No. 73325-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID THOMPSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Alan R. Hancock

BRIEF OF APPELLANT

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A. INTRODUCTION

David Thompson was alleged to have assaulted Robbie Speers with a deadly weapon. Yet Mr. Speers and another witness testified the weapon seized and tested was not the weapon used by Mr. Thompson.

An investigating deputy explicitly opined before the jury that Robbie Speers was telling the truth, a fact used by the prosecutor in closing argument.

Mr. Thompson urges the Court to reverse and dismiss his conviction, or in the alternative, reverse his convictions and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented that Mr. Thompson assaulted Robbie Speers with a deadly weapon.

2. Deputy Harvey's opinion regarding the truthfulness of Robbie Speers's allegations impermissibly invaded the province of the jury and violated Mr. Thompson's constitutionally protected right to a fair trial and right to a jury.

3. The trial court erred in imposing Legal Financial Obligations (LFOs) in the absence of an individualized inquiry into Mr. Thompson's ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove every element of the charged offense. Mr. Thompson was charged with assaulting Robbie Speers with a deadly weapon. The State provided a pellet gun, which the Washington State Patrol Crime Laboratory showed was a deadly weapon, but which all of the witnesses testified was not the weapon that Mr. Thompson brandished. Did the State prove all of the essential elements of the charged offense?

2. A witness may not comment or opine about the credibility of another witness. Such improper vouching violates the defendant's right to a fair trial and right to a jury trial. Here, a police officer stated his unsolicited opinion regarding the truthfulness of Robbie Speers, thus bolstering the credibility of the witness. This error was compounded when the prosecutor in closing argument referenced Deputy Harvey's opinion to persuade the jury Robbie Speers was telling the truth. Did the officer's unsolicited opinion constitute improper vouching, thus violating Mr. Thompson's right to a fair trial and right to a jury trial?

3. A court may impose discretionary LFOs only after making an individualized assessment on the record of the defendant's financial situation and determining his ability to pay. The court here imposed

over $1400 in discretionary LFOs without making any finding regarding Mr. Thompson's financial circumstances or his ability to pay. Is Mr. Thompson entitled to reversal of his sentence and remand for a new sentencing hearing?

D. STATEMENT OF THE CASE

David Thompson's mother, Juanita Manley, is married to Earling Manley. 10/21/2014RP 241. Mr. Thompson lived with his girlfriend in an apartment above a detached garage on Mr. Manley's property on Orcas Island. 10/20/2014RP 163.

Robbie Speers and his brother, Adrian Speers lived in the basement of Mr. Manley's home. 10/20/2014RP 162-63. Mr. Manley is Robbie and Adrian Speers' grandfather. 10/21/2014RP 241.

On January 3, 2014, Robbie, Adrian, and their friend, Barry Sharpe, were watching television. 10/20/2014RP 164. Mr. Sharpe had his dog with him and had let him outside. 10/20/2014RP 164; 10/21/2014RP 307. Mr. Thompson's female dog was already outside and the two dogs began playing together. 10/20/2014RP 164. A few minutes later, the young men heard barking, looked outside, and saw Mr. Thompson's male dog and Mr. Sharpe's dog fighting. 10/21/2014RP 309. Mr. Sharpe, Robbie Speers and Mr. Thompson

came outside, separated the dogs, and took them into their respective residences. 10/21/2014RP 166. According to Mr. Sharpe, Mr. Thompson blamed Mr. Sharpe's dog for biting him when he was trying to separate the dogs, and vowed to put down Mr. Sharpe's dog. 10/20/2014RP 167.

According to Robbie Speers, Mr. Thompson came into the basement apartment carrying a gun. 10/20/2014RP 168. Mr. Thompson said he was going to shoot Mr. Sharpe's dog. 10/20/2014RP 168. According to Robbie Speers, Mr. Thompson said that if he got in the way, he would shoot Mr. Speers. 10/20/2014RP 168. Mr. Speers pushed the barrel of the gun away from him and he and Mr. Thompson began fighting. 10/20/2014RP 170. At some point, Mr. Thompson left the basement apartment and went to his residence. 10/20/2014RP 170. Robbie Speers called the police. 10/20/2014RP 170.

Mr. Thompson was arrested and charged with second degree assault with a deadly weapon and felony harassment. CP 42-43.[1]

[1] Mr. Thompson was convicted of these offenses and one count of possession of a dangerous weapon in a previous jury trial, and sentenced for those offenses. Mr. Thompson was granted a new trial for the State's violation of *Brady v. Maryland*, 373 U.S.83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which is the subject of this appeal. CP 70-74, 81-91, 112-13.

Deputy Raymond Harvey, who responded to the 911 call, testified about his interview with Robbie Speers:

> Q; And did you talk to him about it?
>
> A: I did.
>
> Q: What was his demeanor?
>
> A: He was breathing heavy and very point blank with his story with me.
>
> Q: What do you mean by point blank?
>
> A: Meaning there wasn't any hesitation in what he relayed to me.
>
> Q: Why is that significant?
>
> A: Generally, somebody making a story up has some hesitation because they actually have to think about what they are saying rather than recalling the information from memory.
>
> Q: Are you saying that based on your experience as a law enforcement officer?
>
> A: I am.

10/21/2015RP 291. Mr. Thompson did not object to this testimony.

The deputies seized, and the State crime laboratory tested, a pellet gun from the garage below Mr. Thompson's apartment. 10/21/2014RP 299. Based upon his testing, the crime lab employee opined that the pellet gun was a deadly weapon. 10/21/2014RP 328-31, 335-36. Robbie Speers and Mr. Sharpe testified this pellet gun was not

the gun they had observed Mr. Thompson possessing. 10/21/2014RP 245, 320.

Nevertheless, the jury convicted Mr. Thompson of felony harassment and second degree assault. CP 137-38.

At sentencing, without inquiring whether Mr. Thompson had any ability to pay LFOs, the court imposed $1400 in LFOs, of which only $600 arguably were mandatory fees. CP 170; 2/27/2015RP 11-12.

E. ARGUMENT

1. **The State failed to prove Mr. Thompson used a deadly weapon in the assault.**

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).

Here, the State charged Mr. Thompson with assaulting Robbie Speers with a deadly weapon. Thus, the State was required to prove Mr. Thompson had a deadly weapon, a fact it failed to prove. As a consequence, Mr. Thompson is entitled to reversal of his conviction.

b. *The State failed to prove Mr. Thompson assaulted Robbie Speers with a deadly weapon.*

"A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: ... (c) Assaults another with a deadly weapon". RCW 9A.36.021(1). An item is a deadly weapon if, under the circumstances in which it is used, it is readily capable of causing death or substantial bodily harm. RCW 9A.04.110(6). RCW 9A.04.110(6) defines a "deadly weapon" as:

> any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm[.]

The State's theory was that Mr. Thompson assaulted Robbie Speers with the pellet gun the police seized and which the State tested

and alleged was a deadly weapon. But, each of the people present at the time of the argument between Mr. Thompson and Robbie Speers testified that this pellet gun was not the gun with which Mr. Thompson was armed. *See* RP 245 (Robbie Speers); RP 320 (Barry Sharp).

The decision in *State v. Carlson* is instructive on this issue. 65 Wn.App. 153, 828 P.2d 30, *review denied,* 119 Wn.2d 1022 (1992). In *Carlson,* the defendant pointed a gun, which appeared to be a rifle, at the victim and held the barrel several inches from his face. *Carlson,* 65 Wn.App. at 154-55. The victim pushed the gun away, after which the defendant held it as if he were preparing to strike the victim. *Id.* at 155. The gun was not placed in evidence, and the defendant testified it was an inoperative BB gun. *Id.* The trial court did not find directly that the BB gun was a deadly weapon. *Id.* at 157. On appeal of his conviction for second degree assault, the defendant argued the BB gun was not a deadly weapon in fact because it was inoperative. The appellate court agreed, framing the issue as "whether the weapon 'as used' was 'readily capable of causing ... substantial bodily harm.' " *Id.* at 159. Because the gun was not in evidence and the only testimony as to whether the gun was "readily capable" came from the defendant, the

court concluded there was insufficient proof the weapon was deadly. *Id.* at 161-62.

Here, the gun placed into evidence and deemed to be a deadly weapon was not the weapon used. Whatever object Mr. Thompson may have used was never determined to be a deadly weapon nor was it ever shown that the manner in which it was used was readily capable of causing substantial bodily harm. As in *Carlson*, the "gun" very well could have been an inoperative gun not readily capable of causing death or substantial bodily harm. As a result, the State failed to prove Mr. Thompson used a deadly weapon.

c. *Mr. Thompson's conviction for second degree assault must be reversed with instructions to dismiss.*

Since there was insufficient evidence to support the second degree assault conviction in Count I, this Court must reverse the conviction 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 improper opinion of Deputy Harvey concerning the truthfulness of Robbie Speers impermissibly invaded the province of the jury.**

a. *Improper vouching by a police officer violates a defendant's rights to a fair trial and a jury.*

The role of the jury is to be held "inviolate." U.S. Const. amend. VI; Const. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the right to trial by jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Under the Constitution, the jury has "the ultimate power to weigh the evidence and determine the facts." *State v. Montgomery*, 163 Wn.2d 577, 589-90, 183 P.3d 267 (2008), *quoting James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

In addition, an accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. I, §§ 3, 21, 22. Lay witness opinion testimony about the defendant's guilt invades that right. *State v. Johnson*, 152 Wn.App. 924, 934, 219 P.3d 958 (2009); *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *City of Seattle v. Heatley*, 70

Wn.App. 573, 577, 854 P.2d 658 (1993), *citing State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because admitting such evidence "violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury." *Carlin*, 40 Wn.App. at 701; *see also Dubria v. Smith*, 224 F.3d 995, 1001-02 (9th Cir., 2000) (suggesting that the admission of taped interviews containing police statements challenging the defendant's veracity may also violate the defendant's right to due process), *cert. denied*, 531 U.S. 1148 (2001).

In determining whether such statements are impermissible opinion testimony, courts consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" *State v. Demery*, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001), *quoting Heatley*, 70 Wn.App. at 579.

There are some areas which are clearly inappropriate for opinion testimony in criminal trials, particularly expressions of personal belief,

as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. *Demery*, 144 Wn.2d at 759; *State v. Farr-Lenzini*, 93 Wn.App. 453, 463, 970 P.2d 313 (1999).[2] This is especially true for police officers because their testimony carries an "aura of reliability." *Demery*, 144 Wn.2d at 765. Police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is appropriate, not in determining when there is guilt beyond a reasonable doubt. *See Montgomery*, 163 Wn.2d at 595, *citing* Deon J. Nossel, *Note: the Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 Colum. L.Rev. 231, 244 (1993) ("Once [the expert] had testified as to the likely drug transaction-related significance of each piece of physical evidence, the jury was competent to draw its own conclusion as to [the defendant's] involvement in the distribution of cocaine." (*citing United States v. Boissoneault*, 926 F.2d 230, 233 (2d Cir.1991)).

[2] This rule is grounded in the Rules of Evidence. Testimony that tells the jury which result to reach is likely not helpful to the jury (as required by ER 702), is probably outside the witness's area of expertise (in violation of ER 703), and is likely to be unfairly prejudicial (in violation of ER 403).

b. *Deputy Harvey's opinion regarding the truthfulness of Robbie Speers constituted improper opinion testimony.*

Here, Deputy Harvey opined that, based upon his law enforcement experience, Robbie Speers was telling the truth. 10/21/2014RP 291. This was an improper opinion that invaded the province of the jury. *State v. Kirkman,* 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (police officer's opinion testimony may be especially prejudicial because the "officer's testimony often carries a special aura of reliability.").

The error was compounded when the prosecutor in her closing argument pointed out to the jury that Deputy Harvey's opinion was "evidence that what Robbie Speers says is true." 10/22/2014RP RP 421-22.

Deputy Harvey's conduct was no different from the two police officers who rendered their opinions that a fact witness was telling the truth when he gave a statement to the police. *State v. Wilber,* 55 Wn.App. 294, 298-99, 777 P.2d 36 (1989). The officers testified that they had been given special training to enable them to determine whether or not someone was telling the truth. Over defense objection, the court allowed them to testify that, in their opinion, the witness was telling the truth when he gave his original statement to the police.

Wilber, 55 Wn.App. at 297. While the Court of Appeals found the opinion testimony evidence harmless, the Court nevertheless found the testimony improper. *Id.* at 298-99.

Deputy Harvey's opinion testimony here was improper. This Court should reverse Mr. Thompson's convictions.

c. *The error is manifest and of constitutional magnitude allowing Mr. Thompson to raise the issue despite the lack of an objection.*

In general, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *Kirkman*, 159 Wn.2d at 926. But a party can raise an error for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926. The defendant must show the constitutional error actually affected his rights at trial, thereby demonstrating the actual prejudice that makes an error "manifest" and allows review. *Kirkman*, 159 Wn.2d at 926-27. "If a court determines the claim raises a manifest constitutional error, it may still be subject to the harmless error analysis." *Id.* at 927.

The infringement on the province of the fact-finder suggests an error of constitutional magnitude. *Demery*, 144 Wn.2d at 759. "Admission of witness opinion testimony on an ultimate fact, without

objection, is not automatically reviewable as a 'manifest' constitutional error." *Kirkman*, 159 Wn.2d at 936. But, "an explicit or nearly explicit" opinion on a victim's credibility can constitute manifest error. *Id.* at 936, 155 P.3d 125 (noting, "[r]equiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow").

"Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. *Kirkman*, 159 Wn.2d at 936. Here, such a statement occurred. Deputy Harvey stated that based upon Mr. Speer's emotional and physiological response, he was not making up a story, *ergo*, he was telling the truth. As a consequence, Mr. Thompson may raise the issue for the first time on appeal absent an objection. *Id.* at 938.

d. *The prosecutor committed misconduct in taking advantage of Deputy Harvey's improper testimony.*

Prosecutors represent the State as quasi-judicial officers and they have a "duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the

scales against the accused.'" *State v. Monday,* 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose

interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

It is misconduct for a prosecutor to expresses his or her personal belief as to the truthfulness of a witness. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "Whether a witness has testified truthfully is entirely for the jury to determine." *Id.*

Here, the prosecutor vouched for the truthfulness of Robbie Speers when she argued to the jury that Deputy Harvey had determined that Mr. Speers was telling the truth. This was misconduct and took advantage of the improper opinion testimony of Deputy Harvey.

e. *The error in admitting Deputy Harvey's improper opinion testimony was not a harmless error.*

Since improper opinions on guilt invade the jury's province and thus violate the defendant's constitutional right, courts apply the constitutional harmless error standard to determine if the error was harmless. *State v. Hudson*, 150 Wn.App. 646, 656, 208 P.3d 1236 (2009); *State v. Thach*, 126 Wn.App. 297, 312-13, 106 P.3d 782 (2005). Under this standard it is presumed that the constitutional error was prejudicial, and the State must prove beyond a reasonable doubt

that any reasonable jury would have reached the same result absent the error. *State v. Watt,* 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *Thach,* 126 Wn.App. at 313.

Given the fact the State failed to prove Mr. Thompson had a deadly weapon at the time of the argument between he and Mr. Speers, the credibility of Robbie Speers and Barry Sharpe was critical to the State in attempting to prove Mr. Thompson guilty. The detective's improper opinion regarding Mr. Speers's credibility coupled with the prosecutor's compounding the error in closing argument, claiming Mr. Speers was telling the truth rendered Mr. Thompson's trial patently unfair and must result in reversal of his convictions.

3. **The trial court erred in imposing court costs and attorney's fees without making a finding regarding Mr. Thompson's ability to pay.**

At sentencing, the court imposed LFOs in the amount of $1,400 of which $600 was mandatory fees. CP 170. Instead of a boilerplate finding that Mr. Thompson had the ability to pay, the Judgment and Sentence contained a boilerplate finding that stated: "The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them." CP 170. The court did not check any of the boxes, merely imposing the legal financial

obligations without making an individualized inquiry into Mr. Thompson's ability to pay. 2/27/2015RP 11-12.

a. *The court may impose court costs and fees only after a finding of an ability to pay.*

The allowance and recovery of costs is entirely statutory. *State v. Nolan,* 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." *See also State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015) (citing RCW 10.01.160 and requiring court to make individualized inquiry into defendant's ability to pay). In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs.

Blazina held:

> "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." [citation omitted] To determine the amount and method for paying of costs, "the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." [citation omitted]

Id., *citing* RCW 10.01.160(3) (emphasis in original).

The court here made no such inquiry and under *Blazina*, Mr. Thompson is entitled to a new sentencing hearing.

b. *The trial court failed to make an individualized inquiry into Mr. Thompson's ability to pay the LFOs.*

In *Blazina*, the Supreme Court held that prior to imposing discretionary LFOs, the trial court *must* make an individualized inquiry into the defendant's financial circumstances and his current and future ability to pay. *Blazina*, 182 Wn.2d at 837-38. In addition, the record must reflect this individualized inquiry:

> *Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry*. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including

> restitution, when determining a defendant's ability to pay.

Id. (emphasis added).

Here, the trial court failed to make the individualized inquiry required under 10.01.160. CP 141; 6/5/2015 11-12.

The *Blazina* Court suggested courts use the guidelines listed in GR 34 in assessing an individual's ability to pay LFOs:

> Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Blazina, 182 Wn.2d at 838-39.[3]

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[3] GR 34 states in relevant part:

> (3) An individual who is not represented by a qualified legal services provider (as that term is defined below) or an attorney working in conjunction with a qualified legal services provider shall be determined to be indigent within the meaning of this rule if such person, on the basis of the information presented, establishes that;

Here, there was no inquiry into Mr. Thompson's overall financial status; any outstanding debts, current income, rent obligations, and similar subjects.

In addition, only the $100 victim assessment and the $500 DNA collection fee were mandatory fees that arguably could not be waived. *See State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson*, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory). All of the other fees imposed by the court were discretionary and could have been waived. Yet, the court failed to consider waiving these discretionary costs or even

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> (A) he or she is currently receiving assistance under a needs-based, means-tested assistance program such as the following:
> (i) Federal Temporary Assistance for Needy Families (TANF);
> (ii) State-provided general assistance for unemployable individuals (GA-U or GA-X);
> (iii) Federal Supplemental Security Income (SSI);
> (iv) Federal poverty-related veteran's benefits; or
> (v) Food Stamp Program (FSP); or
> (B) his or her household income is at or below 125 percent of the federal poverty guideline; or
> (C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or
> (D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.

GR 34(a)(3).

consider the impact that imposition of these fees would have on Mr. Thompson as required by *Blazina*.

c. *The remedy for the court's failure to inquire into Mr. Thompson's financial circumstances and make a finding of her ability to pay the LFOs is remand for a new sentencing hearing*.

Where the trial court fails to make an individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand the matter to the trial court for a "new sentence hearing[]." *Blazina*, 182 Wn.2d at 839. This Court should remand Mr. Thompson's matter to the trial court for a new sentencing hearing.

F. CONCLUSION

For the reasons stated, Mr. Thompson asks this Court to reverse his conviction for second degree assault with instructions to dismiss. Mr. Thompson also asks this Court to reverse his convictions and remand for a new trial in light of the impermissible opinion testimony. Further, Mr. Thompson is entitled to a new sentencing hearing because the trial court failed to engage in an individualized assessment of whether he had the present or future ability to pay LFOs. Lastly, should this Court rule against Mr. Thompson, he asks this Court to not order costs on appeal because he is indigent and has been so found for the purpose of this appeal.

DATED this 16th day of December 2015.

Respectfully submitted,

s/Thomas M. Kummerow

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73325-7-I
v.	)	
	)	
DAVID THOMPSON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] RANDALL SUTTON [kcpa@co.kitsap.wa.us] KITSAP COUNTY PROSECUTING ATTORNEY 614 DIVISION ST., MSC 35 PORT ORCHARD, WA 98366-4681	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL
[X] DAVID THOMPSON 919355 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF DECEMBER, 2015.

X_____

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