

No. 74436-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JANET BAUML,

Appellant.

FILED
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Court of Appeals
Division I
State of Washington

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

The Honorable Monica J. Benton

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Marianne Cooper was a competent, lonely elderly woman who saw very little of her family. Ms. Cooper and Janet Bauml were good friends for several years when Ms. Bauml began to borrow money from Ms. Cooper, who Ms. Cooper knew was just barely making ends meet. Ms. Cooper did not condition the loans on any specific purpose and believed Ms. Bauml when she promised to repay. When Ms. Cooper's family discovered the loans they contacted the police. Ms. Bauml was convicted of five counts of first degree theft and four counts of second degree theft.

The State failed to prove Ms. Bauml deceived Ms. Cooper in giving her the money and failed to prove Ms. Bauml did not intend to repay the loans. The court infringed Ms. Bauml's right to present a defense and erred in categorically refusing to impose a First Time Offender Waiver sentence. Ms. Bauml seeks reversal of her convictions.

B. ASSIGNMENTS OF ERROR

1. Ms. Bauml's constitutionally protected right to due process was violated where there was insufficient evidence to support the jury's verdict that she committed theft in counts 2 through 10.

2. The trial court erred in failing to instruct the jury using

Defendant's Proposed Jury Instruction 2, which stated:

Acquiring property by "aid of deception" requires that the victim relied on the deception. If the victim would have parted ways with the property even if the true facts were known, there is no theft.

3. In refusing to instruct the jury using Defendant's Proposed Jury Instruction 2, the trial court violated Ms. Bauml's constitutionally protected right to present a defense.

4. The trial court erred in refusing to sentence Ms. Bauml to a First Time Offender Waiver sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove beyond a reasonable doubt all of the essential elements of the charged offenses. The State bore the burden of proving Ms. Bauml deceived Ms. Cooper about the reasons she needed the money and that Ms. Bauml had no intention of repaying the money to Ms. Cooper. Instead, the testimony established Ms. Cooper did not condition the loans on any purpose and testified she would have given the money to Ms. Bauml if she asked. The testimony also established Ms. Bauml repeatedly promised to repay the loans and Ms. Cooper believed her. Is Ms. Bauml entitled to reversal of her convictions with instructions to dismiss for a lack of evidence?

2. The trial court is required to give a requested jury instruction where the instruction is a correct statement of the law and reflects the party's theory of the case. The failure to give a defense jury instruction which tracks the defense theory of the case deprives the defendant of the right to present a defense. Ms. Bauml requested a jury instruction defining the term "deception" for the purposes of the theft statutes that was a correct statement of the law and tracked her theory of the defense. Is Ms. Bauml entitled to reversal of her convictions and remand for a new trial for the denial of her right to present a defense?

3. The sentencing court has broad discretion in deciding to impose a First Time Offender Waiver. Nevertheless, the court abuses that discretion when it categorically refuses to consider a First Time Offender Waiver where the defendant is otherwise statutorily eligible. Did the court here abuse its discretion where Ms. Bauml was statutorily eligible for a First Time Offender Waiver but the court simply refused to consider a First Time Offender Waiver based solely on the amount of the theft for which Ms. Bauml was found guilty?

D. STATEMENT OF THE CASE

Eighty-six year-old Mariana Cooper lived alone in a duplex she purchased in 1993; her husband having died in 1992. 10/22/2015RP 475; 10/26/2015RP 14-15. No one who was close to Ms. Cooper had concerns about her mental abilities. Her granddaughter never had any concerns, describing her as “functioning fine.” 10/22/2015RP 517. An estate-planning attorney who drafted her will in 2009 did not see any problems with Ms. Cooper’s memory or cognitive ability.

10/27/2015RP 359. Ms. Cooper’s financial planner who saw her once a year also had no questions about her cognitive ability and saw no signs of dementia. 10/28/2015RP 454. Ms. Cooper’s regular physician who she had been seeing for approximately 20 years never expressed any concern about her cognitive function. 10/26/2015RP 122. Ms. Cooper is currently living in the independent wing of a retirement community and not receiving any dementia care. 10/26/2015RP 122.¹

Ms. Cooper had two children, a son, and a daughter who had drug problems and died in 2007. 10/26/2015RP 13-16. Ms. Cooper and

¹ In 2012, Ms. Cooper was assessed as having some indication of dementia following an emergent assessment. 10/25/2015RP 186; 10/27/2015RP 219-20. The assessor admitted there was no way of knowing what Ms. Cooper’s cognitive abilities were in 2009-10. 10/27/2015RP 278. The assessment was preliminary only and was the result of a one and one-half hour visit by the assessor with Ms. Cooper at the direction of the police. 10/27/2015RP 291-92.

her daughter grew distant over the daughter's drug use and never reconciled. 10/26/2015RP 9. Even when her daughter was alive, the relationship between the two was described as "not close."

10/22/2016RP 512. Ms. Cooper also had very little contact with her son as he lived in Yakima, but she occasionally spoke with him on the phone. 10/26/2015RP 17, 92. Ms. Cooper and her son's relationship was described as not estranged but not "particularly extremely close either." 10/22/2016RP 485. Ms. Cooper did not see the rest of her family very much, only around the holidays. 10/26/2015RP 16-17. Ms. Cooper's social life revolved around her church. 10/26/2015RP 16.

In 2004, Ms. Cooper became close friends with Janet Bauml, who she met at a neighbor's house. 10/26/2015RP 19-20. Ms. Cooper described Ms. Bauml, who was self-employed, as a single mother trying to take care of her children and earn money to pay rent.

10/26/2016RP 23. Ms. Bauml's children referred to Ms. Cooper as "grandma." 10/26/2015RP 28. Ms. Cooper and Ms. Bauml's relationship was a close one, becoming in essence a mother-daughter relationship. 10/26/2015RP 93.

Ms. Cooper and Ms. Bauml saw each other daily and Ms. Cooper asked Mr. Bauml to help her with things, which included help

her with her checkbook and paying her bills. 10/26/2015RP 23-25.

When Ms. Cooper would pay her bills, she would tell Ms. Bauml how much to pay and Ms. Bauml would fill out the check. 10/26/2015RP 25.

Ms. Cooper and Ms. Bauml were such close friends that Ms. Cooper asked Ms. Bauml to become the executor of her estate instead of one of her absent family members. 10/26/2015RP 34. Ms. Cooper had a new will drafted naming Ms. Bauml as executor but not an heir who stood to benefit from the will. 10/26/2015RP 35-36. Ms. Cooper trusted Ms. Bauml enough that she had a power of attorney given to Ms. Bauml for her healthcare and her finances in the case of her incapacity. 10/26/2015RP 36. Ms. Cooper also had Ms. Bauml placed on her Bank of America bank account in the case of incapacity as well. 10/26/2015RP 36-37. Ms. Cooper's family was aware of these facts and did not object. 10/26/2015RP 96.

Sometime in 2008, about four years after they first met, Ms. Bauml asked Ms. Cooper to lend her money in order to pay her rent and utilities. 10/22/2015RP 37-38. Ms. Cooper gave Ms. Bauml the money as a gift and did not expect repayment. 10/22/2015RP 38;10/26/2015RP 102,118. A few months later, Ms. Bauml asked for

another loan for the same reason and Ms. Cooper wrote her a check for the requested amount. 10/26/2015RP 39. Subsequently, Ms. Bauml asked for money to pay for her son's drug problem and her own health issues. 10/26/2015RP 44-45. Every few months after that Ms. Bauml asked Ms. Cooper to loan her money. 10/26/2015RP 39-40. When she was asking for the money, Ms. Bauml was very serious and desperate. 10/26/2015RP 40. Ms. Cooper never turned down Ms. Bauml's request for money. 10/26/2015RP 41. Ms. Bauml always promised to pay the money back. 10/26/2015RP 41-42. Ms. Cooper never put the terms of the loans to Ms. Bauml in writing. 10/26/2015RP 76.

Ms. Cooper knew Ms. Bauml was raising two children and had trouble making ends meet. 10/26/2015RP 102. Ms. Cooper freely gave money to Ms. Bauml for her rent and utilities and was never forced to give Ms. Bauml money. 10/26/2015RP 39-40, 102. Ms. Cooper never asked or conditioned the loans to Ms. Bauml on a detailed accounting of how Ms. Bauml was using money. 10/26/2015RP 103. Ms. Bauml never used Ms. Cooper's credit cards or wrote checks for herself without Ms. Cooper's authorization. 10/26/2015RP 110.

Ms. Cooper learned about a reverse mortgage on her residence in an advertisement in her mail. 10/26/2015RP 115. It was Ms.

Cooper's idea to obtain the reverse mortgage on her home. *Id.* Ms. Cooper never discussed the reverse mortgage with her financial planner prior to obtaining the reverse mortgage. 10/26/2015RP 115. Ms. Bauml encouraged Ms. Cooper to obtain the reverse mortgage, but Ms. Cooper was aware Ms. Bauml was not a financial planner. Ms. Cooper and Ms. Bauml never discussed a repayment plan and Ms. Cooper never expressly asked for repayment until she needed a new roof in 2011. 10/26/2015RP 118, 124. Ms. Cooper last saw Ms. Bauml on Christmas Eve 2011, but did not press the repayment issue with Ms. Bauml. 10/26/2015RP 120-21.

Ms. Cooper told her granddaughter about the loans to Ms. Bauml in February 2012. 10/26/2015RP 87, 121. Ms. Cooper's granddaughter called the police one week after this disclosure. 10/22/2015RP 528; 10/26/2015RP 121.

Following a police investigation, Ms. Bauml was charged with six counts of first degree theft and four counts of second degree theft, each count containing a major economic offense aggravating factor and vulnerable victim aggravating factor. CP 48-53. At the end of the trial, the jury was unable to reach a verdict on the first count, but found Ms. Bauml guilty of the remaining counts and the major economic offense

aggravator. CP 175-94; 11/5/2015RP 917-20.² The State chose not to proceed on a separate trial on the vulnerable victim aggravator.

11/5/2015RP 925.

At sentencing, Ms. Bauml moved the court to impose a First Time Offender Waiver, noting she was eligible and that both she and the public would benefit from this sentence:

This is -- a first-time offender waiver was designed by the legislature for people like Ms. Bauml, for people who are a low risk for reoffending, for people who are in need of treatment, for people who would benefit from that structure, people who would benefit from that treatment. And there is also a concrete benefit to Ms. Cooper herself in that this would be an avenue that would allow Ms. Bauml to comply with the restitution order, and try and make right all the money that she borrowed from Ms. Cooper.

RP 939. The trial court refused to impose a First Time Offender Waiver, instead imposing the high end of the standard range sentence:

The Court's going to impose the maximum term on the range. I am not going to impose the first-offender waiver. I'm not persuaded that the kind of conduct that Ms. Bauml experienced -- or, excuse me, the kind of experience that Ms. Cooper had justifies that. This is a scenario where there was a continuous effort to take money. You perceived it as a true need. But, you didn't explore these other options; you just kept coming back to her. That was pathological. And it was wrong—morally

² Ms. Bauml was also charged with two additional theft counts involving a different person. CP 53. The jury was unable to reach verdicts on these counts and they subsequently dismissed. CP 216.

wrong. I don't think you see that. I don't think your children see it. You have this twisted, Ms. Bauml. This isn't about what Mariana did for you. This is about what you did to Ms. Cooper. And somehow you have this in your head that it was all, you know, out of friendship. It was deceit, deceit. And it's because of that that I'm imposing the maximum term on each of these counts.

RP 948-49.

E. ARGUMENT

1. There was insufficient evidence presented to prove Ms. Bauml deceived Ms. Cooper or to prove that she would not repay Ms. Cooper.

- a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of

evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. *There was a lack of evidence Ms. Bauml deceived Ms. Cooper and a lack of evidence that Ms. Bauml did not intend to repay.*

The State's theory was that Ms. Bauml deceived Ms. Cooper about her intended use of the money, thus making Ms. Bauml guilty of theft. The State also theorized that Ms. Bauml had no intention of repaying Ms. Cooper, intending instead to permanently deprive Ms. Cooper of the money. The State failed to produce sufficient evidence to support either of its theories.

To find Ms. Bauml guilty of theft in the first degree by means of deception, the jury had to be satisfied beyond a reasonable doubt that she (1) obtained unauthorized control over property exceeding \$1,500, (2) by color or aid of deception, (3) with intent to deprive Ms. Cooper of the property. RCW 9A.56.020(1)(b); RCW 9A.56.030(1)(a). Similarly, to find Ms. Bauml guilty of second degree theft by color or aid of deception, the same elements must have been proven with the monetary limit between \$750 and \$1,500. RCW 9A.56.040(1)(a). "By color or aid of deception' means that the deception operated to bring

about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services.”

RCW 9A.56.010(4).

“Deception” includes a broad range of conduct, including “not only representations about past or existing facts, but also representations about future facts, inducement achieved by means other than conduct or words, and inducement achieved by creating a false impression even though particular statements or acts might not be false.” *State v. Casey*, 81 Wn.App. 524, 528, 915 P.2d 587 (1996) (footnote omitted). The State must also prove that the victim relied on the defendant’s deception, which “is established where the deception in some measure operated as inducement.” *Id* at 529. Acquiring property by “aid of deception” requires that the victim relied on the deception. *Id*. If the victim would have parted with the property even if the true facts were known, there is no theft. *State v. Renhard*, 71 Wn.2d 670, 672-74, 430 P.2d 557 (1967).

- c. *Sorely lacking was any evidence Ms. Bauml deceived Ms. Cooper or that she never intended to repay Ms. Cooper.*

The evidence established Ms. Bauml told Ms. Cooper she would repay her and that Ms. Cooper believed that Ms. Bauml would repay. When Ms. Bauml borrowed money from Ms. Cooper she always appeared to want to repay the money. There was no evidence of Ms. Bauml's intent to the contrary, that she did not intend to repay.

In addition, Ms. Cooper did not rely on the reasons Ms. Bauml gave for needing the money. Ms. Cooper stated that she would have given the money if Ms. Bauml had asked and that the reason for needing the money did not matter to her. The State was required to prove that Ms. Cooper relied on the deception, yet Ms. Cooper stated she did not rely on any of the reasons given by Ms. Bauml. And while deception need not be the sole reason the money was given, it has to be a reason. In this case it was not a reason. The evidence established that Ms. Cooper would have given Ms. Bauml the money no matter what.

The State failed to prove the essential elements of deception or permanent deprivation. Ms. Bauml's convictions must be reversed.

- d. *Ms. Bauml's convictions must be reversed with instructions to dismiss.*

Since there was insufficient evidence to support the convictions, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. The trial court impermissibly infringed Ms. Bauml’s right to present a defense when it refused to give her requested jury instruction.

Ms. Bauml proffered a jury instructional defining the term “aid of deception” as it was defined in this Court’s decision in *State v. Mehrabian*, 175 Wn.App. 678, 308 P.3d 660, *review denied*, 178 Wn.2d 1022 (2013). CP 123; 11/3/2015RP 835. The trial court refused to give the instruction:

I went back to read the case that was cited. I—I’m not persuaded that the case holds this. I understand that one might argue from the case. But I’m not—I’m not satisfied that it’s actually what the case could be cited for in terms of a holding. And so, as a consequence I’m not

going to include it in the Defense—in the Court’s instructions.

11/4/2015RP 842. Ms. Bauml excepted to the court’s refusal to give the requested instruction. 11/4/2015RP 845.

- a. *A defendant is entitled to have the jury instructed on his theory of the case.*

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant’s right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant’s right to trial by an impartial jury, which includes “as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of ‘guilty.’”). Similarly, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

A defendant has the right to have the jury accurately instructed. *Winship*, 397 U.S. at 364. Thus, as part of the constitutionally protected right to present a defense, the defendant is entitled to instructions embodying his theory of the case if the evidence supports that theory.

State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). “Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case.” *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). When considering whether a proposed jury instruction is supported by sufficient evidence, the trial court must take the evidence and all reasonable inferences in the light most favorable to the requesting party. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

This Court reviews a trial court’s refusal to give a requested jury instruction *de novo* where the refusal is based on a ruling of law. *State v. White*, 137 Wn.App. 227, 230, 152 P.3d 364 (2007), *citing State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Where the court’s refusal to give a requested instruction was based on factual reasons, it is reviewed for an abuse of discretion. *White*, 137 Wn.App. at 230, *citing Walker*, 136 Wn.2d at 771-72. A proposed instruction is appropriate if it properly states the law, is not misleading, and allows a party to argue a theory of the case that is supported by the evidence. *Redmond*, 150 Wn.2d at 493.

Ms. Bauml's right to present a defense was infringed when the trial court refused to give the requested instruction.

b. *The requested instruction was a correct statement of the law and tracked M. Bauml's theory of defense.*

Ms. Bauml's theory of defense was that she did not deceive Ms. Cooper, Ms. Cooper gave the money willingly to help Ms. Bauml, and Ms. Cooper would have given Ms. Bauml the money even if she knew what Ms. Bauml ultimately did with it. The requested instruction tracked that defense. Further, Defendant's Instruction 2 was a correct statement of the law. The instruction was taken verbatim from the decision in *Mehrabian*. See *Mehrabian*, 175 Wn.App. at 701, citing *State v. Renhard*, 71 Wn.2d 670, 672-74, 430 P.2d 557 (1967); *Casey*, 81 Wn.App. at 529. Thus the Court was required to instruct the jury using Ms. Bauml's requested instruction.

The court's instructions did not define "aid of deception" consistent with Ms. Bauml's defense. Court's Instruction 10 purports to define "aid of deception" but the definition is cursory and was not helpful to Ms. Bauml's theory of defense nor did it allow Ms. Bauml to argue her theory before the jury. CP 144.³ The court's instruction does

³ Court's Instruction 10 states:

not state that the victim must rely on the deception and that if the victim had known the true facts, would have parted with the property anyway. CP 123. This was a correct statement of the law and the entire basis of Ms. Bauml's theory of defense.

The trial court's conclusion that the rule cited in *Mehrabian* was not the holding of the court is of no moment. The *Mehrabian* Court cited the rule from the Supreme Court in *Renhard* and the Court of Appeals in *Casey*. This rule has not been overruled and these decisions have not been reversed or superseded.

As a consequence, Ms. Bauml's right to present a defense was violated when the trial court refused to instruct the jury using her proposed jury instruction. Ms. Bauml is entitled to reversal of her convictions and remand for a new trial.

By color or aid of deception operated to bring about the obtaining of the property or services. It is not necessary that deception be the sole means of obtaining the property and services.

CP 144.

3. **The trial court's failure to exercise discretion, refusing to consider a First Time Offender Waiver, was error and Ms. Bauml's sentence should be reversed.**

- a. *Ms. Bauml was statutorily eligible for a First Time Offender Waiver.*

In imposing a sentence, the trial court may impose a First Time Offender Waiver, which allows the court to

may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

RCW 9.94A.650(2).

Generally, a defendant cannot appeal a standard range sentence.

RCW 9.94A.585(1). A defendant may challenge the procedure by

which a sentence within the standard range was imposed. *State v.*

Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); *State v. Ammons*,

105 Wn.2d 175, 183, 713 P.2d 719, *cert denied*, 479 U.S. 930 (1986).

Thus, the limitation on the right to appeal does not preclude appellate

review of whether the sentencing court had legal authority to impose a

first-time offender waiver under RCW 9.94A.650. *State v. Stately*, 152

Wn.App. 604, 607, 216 P.3d 1102 (2009), *review denied*, 168 Wn.2d

1015 (2010). For example, where a trial court refused to exercise

discretion at sentencing because it erroneously believed it lacked authority, RCW 9.94A.585(1) does not bar a defendant's appeal of a standard range sentence. *State v. McGill*, 112 Wn.App. 95, 99-100, 47 P.3d 173 (2002). And a trial court's failure to consider an available alternative sentence is reversible error. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005), citing *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997) (failure to consider exceptional sentence downward)).

Under the RCW 9.94A.650(2) first-time offender option, the trial court has broad discretion to waive a standard range sentence, including refusing to grant the option. *State v. Johnson*, 97 Wn.App. 679, 682, 988 P.2d 460 (1999). “[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.” *Grayson*, 154 Wn.2d at 342.

b. *The court's ruling amounted to a blanket denial of a First Time Offender Waiver for a class of defendants.*

The trial court ruled it was not imposing a First Time Offender Waiver essentially concluding that it would not impose a First Time Offender Waiver to any person convicted of a theft involving a large

sum of money. This constituted a categorical refusal to consider a First Time Offender Waiver for a whole class of people regardless of the circumstances of the person or the crime.

The trial court's actions were no different than the court in *Grayson*, which flatly refused to consider a Drug Offender Sentence Alternative (DOSA) because in its view, the DOSA program was underfunded. 154 Wn.2d at 342-43. The *Grayson* court found the trial court's actions amounted to a categorical refusal to consider a statutorily authorized sentence alternative, which was reversible error. *Id.* The same rationale should apply here. This Court must reverse Ms. Bauml's sentence and remand for imposition of a First Time Offender Waiver sentence.

4. This Court should order that no costs on appeal be imposed.

Should this Court reject Ms. Bauml's arguments on appeal, she asks that this Court to issue a ruling refusing to allow the State to obtain any reimbursement for costs on appeal due to her continued indigency. Such as request is authorized under this Court's recent decision in *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may “direct otherwise.” RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to “compelling circumstances.” *Sinclair*, 192 Wn.App. at 388, *quoting Nolan*, 141 Wn.2d at 628.

In addition, a defendant found to be indigent is presumed to remain indigent “throughout the review” unless there is a finding that the defendant is no longer indigent. RAP 15.2(f). Here there has been no showing that Ms. Bauml’s circumstances have so changed that she is no longer indigent.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This Court must then engage in an “individualized inquiry.” *Id.* at 391, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

The superior court found Ms. Bauml indigent and she was represented by appointed counsel at trial. Ms. Bauml is currently serving the 45-month sentence the court imposed. She agreed to pay \$233, 744.09 in restitution. CP 56. In her declaration appended to her Motion to Proceed *In Forma Pauperis* On Appeal, Ms. Bauml states she is unemployed, she has no assets, expenses, or liabilities, and can contribute nothing towards the expense of her appeal. CP Supp ____, Sub No. 170A.

Because of her current and presumed continuing indigency, Ms. Bauml asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, 192 Wn.App. at 393.

F. CONCLUSION

For the reasons stated, Ms. Bauml asks this Court to reverse her convictions and remand for a new trial or reverse her sentence and remand for resentencing.

DATED this 19th day of October 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74436-4-I
v.)	
)	
JANET BAUML,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF OCTOBER, 2016.



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