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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 93811-3
(COA No. 73590-0-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN CURRAN,

Petitioner.

FILED *CR*
October 31, 2016
Court of Appeals
Division I
State of Washington

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Sean Curran, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Sean Curran seeks review of the Court of Appeals decision dated October 3, 2016, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Was the right to present a defense denied by the trial court's decision to preclude evidence presented by the defense which demonstrated the witnesses had a motive to lie?

2. Should legal financial obligations be imposed for the costs of appeal where there has been no challenge to the order of indigency or demonstrable evidence Mr. Curran is no longer indigent?

D. STATEMENT OF THE CASE

Sean Curran and Shelby Ostergard had known each for a year or two before March 26, 2014. Their relationship involved drug use. 5/4/15 RP 121. They both abused methamphetamines. 5/4/15 RP 102. Mr. Ostergard also used heroin to get high. 5/4/15 RP 99. Ms.

Ostergard admitted she committed bank fraud to get drugs. 5/4/15 RP 5.

On the night of March 26, Mr. Curran, Ms. Ostergard, and others were at Mr. Curran's house "partying" and using drugs. 5/4/15 RP 102. At some point while they were partying, Ms. Ostergard left Mr. Curran's house. 5/4/15 RP 107. She returned after she got a call from Viktoriya Tarasenko, who was still at Mr. Curran's house. 5/4/15 RP 108. When Ms. Ostergard returned, she brought her friend "Mitch," a person whose identity was not otherwise disclosed at trial. 5/4/15 RP 110.

Mr. Curran was not happy to see Ms. Ostergard and "Mitch." 5/4/15 RP 110. Mr. Curran yelled at Ms. Ostergard and hit the side of her car with a baseball bat, knocking off the side view mirror. 5/4/15 RP 115. At trial, Mr. Curran attempted to tell the jury he was upset because he believed Ms. Ostergard and Ms. Tarasenko intended to prostitute themselves to get more drugs. 5/4/15 RP 5.

Ms. Tarasenko left with Ms. Ostergard. While Ms. Ostergard claimed Mr. Curran displayed a firearm and threatened to kill her as he followed the two women in his truck, Ms. Tarasenko had no memory of Mr. Curran following them or threatening anyone with a firearm.

5/4/15 RP 155. Ms. Tarasenko testified she did not see Mr. Curran show, display or brandish a weapon. 5/4/15 RP 159.

Mr. Curran never denied hitting the car. He tried to explain his actions, but was prevented by the State's sustained objections. Although the jury heard Mr. Curran did not want the women to "hang out with some older gentleman," they were never told why this provided Mr. Curran with justification for his actions. 5/5/15 RP 191. When he attempted to explain why he was justified, the court upheld the State's objection. 5/5/15 RP 192.

Mr. Curran also tried to explain why Ms. Ostergard had a motive to lie. When Mr. Curran attempted to explain why she had a motive to lie, the State's objection was sustained. 5/5/15 RP 192. Mr. Curran continued to explain Ms. Ostergard's motives during his testimony. Each time, the court sustained the State's objection and struck the testimony. *See* 5/5/15 RP 192, 5/5/15 RP 193, 5/5/15 RP 200, 5/5/15 RP 206, and 5/5/15 RP 207.

Mr. Curran was found guilty of malicious mischief and harassment. 5/5/15 RP 233-34. The jury was unable to reach a verdict with respect to the assault charge. 5/5/15 RP 233.

The court only imposed mandatory fees against Mr. Curran, persuaded of his inability to pay additional fees. When Mr. Curran appealed his convictions and sentence, he was found to be indigent by the trial court. No evidence has been presented his circumstances have changed.

The Court of Appeals denied relief to Mr. Curran. *See App. at 1.* The court found the trial court did not abuse its discretion in excluding the evidence. *Id.* In addition, the Court of Appeals denied Mr. Curran's request that he not be assessed an additional legal financial obligations as a result of his appeal. *Id.*

E. ARGUMENT

1. MR. CURRAN WAS DENIED HIS RIGHT TO PRESENT A DEFENSE WHEN THE COURT PRECLUDED HIM FROM PRESENTING EVIDENCE THE STATE'S WITNESSES HAD A MOTIVE TO LIE.

a. The right to present a defense is a significant question of law under the state and federal constitutions meriting review under RAP 13.4(b).

Review should be granted because Mr. Curran's inability to present a defense involves a significant question of law under the state and federal constitutions. RAP 13.4(b).

Court rules may not prevent a defendant from presenting highly probative evidence vital to the defense and "no state interest can be

compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.” *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 298, 359 P.3d 919 (2015) (quoting *State v. Jones*, 168 Wn.2d 713, 723–24, 230 P.3d 576 (2010) (quoting *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983))).

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Jones*, 168 Wn.2d at 720 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). A defendant’s right to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id.* “The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). Sixth Amendment violations, including the right to present a defense, are reviewed de novo. *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).

The trial court must consider the “the integrity of the truth finding process and [a] defendant’s right to a fair trial” before

precluding defense evidence. *Hudlow*, 99 Wn.2d at 14. If evidence is relevant, “the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Darden*, 145 Wn.2d at 622. Evidence rules that “‘infring[e] upon a weighty interest of the accused’ and are ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve’ ” abridge this essential right. *Cayetano-Jaimes*, 190 Wn.App. at 298 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998))).

Reversal for a violation of the constitution is required unless the court finds it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Error is only harmless if the court is convinced beyond a reasonable doubt that “any reasonable jury would have reached the same result without the error.” *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)).

b. Mr. Curran was denied his right to present a defense when he was prevented from explaining why the State's witnesses were not telling the truth.

In its closing argument, the State focused on Mr. Curran's motive, arguing he was angry because Ms. Tarasenko did not want to leave Mr. Curran's house. 5/5/15 RP 219-20. Despite the fact Mr. Curran had been unable to explain why the witnesses had a motive to fabricate, the State concluded its closing argument by asking the jurors to think about the "reasonableness of the testimony that you heard in context of the entire situation and all of the other testimony." 5/5/15 RP 221. In its rebuttal, the State again focused on the motivation of the witnesses to tell the truth, comparing the credibility of the State's witnesses with Mr. Curran. 5/5/15 RP 227-28. The State's final remarks to the jurors again returned to the "reasonableness of everything taken together," clearly focusing on credibility. 5/5/15 229.

This was a case about credibility. Each of the witnesses were admitted drug users and the complaining witness, Ms. Ostergard, was also an admitted thief. 5/4/14 RP 5. There was no dispute Ms. Ostergard spent the night before Mr. Curran was arrested at Mr. Curran's house abusing drugs. 5/4/14 RP 5. When Ms. Ostergard ran

out of drugs, she admitted she decided to commit bank fraud to obtain money to buy more drugs. 5/4/14 RP 5.

Mr. Curran also claimed Mr. Ostergard decided to prostitute herself and Ms. Tarasenko in order to make more money but was precluded from presenting this evidence to the jury. 5/4/15 RP 4. Throughout the trial, Mr. Curran attempted to explain this was why he was justified in trying to stop them from leaving. 5/5/15 RP 206. When the trial court sustained the State's objection to Mr. Curran's attempt to present a defense, the trial court found the question called for speculation regarding "someone else's mental state." 5/5/15 RP 192.

Mr. Curran did not want to testify regarding someone else's mental state, but rather to provide a motive for why the witnesses were being untruthful. When Mr. Curran attempted to explain Ms. Tarasenko's motivation for telling her story, Mr. Curran said "I know. I just can't say. I don't know what to say." 5/5/15 RP 192. The State again objected and the Court stopped Mr. Curran from explaining his understanding of why the women were upset with him and had a motive to lie. 5/5/15 RP 193.

Mr. Curran later attempted to explain the motive of the witnesses to lie, but was prevented when the trial court sustained the

State's objection. 5/5/15 RP 206. Mr. Curran expressed his frustration in not being able to present his defense. 5/5/15 RP 207. He stated:

I can't explain why I had took these actions that I took.
It's like why did you get mad, but don't tell me why you
got mad; just why were you mad.

5/5/15 RP 207.

c. The trial court's denial of Mr. Curran's due process merits review under RAP 13.4(b).

Mr. Curran was denied due process when the court denied him the ability to present his defense. The court failed to apply the required analysis in precluding evidence. This failure justifies review. RAP 13.4(b).

Before a court may preclude defense evidence, it must find it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. The Court of Appeals found Mr. Darden's defense could be excluded because it had little or no probative value other than to "smear" Ms. Ostergard's character. App. at 7 (relying upon *State v. Gallegos*, 65 Wn. App. 230, 237, 828 P.2d 37 (1992)).

Evidence rules that conflict with the right to present a defense "may not be applied mechanistically to defeat the ends of justice" but must meet "traditional and fundamental standards of due process."

Chambers, 410 U.S. at 302. Review should be granted because the court abused its discretion when it excluded essential facts of high probative value whose exclusion effectively barred Mr. Curran from presenting his defense. *Cayetano-Jaimes*, 190 Wn. App. at 304, (quoting *Jones*, 168 Wn.2d at 721).

2. ADDITIONAL LEGAL FINANCIAL OBLIGATIONS SHOULD NOT BE IMPOSED UPON MR. CURRAN WHO LACKS AN ABILITY TO PAY ANY ADDITIONAL FEES.

In reversing the Court of Appeals decision on whether Ms. Wakefield was entitled to remittance of her legal financial obligations, this Court again recognized “the particularly punitive consequences of LFOs” for indigent individuals: “[O]n average, a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.” *City of Richland v. Wakefield*, ___ P.3d ___, 92594-1, 2016 WL 5344247, at *5 (Wash. Sept. 22, 2016) (quoting *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2015)). The imposition of costs against indigent defendants raises problems that are well documented and include “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wn.2d at 839.

Appellate court costs are among the highest legal financial obligations a court can impose. The costs which have been imposed against Mr. Curran are in \$4,023.46. These are consistent with court costs imposed in other cases. In *State v. Sinclair*, for example, the assessed costs of the appeal were nearly \$7,000. 192 Wn. App. 380, 388, 367 P.3d 612 (2016), *review denied*, 185 Wn.2d 1034, 377 P.3d 733 (2016). Unlike most legal financial obligations, there is no limit to how high this legal financial obligation can be. RAP 14.3. The costs imposed here and in *Sinclair* are not an anomaly and are instead consistent with costs imposed in many other cases where an indigent appellate does not prevail. *See, e.g., State v. Nolan*, 141 Wn.2d 620, 622, 8 P.3d 300 (2000) (\$3,400).

These additional legal financial obligations imposed upon appeal are “a millstone around the neck of an indigent offender” who is unable to pay this additional burden. *Sinclair*, 192 Wn. App. at 391. For Mr. Curran, if he were to pay these fees at \$25 a month, he would owe more money to the State ten years from now than what is currently assessed. *See*, Katherine A. Beckett, Alexis Harris and Heather Evans, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, *Washington State Minority and Justice Commission*,

22 (2008). The difficulty reintegrating back into society is compounded by a debt he is unlikely ever to pay back. *Id.* at 3. This limits the ability to find employment, maintain credit and find stable housing. *Id.*

Researchers have even surmised that the imposition of unpayable legal financial obligations increases the likelihood a person will reoffend. *Id.*

This Court in *Wakefield* cautioned trial courts to be vigilant before even imposing low payments. *Wakefield*, 2016 WL 5344247, at *5. The same analysis should be applied when appellate courts are asked to impose legal financial obligations. Unless there is a good cause belief an individual appellants circumstances have changed, the trial court's finding of indigency should be respected. *Sinclair*, 92 Wn. App. at 393.

The trial court found Mr. Curran to be indigent and did not impose legal financial obligations, other than those which the legislature has ordered to be mandatory. Mr. Curran was unemployed when the appeal was filed. His counsel on appeal is appointed. There is no evidence his circumstances have changed or that he is in a better position to pay the costs of his appeal than when counsel was appointed.

While the Court of Appeals found Mr. Curran had presented no evidence he was still unable to pay legal financial obligations, the appointment of counsel demonstrates otherwise. And while RAP 15.2 presumes continued indigency, the order of indigency may be modified where the trial court finds Mr. Curran's condition has improved to the extent that he is no longer indigent. RAP 15.2(f). No such order has ever been entered.

The question of when the costs of appeal should be imposed presents involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b). Mr. Curran is unlikely to be able to pay additional legal financial obligations, other than those already imposed. The imposition of appellate court costs can greatly increase the legal financial obligation an indigent offender owes to the state, making it even more unlikely they will be able to pay these fees in a meaningful time. *Sinclair*, 192 Wn. App. at 391. This Court should grant review to address whether the Court of Appeals order of costs is consistent with this Court's previous rulings on when legal financial obligations should be imposed. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, petitioner Sean Curran respectfully requests this that review be granted pursuant to RAP 13.4 (b).

DATED this 31st day of October 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN MICHAEL CURRAN,

Appellant.

No. 73590-0-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: October 3, 2016

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COURT OF APPEALS
STATE OF WASHINGTON

LEACH, J. — Sean Curran appeals his convictions for malicious mischief and felony harassment. He contends that the trial court violated his Sixth Amendment right to present a defense when it prevented him from testifying about key witnesses' plans to prostitute themselves. This excluded evidence is not relevant to any claimed motive to fabricate and would have unfairly prejudiced the jury against the witnesses. The trial court did not abuse its discretion in excluding the evidence. We affirm. Because the record includes no evidence showing Curran's current inability to pay, we deny his request that the State not receive an award of statutory costs.

BACKGROUND

Events Leading to Arrest

The evening of March 26, 2014, defendant Sean Curran, Shelby Ostergard, and Viktoriya Tarasenko smoked methamphetamine together at Curran's home.

Ostergard left at some point that night and went home. Tarasenko stayed at Curran's house that night.

According to Ostergard, the next morning Tarasenko called Ostergard to ask her to return to the house. When Ostergard arrived, Tarasenko and Curran came out of the house. Ostergard testified that as Curran approached the car, he screamed that Ostergard was trespassing, he was going to call the cops, and he was going to kill her. Curran was carrying a bat. When he got to the car, he swung the bat, hitting the driver's side mirror, breaking it off, and shattering the glass. Ostergard testified that Curran then reached into the car through the driver's side window and slapped her face. She claimed that he said, "I'm going to kill you if you call the cops." Ostergard drove off with Tarasenko in the car. She claims that Curran followed beside her in his truck, holding up a gun and threatening to kill her.

According to Curran, he awoke on the morning of March 27 to Ostergard pulling the screen windows off his house. He admitted to breaking her car mirror but denied that he slapped or threatened to kill her. Curran also denied that he chased her in his truck.

Tarasenko testified that Curran hit the car mirror with a baseball bat, threatened to kill Ostergard, and slapped Ostergard. She had no memory of Curran following them in his truck.

In the early hours of the next morning, around 1:00 a.m., Curran drove to Ostergard's house. He testified he went there to apologize for breaking the car

mirror. When Curran was outside her house, Ostergard called the police. The police arrived minutes later, finding Curran still outside Ostergard's house. Curran told the police he was there to apologize for damaging Ostergard's car. The police arrested Curran.

Events at Trial

The State charged Curran with felony harassment, assault in the fourth degree, and malicious mischief in the third degree. Before trial, the State asked the court to exclude certain evidence of some witnesses' character and prior bad acts. Specifically, the State moved to exclude Curran's claims that Ostergard had plans to engage in bank fraud and arrange for Tarasenko and herself to prostitute themselves to older men. Curran's attorney told the court that they did not intend to go into these issues. The court granted the State's exclusion request. During Curran's testimony, the trial court sustained objections to questions about Ostergard and Tarasenko's plans to do "things that they shouldn't be doing."

The jury found Curran guilty of malicious mischief and harassment. The jury could not reach a verdict on the assault charge. The trial court later dismissed that charge with prejudice. Curran appeals.

ANALYSIS

Excluded Evidence

Curran contends that the trial court denied him his Sixth Amendment right to present a defense. This court reviews a trial court's decision to exclude

evidence for abuse of discretion.¹ “State courts have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.”² While the Sixth Amendment grants a criminal defendant the right to present his defense,³ this right extends only to “relevant evidence that is not otherwise inadmissible.”⁴ “[A] criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.”⁵

“The threshold to admit relevant evidence is very low.”⁶ Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁷ Relevant evidence may still be deemed inadmissible if the State can show the evidence is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.”⁸ If the State establishes that the evidence would have a prejudicial effect, the prejudice from admission must be balanced against the defendant’s need for the information sought.⁹

¹ State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

² State v. Donald, 178 Wn. App. 250, 263, 316 P.3d 1081 (2013) (citing United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)), review denied, 180 Wn.2d 1010 (2014).

³ Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

⁴ State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (quoting State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)).

⁵ State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

⁶ State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

⁷ ER 401.

⁸ Darden, 145 Wn.2d at 622.

⁹ Darden, 145 Wn.2d at 622.

Here, the trial court did not abuse its discretion in excluding testimony related to Ostergard's prostitution plans because the testimony was not relevant to Curran's defense. Curran claims he was prevented from presenting evidence of the witnesses' motive to fabricate. Specifically, Curran contends that he was prevented from explaining that the witnesses fabricated their testimony because they were upset with him, presumably for thwarting their prostitution plans. But none of the stricken testimony addressed the witnesses' motivations. Thus, the excluded evidence did not have "any tendency" to make fabrication "more or less probable."¹⁰

Curran was precluded only from explaining his own motivations in connection with the malicious mischief charge. He testified that he was trying to help his friends by "keep[ing] them from going and doing things . . . they shouldn't be doing." He was unable to explain this statement fully because of the court's previous ruling on the State's request to exclude this evidence.

Curran appears to claim that he damaged Ostergard's car to prevent her from prostituting herself and Tarasenko. The trial court struck Curran's statement that Ostergard "was trying to get [Viktoriya] to go prostitute themselves." Curran attempted to offer this testimony to explain his statement that "the whole reason that [he] smashed her car was that her car is her weakness." Then, when asked why he seemed frustrated, Curran responded, "Trying to explain my actions without explaining my actions. I can't explain why I had took these actions that I

¹⁰ See ER 403.

took. It's like why did you get mad, but don't tell me why you got mad; just why were you mad." Each of these statements references Curran's reasons for his own actions, but none of them show why any witness would fabricate testimony.

Even if Curran did not offer the excluded testimony to explain his own actions, it was not relevant to any witness's credibility. For instance, when defense counsel asked if Curran knew why Ostergard was hanging around older gentlemen, again referencing the alleged planned prostitution, the court sustained the State's objection, ruling that it called for speculation about someone else's mental state. Again, Curran does not explain how this or any of the excluded evidence shows a witness's motive to lie. Because the excluded evidence does not tend to make it more or less likely that the witnesses fabricated their testimony, it was not relevant to Curran's defense.

Curran claims that the stricken evidence was relevant because, in the State's rebuttal closing argument, it relied on the witnesses' motive to tell the truth. Yet still, Curran fails to explain how the excluded evidence shows the witnesses' motive to fabricate.

Excluding the evidence did not prevent Curran from challenging the witnesses' credibility. To the extent the stricken testimony bears on the witnesses' credibility, Curran presented alternative evidence on the issue. In State v. Donald,¹¹ this court concluded that the trial court did not abuse its discretion when

¹¹ 178 Wn. App. 250, 270-71, 316 P.3d 1081 (2013), review denied, 180 Wn.2d 1010 (2014).

excluding evidence with some relevance because the court had reasonable justification for its exclusion and the defendant had opportunity to present the defense through other means. Here, Curran was able to attack the witnesses' credibility through evidence of their drug use, which the court and deputy prosecutor acknowledged was relevant to credibility.

Even if Curran could show minimal relevance, the trial court was justified in excluding Curran's references to prostitution because of the prejudicial effect of that evidence. Courts can properly exclude evidence that has little or no probative value but could have significant prejudicial effect.¹² In State v. Gallegos,¹³ a defendant charged with rape sought to examine the victim's husband about whether he approved or disapproved of her conduct and association with other men. The defendant asserted that the husband's views could show a motive for the victim to fabricate the entire incident or the severity of the incident.¹⁴ This court concluded that the trial court did not abuse its discretion in restricting the cross-examination because the testimony "had little if any probative value on whether the victim was fabricating" and "could have had the prejudicial effect of suggesting some impropriety."¹⁵ Similarly, here, the evidence Curran sought to introduce had little, if any, bearing on the witnesses' motive to fabricate. However, as was noted in the pretrial hearing, evidence of Ostergard's plans involving prostitution could

¹² ER 403; State v. Gallegos, 65 Wn. App. 230, 237, 828 P.2d 37 (1992).

¹³ 65 Wn. App. 230, 236-37, 828 P.2d 37 (1992).

¹⁴ Gallegos, 65 Wn. App. at 236-37.

¹⁵ Gallegos, 65 Wn. App. at 237.

"smear" her character. As the excluded evidence was not relevant to whether Ostergard was telling the truth and merely tends to have the prejudicial effect of besmirching her character in the eyes of the jury, the trial court acted within its discretion in excluding it.

The trial court's decision to exclude the evidence was not arbitrary, nor did it "significantly undermine a fundamental element of [Curran's] defense."¹⁶ Therefore, the trial court did not abuse its discretion in excluding evidence of the witnesses' prostitution plans or striking Curran's related testimony.

Appellate Costs

Curran asks that the court waive his appellate costs. RCW 10.73.160(1) vests the appellate court with broad discretion to grant or deny appellate costs.¹⁷ RAP 14.2 permits the court to exercise that discretion in a decision terminating review. In exercising that discretion, ability to pay, although not the only relevant factor, is an important consideration.¹⁸ "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."¹⁹

In this case, facts weigh both for and against imposing appellate costs. On the one hand, the trial court entered an order of indigency, waiving court costs and

¹⁶ Donald, 178 Wn. App. at 268.

¹⁷ State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

¹⁸ Sinclair, 192 Wn. App. at 389.

¹⁹ RAP 15.2(f).

fees because Curran was not employed at the time. The trial court found that “the defendant lack[ed] sufficient funds to prosecute an appeal,” and there was no subsequent finding that Curran’s financial condition has improved or is likely to improve.²⁰ On the other hand, the order of indigency was signed ex parte, and thus, the State had no opportunity to present evidence showing Curran’s ability to pay.²¹

As a whole, the record does not support a finding that Curran cannot currently or will not in the future be able to pay costs. In State v. Sinclair,²² we found that awarding appellate costs was not appropriate because there was no “realistic possibility that [Sinclair would] be released from prison in a position to find gainful employment that [would] allow him to pay appellate costs.” Sinclair was 66 years old with a minimum sentence of 280 months.²³ By contrast, Curran is relatively young at 31 years, he served only three months, and he has been released from custody.

Further, in Sinclair, the trial court appointed appellate counsel because Sinclair was “unable by reason of poverty to pay for any of the expenses of appellate review.”²⁴ Here, by contrast, the trial court justified waiver of expenses based on a finding that the defendant was unemployed. Curran provides no evidence that he is still unemployed or is unable to obtain employment. We

²⁰ Sinclair, 192 Wn. App. at 393.

²¹ Sinclair, 192 Wn. App. at 393.

²² 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

²³ Sinclair, 192 Wn. App. at 393.

²⁴ Sinclair, 192 Wn. App. at 392.

therefore decline to conclude that Curran is presently unable to pay appellate costs.

CONCLUSION

Because evidence about the witnesses' plans to prostitute themselves was not relevant to Curran's defense at trial, the trial court properly excluded that evidence. And because Curran provided no evidence that he is currently unable to pay appellate costs, we decline Curran's request to deny the State costs. We affirm.

Leach, J.

WE CONCUR:

Mann, J.

Trickey, AQT

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73590-0-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: October 31, 2016