts will not find prejudicial error “unless it is clear and unmistakable that counsel is expressing a personal opinion.”

State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). For example, “I believe [the witness]. I believe him,” is misconduct. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting State v. Sargent, 40 Wn. App. 340, 343, 698 P.2d 598 (1985)).

Here, the context of the comments makes it clear that the prosecutor was not improperly expressing a personal opinion as to Otero's credibility. The alleged misconduct did not occur during closing argument, but rather when the prosecutor was cross-examining Otero and attempting to convince the trial court to allow cross-examination that would be relevant to Otero's credibility. “Generally, cross examination should be limited to the subject matter of the direct examination **and**

matters affecting the credibility of the witness.” ER 611(b); State v. Lord, 117 Wn.2d 829, 870, 822 P.2d 177 (1991) (emphasis added). The record shows that the direct examination of Otero was limited to the burglary charge, but the prosecutor, in good faith, believed that he should be allowed to examine Otero on the alleged use of the stolen credit card to attack the credibility of his denial of having stolen the card.

After the trial court had both overruled and sustained several objections that the prosecutor’s questions were beyond the scope of direct examination, the prosecutor said to the court: “Your Honor, the State argues that all of these go to Mr. Otero’s credibility.” This is one of the two utterances by the prosecutor that Otero now, for the first time on appeal, argues were misconduct. There was nothing improper about the prosecutor’s argument directed to the trial court, which was clearly intended to make sure that the trial court wasn’t ruling on the objections with the limited perspective of the scope of direct examination when matters of credibility may also be inquired into on cross-examination. The prosecutor used passive and neutral language in seeking an opportunity to inquire into Otero’s credibility; he did not express his personal opinion as to Otero’s credibility.

The second instance that Otero points to occurred shortly thereafter when the prosecutor, after additional sustained objections, said to the trial court: "Is the witness's credibility not at issue?" While this may have shown a tone of frustration, it was, again, viewed in context, not a direct expression of personal opinion as to Otero's credibility. It was directed to the trial court, not the jury, and was intended to persuade the court to allow the State to inquire into credibility. In neither instance did the prosecutor use personal language, such as "I think" or "I believe," that Otero was not credible.

It is not necessary to determine the correctness of the trial court's evidentiary rulings in response to Otero's repeated objections that the prosecutor's questions were beyond the scope of direct examination. However, noting that the court's rulings were not entirely consistent shows that the prosecutor's efforts to persuade the court to allow expanded cross-examination certainly did not amount to "flagrant and ill-intentioned" misconduct. Although the trial court sustained most of Otero's objections to questions about matters other than his conduct at the apartment building, the trial court overruled objections to other questions that were seemingly beyond the narrow scope that the court at other times enforced. The court overruled beyond-the-scope objections to several questions relating to: whether two witnesses not associated with the

apartment building would be able to recognize Otero; whether Otero had been wearing the same clothes at the time of his arrest as were depicted in a still photo from the QFC video; where Otero went when he left the apartment building and how long it took him to get there; and asking Otero to identify the photo that was used in the montage that was shown by law enforcement to the witness from The Finish Line.

It should also be noted, when assessing the prosecutor's conduct, that the burglary at the apartment building and all three counts of identity theft were charged as being part of a common plan or scheme, and that all of the crimes occurred within the same 24-hour period. CP 10-11. Rather than stating his personal opinion on Otero's credibility, in context it is clear that the prosecutor was asking in good faith for an opportunity for expanded cross-examination. Indeed, after the trial court took the morning recess and discussed the matter with the prosecutor outside the presence of the jury, upon reconvening the trial court overruled an objection to the prosecutor's question as to whether Otero denied using the stolen credit card, a question that clearly would have been beyond the scope of direct under the court's prior rulings. It might be that during the recess the court reviewed ER 608(b) and decided, in its discretion, to allow the prosecutor to attack the credibility of Otero's denial of having stolen the card with a question as to whether he had used the card.

The two comments of the prosecutor, alleged by Otero to have been misconduct, cannot be characterized as flagrant and ill-intentioned, even under the authorities relied on by Otero. Otero attempts to overcome the fact that he failed to object at trial by invoking State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). But the prosecutor's conduct here, in making evidentiary arguments in response to confusing rulings by the trial court, were not the type of comments that reviewing courts have held to be so ill-intentioned and inflammatory to require reversal despite a lack of objections. See, e.g., State v. Belgarde, 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988) (prosecutor stated the American Indian group with which defendant was affiliated was "a deadly group of madmen" and "butchers," and told them to remember "Wounded Knee, South Dakota"); Reed, 102 Wn.2d at 143-44 (prosecutor said defendant was a liar four times, stated defense had no case, said the defendant was a "murder two," and implied the defense witnesses should not be believed because they were from out of town and drove fancy cars).

Otero also relies on State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014), which only further demonstrates the gap between the prosecutor's conduct in this case and the type of comments that will be determined to have been an impermissible expression of personal opinion. In Lindsay, the prosecutor in closing argument said, *inter alia*, that the

defense case was “a crock” and the defendant’s testimony was “funny,” “disgusting,” “comical,” and “the most ridiculous thing I’ve ever heard.”

Lindsay, 180 Wn.2d at 438. The supreme court summarized the prosecutor’s misconduct and its holding thusly:

The prosecutor’s argument that Holmes lied on the stand and the statement that Holmes’s testimony was “the most ridiculous thing I’ve ever heard” are even more direct statements of the prosecutor’s personal opinion as to Holmes’s veracity. An isolated use of the term “ridiculous” to describe a witness’s testimony is not improper in every circumstance. But labeling testimony “the most ridiculous thing *I’ve ever heard*” is an obvious expression of personal opinion as to credibility. There is no other reasonable interpretation of the phrase. Given that comment, in context with the “crock” accusation and the “sit here and lie” argument, we hold that the prosecutor in this case impermissibly expressed his personal opinion about the defendant’s credibility to the jury.

Lindsay, 180 Wn.2d 438. The case at bar bears not the faintest resemblance to Lindsay.

In addition, had there been an objection and request for a curative instruction any prejudice would have been neutralized. The trial court could have instructed the jury to disregard the prosecutor’s comments and informed the jurors that they alone were the sole judges of the credibility of the witnesses. This is, in fact, what the jurors were told in the standard written instruction given at the close of the evidence. CP 97.

The prosecutor did not commit misconduct. However, if there was any inappropriate conduct at all, prejudice would have been minimal and the error harmless. The evidence of Otero's guilt on the three counts of identity theft was strong. Although he was not convicted of the burglary of Dare's apartment, video evidence and Otero's own admission placed him on Dare's floor of the apartment building at about the time the credit card was stolen from her purse. Otero's probation officers identified Otero from the police bulletin photos taken from QFC and the apartment building. The jurors saw video evidence of the unauthorized transactions at Walgreens and QFC, and a witness from the Finish Line testified that he was "one hundred percent" certain, based on having seen Otero before, that Otero had used the credit card at the shoe store. If there was any misconduct at all, there was not a substantial likelihood that it affected the verdicts.

2. APPELLATE COSTS SHOULD BE IMPOSED.

Otero asks this Court to rule that, should the State prevail on appeal, he should not be required to repay appellate costs on the grounds that he is currently indigent. This claim should be rejected. It is a defendant's future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no

information from which this Court could reasonably conclude that Otero has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

As in most cases, Otero's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record contains almost no information about Otero's financial status or employment prospects, and the State did not have the right to obtain information about his financial situation.

Otero obtained an ex-parte Order Authorizing Appeal In Forma Pauperis after presenting a declaration regarding his current financial circumstances. CP 141-42. The declaration contained no information about Otero's employment history, potential for future employment, or likely future income, nor did the trial court make any findings regarding Otero's likely future ability to pay financial obligations.

It is a defendant's future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments).

In State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016), this court held that costs should not be awarded because the defendant was 66 years-old and was facing a 24-year sentence, meaning there was “no realistic possibility” that he could pay appellate costs in the future. This Court also recognized, however, that “[t]o decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible exercise of discretion than to decide that they should always be imposed as a matter of policy.” Id. at 391.

The record is devoid in this case of any information that would support a finding that there is “no realistic possibility” Otero will be able in the future to pay appellate costs. In such circumstances, appellate costs should be awarded. State v. Caver, No. 73761-9-1, slip op. at 10-14 (filed Sept. 6, 2016). Otero is only 35 years old, and received a 45-month sentence. CP 138, 136. He thus has the majority of his working years ahead of him. Because the record in this case contains no evidence from which this Court could reasonably conclude that the defendant has no future ability to pay appellate costs, any exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable and arbitrary.

D. CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court affirm Otero's judgment and sentence.

DATED this 25 day of October, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DONALD J. PORTER, WSBA #20164  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Jared B. Steed, containing a copy of the Brief Of Respondent, in STATE V.ROBERTO OTERO, Cause No. 74122-5-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Done in Seattle, Washington

\_\_\_\_\_  
Date : Oct.25, 2016