No. 33141-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

IAN ANDERSON,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Mr. Anderson was charged with possession of a stolen motor vehicle. During jury selection, the trial court ordered a specific individual, who was presumably a court staff member, to question a potential juror about his right to serve on a jury. This inquiry took place outside of the courtroom. The issue was not addressed again, but the record indicates the potential juror was dismissed for cause. This violated Mr. Anderson's right to a public trial. In addition, because Mr. Anderson was not present during the questioning, the court's actions violated his constitutional right to be present. Reversal is required.

At trial, the court admitted evidence of Mr. Anderson's attempt to flee from police and the force they used to place him under arrest, including tasing him. Because there were two unrelated outstanding warrants against him, any inference of consciousness of guilt from Mr. Anderson's attempt to flee was nothing more than speculation. In addition, evidence of his being tased, including details about how a taser works and a photograph showing the taser darts in Mr. Anderson's back, was irrelevant and highly prejudicial. The trial court erred when it allowed this evidence in over Mr. Anderson's objection, and this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Anderson's constitutional right to a public trial.

2. The trial court violated Mr. Anderson's constitutional right to be present.

3. The trial court erred when it admitted evidence of Mr. Anderson's attempt to flee from police.

4. The trial court erred when it admitted evidence of the force used by officers to apprehend Mr. Anderson.

5. The imposition of legal financial obligations is improper because Mr. Anderson lacks the ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Jury selection implicates a defendant's right to a public trial under article I, sections 10 and 22. A trial court may order potential jurors be questioned outside of the courtroom only if it performs an analysis of the five factors articulated in *State v. Bone-Club.*[1] Where the trial court ordered a potential juror be questioned about his fitness to serve on the jury outside

[1] 128 Wn.2d 254, 906 P.2d 325 (1995).

of the courtroom without performing a *Bone-Club* analysis, did the court violate Mr. Anderson's right to a public trial?

2. The Sixth and Fourteenth Amendments and article I, section 22 protect a defendant's right to be present at all critical stages of trial, which includes jury selection. Where the trial court ordered a potential juror to be individually questioned outside the presence of the parties, did it violate Mr. Anderson's constitutional right to be present?

3. Evidence must be relevant and more probative than prejudicial to be admitted at trial. Where the trial court admitted evidence of Mr. Anderson's attempt to flee from police, and their efforts to apprehend him, including detailed testimony about tasing him, did the trial court commit reversible error?

4. RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and the Supreme Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."[2] Here, the trial court recognized that Mr. Anderson was unable to pay but determined that it was required to

[2] *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

impose the legal financial obligations regardless. Should this Court remand with instructions to strike the fees and costs?

D. STATEMENT OF THE CASE

Bryan Dugdale owned a Nissan Maxima, which was purchased used by his father in Montana. 1 RP 150. Mr. Dugdale drove the car for about a year, but parked it permanently in back of his apartment after it began stalling out. 1 RP 151-52. After Mr. Dugdale made arrangements to sell the car to his neighbor, he removed the registration from the car and locked it. 1 RP 154. A few days later, he received a text message from his neighbor, asking where the car had gone, and Mr. Dugdale realized it had been stolen over the weekend. 1 RP 156-57.

A sergeant with the Spokane Police Department noticed a car with Montana plates and confirmed it was the Maxima that had been reported stolen. 1 RP 188. After the car stopped at a business and the sergeant boxed the vehicle in, he approached the driver, who was later identified as Ian Anderson. 1 RP 189-90, 193. Mr. Anderson was initially compliant with the sergeant's demands. 1 RP 194. Mr. Anderson kept his hands on

the steering wheel and explained to the sergeant he had borrowed the car. 1 RP 194.

Once back-up arrived, the sergeant ordered Mr. Anderson out of the car. 1 RP 194. Mr. Anderson complied, but when the sergeant attempted to handcuff him, Mr. Anderson ran. 1 RP 197. Another officer grabbed Mr. Anderson and they took him to the ground by force. 1 RP 197-98. An officer tased Mr. Anderson, and Mr. Anderson was handcuffed shortly after. 1 RP 200. Mr. Anderson asked one of the officers what he was being arrested for and the officer responded that he was under arrest for possession of a stolen motor vehicle and an outstanding warrant. 1 RP 177; CP 4.

At the start of jury selection, immediately before the prospective jurors were brought into the courtroom, the State notified the court that one juror had a felony conviction and it wanted to establish that the juror's rights had been restored. 1 RP 5. The trial court indicated that a specific individual, who was presumably a court staff member, could inquire of the juror outside the courtroom and release him if he indicated his rights had not been restored or if he did not know whether his rights

had been restored. 1 RP 6-7. The parties did not discuss this juror again on the record, but the Record of Additional Jurors indicates he was struck for cause. Supp. CP __ (sub no. 21).

In a motion in limine, Mr. Anderson moved to exclude testimony about his initial failure to comply with the arrest. 1 RP 123. He also moved to exclude two exhibits proposed by the State, one of which showed the taser darts embedded in Mr. Anderson's back and one of which showed the marks on his back left by the taser darts. 1 RP 124. The trial court denied this motion, finding that any evidence of Mr. Anderson's attempt to flee or resist arrest was admissible, including the fact that the officer tased him. 1 RP 132. The court initially reserved its ruling on whether the photographs were admissible but later admitted the photograph of the taser darts on Mr. Anderson's back over his objection. 2 RP 215; Ex. 10. The sergeant subsequently testified at length about how a taser operates. 2 RP 216.

A jury convicted Mr. Anderson of possession of a stolen motor vehicle. CP 37. He was sentenced to 50 months incarceration. CP 42. At sentencing the judge recognized Mr.

Anderson was unable to pay any fines and costs and stated, "I would totally waive these fines and costs but I can't." 2 RP 330. Finding that it was obligated to impose certain legal financial obligations (LFOs) regardless of Mr. Anderson's ability to pay, it imposed fees and costs totaling $800. 2 RP 330; CP 45.

E. ARGUMENT

1. Mr. Anderson's right to a public trial was violated when the trial court ordered a potential juror be individually questioned outside of the courtroom.

a. A trial court may not question potential jurors outside of the courtroom without performing a *Bone-Club* analysis.

"Our constitution flatly prohibits secret tribunals and Star Chamber justice." *State v. Slert*, 181 Wn.2d 598, 603, 334 P.3d 1088 (2014). Article I, section 10 requires that in all cases, justice "be administered openly." Article I, section 22 guarantees a criminal defendant the right to a "public trial by an impartial jury." These "provisions echo the United States Constitution's Sixth Amendment, applicable to the states through the Fourteenth Amendment due process clause." *State v. Fort*, ___ Wn. App. ___, ___ P.3d ___, No. 26830-6-III, slip op. at 12 (filed Sept. 15, 2015); *Waller v. Georgia*, 467 U.S. 39, 44, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). The right to a public

trial provides for both accountability and transparency and "is a core safeguard in our system of justice." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012).

While not every interaction between the court and the parties implicates the right to a public trial, "logic and experience" demonstrates that jury selection does. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012); *State v. Russell*, ___ Wn.2d ___, ___ P.3d ___, No.85996-5, 2015 WL 4949899 at *5 (filed Aug. 20, 2015) (citing *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). "A trial court may question potential jurors individually outside of the public's presence – thereby closing the courtroom – but only after considering the five *Bone-Club* factors on the record." *State v. Frawley*, 181 Wn.2d 452, 459, 334 P.3d 1022 (2014); *see also State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

Public trial violations are structural error and may be raised for the first time on appeal. *State v. Slert*, 181 Wn.2d 598, 603, 334 P.3d 1088 (2014). When the trial court closes a courtroom without performing a *Bone-Club* analysis, a new trial is the appropriate remedy. *Frawley*, 181 Wn.2d at 459. This

Court reviews a public trial violation de novo. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012).

b. Reversal is required because the trial court ordered the potential juror be questioned outside of the courtroom about whether his civil rights had been restored.

Immediately before the prospective jurors were brought into the courtroom, the State alerted the court it had learned Juror 31 had a prior felony conviction and stated, "we would need to establish that his rights have been restored." 1 RP 5. The deputy prosecuting attorney did not indicate how she learned about the felony conviction or provide any details about the conviction. Instead, she informed the court:

> I don't believe, to my knowledge, that the jury coordinators do anything to assess that. The way I've handled it in the past is had them brought in individually to see if they know if their rights have been restored. Given the age of it, it somewhat becomes convoluted because they generally don't have a very good memory that far back.

1 RP 5-6.

The trial court ruled that an inquiry of Juror 31 would be conducted outside of the courtroom by an individual identified only as "Ms. Ottoson." 1 RP 6. If Juror 31 informed Ms. Ottoson that his rights had not been restored, or if he was unsure whether his rights had been restored, Juror 31 would be released

from jury service without further consideration. 1 RP 7. The issue was not addressed again on the record, but the Record of Additional Jurors reflects that Juror 31 was ultimately struck for cause. Supp. CP __ (sub no. 21).

Before isolating Juror 31 from the rest of the jury panel and instructing Ms. Ottoson to interview him outside of the courtroom and the parties' presence, the court did not perform a *Bone-Club* analysis. 1 RP 6-7. It simply directed that the juror be questioned and released unless he was certain his civil rights had been restored. *Id.*

This questioning violated Mr. Anderson's public trial right. Our Supreme Court has repeatedly held that the individual questioning of potential jurors outside the courtroom is a closure that creates the presumption of prejudice. *See Wise*, 176 Wn.2d at 1118; *Paumier*, 176 Wn.2d at 35; *State v. Shearer*, 181 Wn.2d 564, 574, 334 P.3d 1078 (2014); *see also Fort*, ___ Wn. App. ___, ___ P.3d ___, No. 26830-6-III, slip op. at 18 (recognizing that "the Supreme Court solidified the role of the public trial right in the context of voir dire" and finding a public trial right violation where counsel and the trial court

questioned potential jurors in chambers). In *Paumier*, the court found that the trial judge's individual questioning of potential jurors in chambers about private matters, including their health issues, *criminal history*, and familiarity with the defendant and the crime, violated the defendant's right to a public trial. 176 Wn.2d at 33, 35. Finding reversal warranted, the court held "the trial court erroneously closed the courtroom when it privately questioned potential jurors during voir dire without first conducting a *Bone-Club* analysis." *Id*. at 35.

In *Shearer*, there was a question about whether a juror was disqualified from jury service due to a criminal conviction. 181 Wn.2d at 568. The judge conducted an in-chambers conference with the juror and the parties, but no record was made of what occurred during that meeting. *Id*. The State argued the closure was merely for a "ministerial or administrative matter" and therefore did not implicate the right to a public trial. *Id.* at 574. The court disagreed, finding *Paumier* controlled and the court violated the defendant's article I, section 22, public trial rights when it evaluated the juror's

fitness to serve in chambers without performing a *Bone-Club* analysis. *Id*.

Paumier and *Shearer* control here. Just like in *Shearer*, a question arose as to whether Juror 31 was qualified to sit on the jury given a past criminal conviction. Similar to considering the State's challenge to the juror's fitness in chambers, as the court did in *Shearer,* the trial court here delegated the task to Ms. Ottoson, who conducted the inquiry outside the presence of the judge, the parties, and the public. This violated Mr. Anderson's public trial rights. *See Paumier,* 176 Wn.2d at 35; *Shearer*, 181 Wn.2d at 574.

Public trial rights violations are not subject to a harmlessness analysis. *Shearer,* 181 Wn.2d at 573. This Court should reverse.

2. The trial court violated Mr. Anderson's right to be present during a critical stage of his trial.

The fundamental right of a criminal defendant to be present at all critical stages of his trial is protected by the Sixth and Fourteenth Amendments and article I, section 22. *State v. Irby,* 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011); *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674

(1934) (*overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)). The right to be present is rooted in the confrontation clause of the Sixth Amendment, but is also protected by the Due Process Clause where the defendant is not confronting witnesses against him. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

There are some limitations on this right. A defendant does not have the right to be present when his "presence would be useless, or the benefit but a shadow." *Snyder*, 291 U.S. at 106-07. This is not true during jury selection. "Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice." *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). During the selection of jurors, it is within the defendant's "power, if present, to give advice or suggestion or even to supersede his lawyers altogether." *Irby*, 170 Wn.2d at 883. Thus, where the charge is a felony, the right to be present attaches "*at least* from the time when the work of empaneling the jury begins." *Id*. (quoting

Lewis v. United States, 146 U.S. 370, 374, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)) (emphasis added).

a. Mr. Anderson had a fundamental right to be present during the inquiry of Juror 31.

In *Irby*, the court contacted counsel for the parties by email to inform them that four jurors had been excused by the court administrator, two jurors had job-related hardships, and four jurors had a parent who was murdered. 170 Wn.2d at 878. The judge asked the attorneys if they wanted to release these jurors. *Id*. Both lawyers agreed to release seven of the ten jurors at issue, and the State objected to the release of three of the jurors who had a parent who had been murdered. *Id*. On appeal, the defendant asserted that the court's release of seven jurors based on its email exchanges with counsel violated his right to be present at all critical stages of his trial. *Id*. at 879. Our Supreme Court agreed, finding the email exchange was a part of the jury selection process because the jurors were being "evaluated individually and dismissed for cause." *Id*. at 882.

Similar to *Irby*, Juror 31 was being evaluated individually and was ultimately dismissed for cause. The State indicated Juror 31 had a felony conviction, without providing

any basis for its assertion, immediately before the prospective jurors entered the courtroom to be sworn in. 1 RP 5-8. Had the State not flagged this issue when it did, Juror 31 would have been brought into the courtroom with the rest of the jury panel.

The trial court determined Juror 31 should be questioned in private and ruled that even if he was just *unsure* whether his civil rights had been restored, he would be removed from the jury pool regardless of the actual status of his rights. 1 RP 6-7. This ruling failed to appreciate that it was highly likely Juror 31's civil rights had been restored, whether he was aware of it or not. Under RCW 2.36.070(5), a person is competent to serve as a juror unless he "[h]as been convicted of a felony and has not had his or her civil rights restored." But the right to vote is "provisionally restored as long as the person is not under the authority of the department of corrections." RCW 29A.08.520(1). This provisional restoration may be revoked only if the individual fails to pay his legal financial obligations. RCW 29A.08.520(2)(a).

Given the deputy prosecuting attorney's statement that Juror 31 would be required to have a memory that went "far

back" in order to recall whether his rights had been restored following his conviction, it was unlikely he remained under the authority of DOC. 1 RP 6. In addition, if Juror 31 believed he had registered to vote, a quick check of the state's voter database could have resolved any concerns about whether his civil rights had been restored. *See* RCW 29A.08.520(4).[3] However, Mr. Anderson was unable to raise any of these issues because he was denied the right to be present during the questioning of the juror.

Whether Juror 31 believed he was eligible to serve on the jury was not determinative of whether he was actually fit to serve under the law, and the trial court should not have directed him to be released after a perfunctory inquiry by a staff member. Because the court ordered Juror 31 to be questioned alone, outside of the courtroom and the presence of either party, Mr. Anderson was unable to evaluate Juror 31's response to the inquiry about the status of his civil rights or take a position about whether the prospective juror was competent to serve.

[3] Pursuant to RCW 29A.08.520(4), "The county clerk shall enter into a database maintained by the administrator of the courts the names of all persons whose provisional voting right have been revoked, and update the database for any person whose voting rights have subsequently been restored pursuant to subsection (6) of this section."

This violated Mr. Anderson's right to be present. U.S. Const. amend. VI, XIV; Const. art. I, § 22.

b. Because the State cannot demonstrate Juror 31 had no chance to sit on the jury, the violation of Mr. Anderson's constitutional right to be present is not harmless beyond a reasonable doubt.

The burden is on the State to demonstrate the violation of Mr. Anderson's right to be present was harmless beyond a reasonable doubt. *Irby*, 170 Wn.2d at 886. When a court releases a potential juror in violation of a defendant's right to be present, the State must demonstrate that the excused juror had "no chance" to sit on the jury. *State v. Slert*, ___ Wn. App. ___, ___ P.3d ____, No. 40333-1-II, 2015 WL 5042148 at *2 (filed Aug. 26, 2015).

The State cannot demonstrate that here. Similar to both *Slert* and *Irby*, where the jurors may have been seated had they been subjected to questioning in the defendant's presence, Mr. Anderson could have established that Juror 31 was qualified to sit on the jury had he been questioned in Mr. Anderson's presence. *See Slert*, 2015 WL 5042148 at *4; *Irby*, 170 Wn.2d at 886.

In addition, taking into account the four jurors struck for cause in addition to Juror 31, and the number of peremptory challenges each party had, Juror 31 would have been seated on the jury had each side elected to exercise all of its peremptory challenges. Supp. CP __ (sub no. 21). For example, Mr. Anderson could have sought, through the use of additional peremptory challenges, to have Juror 31 seated on the jury. The State may have also decided to exercise its peremptory challenges differently, either to allow Juror 31 to be seated or in response to changes in the way the defense exercised its challenges.

As in *Slert*, Juror 31 certainly "had some chance of sitting on the jury." 2015 WL 5042148 at *3. Because "[r]easonable and dispassionate minds may look at the same evidence and reach a different result" the State cannot show beyond a reasonable doubt that removal of Juror 31 in Mr. Anderson's absence had no effect on the verdict. *Irby*, 170 Wn.2d at 886-87. This Court should reverse.

3. The trial court improperly admitted evidence of flight and the force used by officers to subdue Mr. Anderson.

a. Because evidence of flight is only marginally probative, the inference of consciousness of guilt must be substantial and real.

In order for evidence to be admissible at trial, it must be relevant. ER 402. Pursuant to ER 401, relevant evidence is "evidence having 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." Thus, in order "[t]o be relevant… evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case." *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (quoting *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)).

In addition, relevant evidence may be excluded if it is more prejudicial than probative, confuses the issues, or misleads the jury. ER 403. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (quoting *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). Evidence should be excluded if "its effect would be to generate heat instead of

diffusing light, or … where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." *Smith*, 106 Wn.2d at 776 (quoting *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

Prior to trial, Mr. Anderson moved to exclude all evidence of his resistance to arrest. 1 RP 123. The trial court denied the motion, finding Mr. Anderson's resisting and attempt to flee was "fully admissible." 1 RP 129. According to the court, this included any evidence of the officer's use of the taser. 1 RP 132.

However, evidence of flight is admissible only if it creates "a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." *State v. McDaniel*, 155 Wn. App. 829, 853-54, 230 P.3d 245 (2010) (quoting *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001)). "Flight" may include "evidence of resistance to arrest, concealment, assumption of a false name, and related conduct" as long as jurors "can

reasonably infer the defendant's consciousness of guilt of the *charged* crime." *McDaniel*, 155 Wn. App. at 854 (emphasis added). Because this type of evidence is typically only marginally probative, the inference of consciousness of guilt must be "substantial and real." *Id*. It may not be based merely on speculation or conjecture. *Id*. Where the danger of unfair prejudice substantially outweighs the probative value of admitted evidence, the trial court has abused its discretion. *State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012).

b. Given that Mr. Anderson had two outstanding warrants, any inference of consciousness of guilt was speculative.

In response to Mr. Anderson's motion to exclude, the State argued his resistance to arrest "was relevant to present how he was acting" and made a general assertion that its probative value outweighed any prejudice. 1 RP 125-26. Relying on "Tegland," the court agreed and found all evidence of Mr. Anderson's attempt to flee admissible. 1 RP 128-29.

In making this ruling, the trial court failed to evaluate the *strength* of the inference of consciousness of guilt. Mr. Anderson had two outstanding warrants, including one for an escape from custody while serving a prison drug offender sentencing alternative (DOSA). 1 RP 127. He cooperated with the officers until he knew he was being

placed under arrest. 1 RP 196. A suggestion that he ran from the police *because he knew he was driving a stolen vehicle* was nothing more than speculation. 1 RP 127. Instead, the circumstances suggested that Mr. Anderson attempted to flee not because he feared arrest for that crime, but because he knew he had absconded from the Department of Corrections (DOC) custody and had two outstanding warrants for his arrest.

When examining the probative value of flight, a court must examine the degree of confidence with which four inferences can be drawn:

> (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Freeburg, 105 Wn. App. at 498; *McDaniel*, 155 Wn. App. at 854. In this case, it is impossible to draw, with any degree of confidence, an inference from consciousness of guilt to consciousness of guilt *concerning the crime charged*. Given that Mr. Anderson had two outstanding warrants and one was for escaping from DOC custody, it is purely speculative to find he attempted to flee because he was guilty of the crime charged.

When the trial court failed to evaluate the circumstances of this case, and instead relied on general considerations about the admissibility of flight evidence, it abused its discretion. *See McDaniel*, 155 Wn. App. at 855.

c. Evidence that the officer tased Mr. Anderson was both irrelevant and extremely prejudicial.

The trial court found the State could present evidence about Mr. Anderson being tased because it "just tells the story." 1 RP 129-30. Evidence is admissible under the *res gestae* doctrine when each act is "a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury." *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). However, evidence that Anderson was tased by police was inadmissible under both ER 402 and ER 403. Far from being a fact that was necessary to complete the story for the jury, the tasing was completely irrelevant, offered no probative value, and was extremely prejudicial.

Even if the jury heard evidence Mr. Anderson attempted to flee, there was no valid purpose for presenting evidence that he had been tased before complying. Evidence of the use of the taser failed to meet even the minimal standard for relevance: it

did not tend to prove or disprove the existence of a fact which was of consequence to the outcome of the case. *See Weaville*, 162 Wn. App. at 818. All it offered was that Mr. Anderson was a dangerous man who the police needed to electrically shock into submission.

Such evidence was extremely prejudicial. Because it was likely to do nothing more than stimulate an emotional response from jurors, the trial court abused its discretion when it admitted not only the testimony about the tasing, including details about how a taser works, but also a photograph showing the taser darts embedded in Mr. Anderson's back. *See Beadle*, 173 Wn.2d at 120; 1 RP 132; 2 RP 215; Ex. 10.

d. The remedy is reversal and remand for a new trial.

Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Thomas*, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial

is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

The irrelevant and inflammatory evidence admitted against Mr. Anderson suggested he ran from the police because he knew the car was stolen and that he was violent, and the trial court permitted the State to discuss this evidence at length. Two officers testified about how Mr. Anderson had attempted to leave the scene and went into great detail about the physical forced they used to subdue him. 1 RP 172-176, 197-200. They described trying to gain control over Mr. Anderson's different body parts, how Mr. Anderson was placed in a headlock, that Mr. Anderson would not cooperate even after they forced him to the ground, and that one of the officers tased him. 1 RP 174-75, 198-200.

The sergeant prefaced his testimony by stating that it was a "high risk stop" because "in most cases the subjects driving stolen cars are felons and in most cases these felons are armed with some type of weapon." 1 RP 188. He also discussed how a taser works, and described the photograph admitted into

evidence, which showed the taser darts attached to Mr. Anderson's back. 2 RP 216; Ex. 10.

It is reasonably probable that absent this irrelevant and inflammatory evidence, Mr. Anderson would have been acquitted. He told the sergeant he had borrowed the car and a woman testified at trial that she had lent it to him, but the improperly admitted evidence unfairly suggested to the jury that this was untrue. 1 RP 194; 2 RP 240. Mr. Anderson's conviction should be reversed and his case remanded for a new trial at which evidence of his attempt to flee and the officer's use of a taser should be excluded.

4. The legal financial obligations should be stricken because Mr. Anderson lacks the ability to pay.

a. <u>The trial court imposed legal financial obligations against Mr. Anderson despite finding he had no ability to pay them.</u>

At sentencing, the trial court recognized that Mr. Anderson did not have the ability to pay any legal financial obligations (LFOs) but nevertheless imposed fees and costs totaling $800, including a $500 "Victim Assessment," $200 "Criminal Filing Fee," and $200 "DNA collection fee." 2 RP 330; CP 44-45. The judge stated:

> And what I'm going to do, sir, in terms of fines and costs, if I could waive all of this I would. I would totally waive these fines and costs but I can't The State doesn't allow me to so I have to impose 500 dollar victim impact fee, 200 dollars court costs and 100 dollars DNA fee. I would waive them sir, if I could and, counsel, I'm going to set a payment for the gentlemen at 25 a month but, Mr. Charbonneau, if you want to chat with Mr. Anderson, if you want to suggest a date, I'm amenable to whatever he would like to do. As far out as he wants, but it has statutory interest, sir, so the problem is it just sits there and builds up but I'll give you a second if you want to decide what you want to do with that.

2 RP 330.

After defense counsel suggested Mr. Anderson begin paying in 2017, the judge ordered payments to begin June 1, 2017 and lowered Mr. Anderson's monthly payment:

> So why don't we make it – I'm sorry, Counsel, you probably penciled it out. Why don't we make it 15 bucks a month to give him a little bit of help since I can't waive these fees like I wish I could.

2 RP 331. The judge's findings make clear that he did not believe Mr. Anderson could pay any LFOs and that he imposed the fees and costs only because he believed the law required him to do so.

b. The imposition of legal financial obligations on an impoverished defendant is improper under the relevant statutes and court rules, and violates principles of due process and equal protection.

The legislature has mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

As the trial court recognized when it expressed concern about the overwhelming accumulation of interest Mr. Anderson would face on the LFOs, there is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835. In *Blazina*, the court explained that LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after

conviction than when the LFOs were originally imposed. *Id.* at 836. Because the trial court found that Mr. Anderson would not be able to pay more than $15 per month, he will be in an even worse position after a decade of making the minimum payments than as contemplated in *Blazina*.

This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." *Id.* at 837. All of these problems lead to increased recidivism. *Id*. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State may argue that the court properly imposed these costs despite finding Mr. Anderson did not have the ability to pay, because the statutes in question use the word "shall" or "must." *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(h) (convicted criminal defendants "shall be liable" for a $200 fee); RCW 43.43.7541 (every felony

sentence "must include" a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which, as explained above, requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, ___ Wn.2d ___, ___ P.3d ___, No. 90782-0, 2015 WL 4760487, at *4 (filed

Aug. 13, 2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[4]

More than 20 years ago, the Supreme Court stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See*

[4] The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

Blazina, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). Indeed, when listing the LFOs imposed on the two defendants at issue, the court cited the same LFOs Mr. Anderson challenges here: the Victim Penalty Assessment, DNA fee, and criminal filing fee. *Id.* at 831 (discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition cots). *See id.* If the Court were limiting its holding to a minority of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

Indeed, it does not appear that the Supreme Court has ever held that the DNA fee and "criminal filing fee" are exempt

from the ability-to-pay inquiry. And although this Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 *with Blazina*, 182 Wn.2d at 830-39.

It would be particularly problematic to require Mr. Anderson to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants.[5] If nothing else, this suggests the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, *supra*, at *3 ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because "the error, if permitted to stand, would create inconsistent sentences for the

[5] This Court can take judicial notice of the fact that King County courts never impose this cost on indigent defendants. In the alternative, Mr. Anderson would be happy to provide the Court with representative judgments from King County.

same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties); *and see* RCW 9.94A.010 (3) (stating that a sentence should "[b]e commensurate with the punishment imposed on others committing similar offenses").

GR 34, which was adopted at the end of 2010, also supports Mr. Anderson's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay $50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue

here, mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Id.* at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." *Id.* at 529. Given Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply here. Indeed, the Supreme Court discussed GR 34 in *Blazina*,

and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the "criminal filing fee" across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that "principles of due process or equal

protection" guided the court's analysis and recognizing that failure to require waiver of fees for indigent litigants "could lead to inconsistent results and disparate treatment of similarly situated individuals"). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller,* the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the

more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Our Supreme Court has noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because "incarceration would result only if failure to pay was willful" and not due to indigence. *State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997). Unfortunately, this assumption was not borne out. Significant studies post-dating *Blank* indicate that indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. *See* Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay). [6] In other words, the risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525

[6] Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

(holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Anderson concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like Mr. Anderson is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee

statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

c. This Court should reverse and remand with instructions to strike legal financial obligations.

The trial court did not have the benefit of the Supreme Court's decision in *Blazina* when it held it was required to impose the LFOs regardless of its finding that Mr. Anderson could not pay them. Given that the trial court determined Mr. Anderson could not pay the LFOs, and repeatedly expressed its desire *not* to impose these fees and costs against Mr. Anderson, this court should reverse and remand with instructions to strike these financial obligations.

F. CONCLUSION

This Court should reverse Mr. Anderson's conviction because the trial court violated his constitutional right to a public trial and his right to be present. In addition, this Court should reverse because the trial court erred when it admitted evidence of Mr. Anderson's attempt to flee and the force used by officers to apprehend him. Finally, this Court should reverse and remand with instructions to strike the LFOs imposed against Mr. Anderson.

DATED this 15th day of September, 2015.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 33141-5-III
	)	
IAN ANDERSON,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** 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 15TH DAY OF SEPTEMBER, 2015.

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