No. 33575-5-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 14-1-00367-7

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

CHARLES D. COLE,
Defendant/Appellant.

BRIEF OF RESPONDENT

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A. COUNTER-STATEMENT OF ISSUES

1. The State presented sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Cole failed to appear for court on or about October 15, 2014, as charged in Count II.
2. The trial court did not err by excluding irrelevant evidence of Mr. Cole's appearance on other court dates.
3. The trial court did not err by prohibiting defense counsel from arguing during closing irrelevant legal issues that were outside of the jury's instructions.
4. The State did not err during closing argument by arguing facts not in evidence; rather, the State pointed out holes in the defense's affirmative defense to the crime of bail jumping as charged in Count III.
5. Due process does not require that the crime of unlawful possession of a controlled substance contain an element of intent, nor does due process require the crime of bail jumping

to include a stricter *mens rea* than what already exists in statute.

6. The sentencing court did not err by imposing discretionary legal financial obligations because the sentencing court expressly considered Mr. Cole's current or likely future ability to pay.

B. STATEMENT OF THE CASE

On June 23, 2014, Officer Brian Miller observed the defendant, Charles Cole, walking down the street in Wenatchee, Washington. RP 108. Officer Miller recognized Mr. Cole as having an active warrant for his arrest and contacted him. RP 108-09. Officer Miller then arrested Mr. Cole on his warrant and conducted a search incident to arrest. RP 110. During this search, Officer Miller discovered a cigarette pack in a pair of shorts being carried by Mr. Cole, and in that cigarette pack was a meth pipe. RP 110-11. Based on the initial field testing of the residue found in the pipe, the State charged Mr. Cole with one count of unlawful possession of a controlled substance—methamphetamine. CP 2-3.

Officer Miller later sent the pipe to the Washington State Crime Lab for testing. RP 115-16. Mark Zenker, a forensic scientist with the crime lab, tested the residue from the pipe and discovered that it contained methamphetamine. RP 131, 141.

Following charging, Mr. Cole appeared in superior court for a preliminary appearance on June 24, 2015. RP 152-53. At this hearing, the court found probable cause, set bail, entered an order establishing conditions of release, including a requirement that Mr. Cole appear at all hearings scheduled in the matter. RP 153-156; Ex. 24. Mr. Cole also signed this order acknowledging its terms. *Id.*

On September 29, 2014, Mr. Cole appeared in court and received notice of a readiness hearing scheduled for October 15, 2014. RP 186-89. On October 15th, Mr. Cole failed to appear, the court struck the trial date, and issued a warrant for Mr. Cole's arrest. RP 189-90.

On October 20, 2014, Mr. Cole reappeared and the State amended the information to include a count of bail jumping. RP 192-95. Also on that day, Mr. Cole received notice of a new readiness hearing scheduled for December 1, 2014. RP 193; Ex. 13.

On December 1, 2014, Mr. Cole failed to appear for his readiness hearing. RP 159-60. Based on Mr. Cole's nonappearance, the court struck the trial date and issued a warrant for Mr. Cole's arrest. RP 160. Following Mr. Cole's nonappearance, the State filed another amended information adding a second count of bail jumping. RP 162.

Finally, on June 18, 2015, Mr. Cole's charges went to trial. RP 5. Following this two-day trial, the jury returned a verdict of guilty on all three counts and the court continued sentencing to June 24th. At that hearing, the court sentenced Mr. Cole to a standard range sentence of six months, and ran the sentences concurrently. After explicitly considering Mr. Cole's testimony at the earlier trial considering his employment, the court found Mr. Cole to have a current or likely future ability to pay legal financial obligations and imposed several discretionary fees on Mr. Cole. RP 346-47. Mr. Cole thereafter timely appealed to this Court.

C. ARGUMENT

Mr. Cole essentially raises six arguments on appeal. First, he challenges the sufficiency of the evidence on Count II, the first bail

jumping charge. Second, he challenges the exclusion of certain evidence at trial. Third, he challenges the trial court's exclusion of improper defense argument during closing. Fourth, he challenges a portion of the State's closing argument. Fifth, he makes a two-part due process challenge to the crime of unlawful possession of a controlled substance and the crime of bail jumping. Sixth, he challenges the adequacy of the record supporting the sentencing court's imposition of discretionary legal financial obligations (LFOs). The State addresses each of Mr. Cole's arguments in turn.

1. **The State presented sufficient evidence to prove beyond a reasonable doubt the crime of bail jumping as charged in Count II.**

In a challenge to the sufficiency of the evidence, this Court views all the evidence in a light most favorable to the State and then asks whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). "When that evidence is conflicting or is of such a character that reasonable minds may differ, it is a function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to

decide the disputed questions of fact." *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980); *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996).

With respect to Count II, the court instructed the jury that the State needed to prove beyond a reasonable doubt "[t]hat on or about the 15th day of October, 2014, the defendant failed to appear before a court." CP 44 (Instruction No. 12). It is undisputed that Mr. Cole had a readiness hearing on October 15th, that he failed to appear for that hearing, and that the State presented substantial evidence of those facts at trial. At trial, Mr. Cole's former attorney testified as much. RP 213-214 (6/19/15). Mr. Cole testified as much. RP 226-27, 231, 236 (6/19/15). The court records reflected as much. Ex. 8, 10; RP 190 (6/19/15) (testimony of in-court clerk Teisha Brincat).

Despite this undisputed evidence, Mr. Cole argues that the State did not prove that he failed to appear for a hearing on or about October 15th. The thrust of his argument is that the State cannot prove that he failed to appear for the hearing on or about October 15th because he appeared for a hearing on October 16th, which he claims was still on or about October 15th. This argument ultimately

fails because it commits the informal fallacy of being a false dichotomy.

The third option that Mr. Cole ignores is that he had multiple hearing types scheduled within a short period and that attendance at one of those hearing types does not substitute with non-attendance at the other hearing type. The court required Mr. Cole to attend *all* hearings scheduled in his case, not most hearings. Ex. 5 ("The accused shall personally appear in court for all hearing scheduled in this matter.").

While the State acknowledges that October 16th could (under some circumstances) still be considered to be on or about October 15th, all that the court's instructions required was for the State to prove that Mr. Cole failed to appear for a hearing during this time period. The instructions did not require the State to prove that he failed to appear for each and every hearing scheduled during this time period. Importantly, the October 15th hearing was a readiness hearing and the October 16th hearing was a 3.5 hearing.

As explained by Ms. Boeggeman during the trial, there is no substitute for the defendant's attendance at the readiness hearing.

RP 160 (6/18/15). When a defendant misses a readiness hearing, his trial date is struck and passed on to another defendant who is waiting to exercise his or her right to a speedy trial. When no defendant is ready to step into that trial date, the court needs to know that in a timely fashion in order to not waste limited resources bringing in a jury and the jurors need to know to not schedule time off from work.

Accordingly, Mr. Cole's argument with respect the sufficiency of the evidence on Count II lacks merit, and this Court should affirm the conviction.

2. The trial court did not deprive Mr. Cole of a fair trial by excluding irrelevant evidence of his appearance at other court dates.

Mr. Cole argues that the exclusion of certain evidence violated his Sixth Amendment right to a fair trial. To begin with, "the Sixth Amendment does not transform all evidentiary errors into errors of constitutional magnitude." *State v. Barry*, 183 Wn.2d 297, 301, 352 P.3d 161 (2015). The proper framework from which to review this issue is as a typical evidentiary ruling, which this court reviews for abuse of discretion. *State v. Guloy*, 104 Wn.2d 412,

429-30, 705 P.2d 1182 (1985) (reviewing the trial judge's rulings on admissibility for abuse of discretion).

A trial court abuses its discretion when its decision "is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "However, even if the trial court abuses its discretion, in order for the error to be reversible, the appellant must demonstrate prejudice." *Portch v. Sommerville*, 113 Wn. App. 807, 810, 55 P.3d 661 (2002). In this context, "[a]n erroneous [evidentiary] ruling is not reversible error unless the court determines that, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Wilson*, 144 Wn. App. 166, 178, 181 P.3d 887 (2008).

Coming to Mr. Cole's issue, he argues that evidence of his attendance at prior court hearings was relevant to prove the defense of "accident." App. Br. at 11 (discussing *State v. Olsen*, 175 Wn. App. 269, 309 P.3d 518 (2013). "As the proponent of the evidence, the defendant bears the burden of establishing relevance and

materiality." *State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015). "'Relevant evidence' means 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." ER 401. "All relevant evidence is admissible." ER 402.

Mr. Cole's argument fails because accidentally forgetting to come to court is not a defense to the crime of bail jumping. In *Carver*, the Court of Appeals held as much, saying: "we expressly hold . . . that 'I forgot' is not a defense to the crime of bail jumping." *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). Without any basis for distinguishing *Carver*, Mr. Cole's proffered evidence lacked all tendency to make the existence or nonexistence of any fact of consequence (i.e. any element of the crime charged) more or less probable. Accordingly, his argument lacks merit.

Importantly, the trial court did not exclude all evidence of Mr. Cole's appearance at other court hearings. The court still permitted him to introduce evidence of his reappearances after the two bail jumping dates because those were the only appearances that had any

relevance to the affirmative defense claim. RP 205-211, 227-235 (defense evidence about October 16th, October 20th, and December 3rd court dates).

Mr. Cole also claims—for the first time on appeal—that evidence of attendance at his other court hearings was relevant to prove his credibility. The only reason given by counsel at trial was to show a lack of knowledge or intent, not to bolster Mr. Cole's credibility. RP 234. Accordingly, this argument is not properly before the court. RAP 2.5(a).

Even if the court does review the argument, Mr. Cole has failed to establish a rational relationship between showing up at court and having a character for truthfulness. As a society, we do not call a person "honest" just because they show up to work every day; we might call them a hard worker, but that is it. The only way in which the State can conceive of this evidence being relevant to a person's character for truthfulness is if there had been an allegation that he had lied about attending one of those other court hearings, but such an allegation was never made. Even then, the link would be so tenuous that Mr. Cole could not hope to establish prejudice.

Furthermore, the evidence was still inadmissible to prove character under ER 405 and ER 608. Mr. Cole's evidence of truthfulness would have to be proved by evidence of reputation—not specific instances of showing up to court; only the State on cross examination could raise specific instances of conduct. *Id.*

Without any other alternative bases for admitting the proffered evidence, the trial court did not err in excluding the evidence as irrelevant. Accordingly, this Court should affirm Mr. Cole's convictions.

3. The trial court did not deprive Mr. Cole of a fair trial by not permitting defense counsel to introduce misleading evidence about the burden of proof.

"This court reviews a trial court's action limiting the scope of closing argument for abuse of discretion." *State v. Frost*, 160 Wn.2d 765, 771, 161 P.3d 361 (2007), aff'd *Glebe v. Frost*, __ U.S. __, 135 S. Ct. 429, 430-31, 190 L. Ed. 2d 317 (2014). Although Mr. Cole argues this issue under the banner of his Sixth Amendment right to a fair trial, reviewing courts have typically reviewed it under the banner of the defendant's Sixth Amendment right to counsel. *Frost*, 160 Wn.2d at 773.

In deciding whether the trial court abused its discretion, this Court must be mindful of the latitude that must be afforded to defense counsel in making a closing argument. However, that latitude is not altogether unfettered. "It is well established that trial courts possess broad discretionary powers over the scope of counsel's closing arguments." *Frost*, 160 Wn.2d at 771-72. "This court has emphasized that 'the trial court should in all cases . . . restrict the argument of counsel to the facts in evidence.'" *Id.* at 772, quoting *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). "'Counsel's statements also must be confined to the law as set forth in the instructions to the jury.'" *Id*; *State v. Woolfolk*, 95 Wn. App. 541, 548, 977 P.2d 1 (1999) (citations omitted) ("Statements by counsel to the jury on the law must be confined to the law as set forth in the instructions of the court. But counsel are granted more latitude in their discussion of the facts of the case."); *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972) ("It is the rule in this state that statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions of the court.").

Based on this criteria, this Court cannot say that the trial court erred. All that the trial court excluded was an attempt by counsel to bring up the clear, cogent, and convincing burden of proof. RP 307-08. The burden of proof that applies and what that burden means is a matter of law—not fact. Accordingly, the court's limitation was not subject to the wide latitude that it is supposed to give counsel when arguing the facts and how those facts fit the defendant's theory of the case. To the contrary, the cases previously cited unequivocally state that both the prosecution and the defense must confine their argument to the law *as set forth in the instructions*.

In this case, Mr. Cole did not request an instruction defining "clear, cogent, and convincing evidence." Accordingly, Mr. Cole's attempt to discuss and define that intermediate burden of proof did not comply with the requirement to confine his arguments about the law to the instructions of the court.

Mr. Cole tries to say that the jurors had some inkling about this intermediate burden of proof because of what is written in the Jurors' Handbook to Washington Courts. This argument fails (1) because the handbook is not a part of the court's instructions to the

jury, (2) because there is no evidence that the jurors even received or read the handbook, and (3) because the handbook does not mention the intermediate burden of proof.

Assuming, *arguendo*, that the trial court abused its discretion, this Court should hold the error harmless. "This court has adopted the overwhelming untainted evidence test as the proper standard for harmless error analysis in Washington." *Frost*, 160 Wn.2d at 782 (citations and quotations omitted). "Under the overwhelming untainted evidence test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id.* "A finding of harmless error requires proof beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *Id.* "Here, the trial court's action did not taint the evidence before the jury in any way, as counsel's argument is not evidence." *Id.* (emphasis added). "The fact the jury was properly instructed on the State's burden of proof in general . . . supports the conclusion that the trial court's error was harmless." *Id.* at 371. Because the harmless error analysis from *Frost* unequivocally

applies to this case, this Court cannot say that the outcome of the trial could have been different had counsel been able to discuss the non-instructed intermediate burden of proof; this is especially so considering that the court's instructions on the law were accurate and counsel was able to argue his entire theory of the case without discussing the irrelevant and non-applicable intermediate burden of proof. *See generally* RP 305-319 (defense counsel's closing argument).

Because the trial court did not err, this Court should affirm Mr. Cole's convictions. If the trial court did err, this Court should hold the error harmless.

4. The State did not err in closing argument by pointing out a lack of facts that a reasonable juror might want to consider when deciding whether the defendant had met his burden of proof with regard to his affirmative defense.

"A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). "In determining whether prosecutorial misconduct occurred, we first evaluate whether the prosecuting attorney's comments were improper." *Id.* "If the

prosecuting attorney's statements were improper, and the defendant made a proper objection to the statements, then we consider whether the statements prejudiced the jury." *Id.* "Prejudice is established only where there is a substantial likelihood the instance of misconduct affected the jury's verdict." *Id.*

"Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice." *Id.* "We review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given." *Id.* "A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *Id.* at 595.

Here, trial counsel did not object to the portion of the State's closing argument, which Mr. Cole now challenges for the first time on appeal. Accordingly, Mr. Cole must establish that any prosecutorial error was both "flagrant and ill-intentioned" and

prejudicial. Because Mr. Cole does not cite to the proper legal standard and does not make any argument from the proper legal standard, he fails to sustain *his burden* on appeal. Accordingly, this Court should decline to review the claimed error. *Alexander v. Gonser*, 42 Wn. App. 234, 236 fn. 2, 711 P.2d 347 (1983) ("A reviewing court will not consider an issue in the absence of argument and citation of authority."), citing *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 29, 593 P.2d 156 (1979).

In the event that this Court does review the issue, this Court cannot say that the State erred. "[I]n the context of the total argument," the challenged portion relates only to Mr. Cole's burden of proving his affirmative defense by a preponderance of the evidence; by raising this particular affirmative defense, Mr. Cole had the burden of proving that he did not recklessly contribute to his non-appearance. RCW 9A.76.170(2). Reviewing the State's argument as a whole, including the rebuttal argument, it is clear that what the State was doing was pointing out evidence that a reasonable juror might have wanted hear about when weighing whether Mr.

Cole had satisfied *his burden of proof* with regard to proving that he did not recklessly contribute to his nonappearance. RP 300-01, 319-20.

Even when the defendant does not have a burden of proof, case law still clearly permits the State to point out holes in the defendant's theory of the case:

> While defendants are not obligated to produce any evidence, a prosecutor is allowed to comment on a defendant's failure to support her own factual theories: 'When a defendant advances a theory exculpating [her], the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence.'

State v. Vassar, 188 Wn. App. 251, 260, 352 P.3d 856 (2015), quoting *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). This holds truer in this case where the defendant actually did have a burden of producing evidence to support his affirmative defense.

Finally, in the event that any error occurred, Mr. Cole cannot satisfy his burden of proving prejudice. Defense counsel and the jury instructions both reminded the jury that the attorneys' closing arguments were not evidence and to disregard any argument not

supported by the facts admitted into evidence. RP 305-06; CP 32 (Instruction 1). Furthermore, no prejudice can be established because the challenged portion of the State's argument was conditional on the jury believing Mr. Cole. RP 301. The State's overall argument was that Mr. Cole could not establish his affirmative defense because it was predicated on lies he told to the jury. RP 301-04. Reviewing the result of this trial, this Court can easily infer that the jury did not believe a word Mr. Cole said. Had they done so, they would have acquitted on the meth charge based on the affirmative defense of unwitting possession.

Because Mr. Cole has not properly raised this issue before this Court, because the State's argument was not flagrant and ill intentioned, and because the State's argument did not prejudice Mr. Cole in any way, this court should affirm Mr. Cole's conviction on Count III.

5. Mr. Cole has failed to prove that the crimes of bail jumping and unlawful possession of a controlled substance violate constitutional due process requirements, either facially, or as applied.

This court generally reviews constitutional errors, including violations of a defendant's due process[1] rights, de novo. *Wash. Independent Telephone Ass'n v. Wash. Utilities and Transp. Com'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003) (holding that an alleged denial of due process is reviewed de novo); *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006) (same).

Although Mr. Cole did not challenge the constitutionality of these statutes below, he may do so for the first time on appeal. *State v. Rice*, 174 Wn.2d 884, 893, 279 P.3d 849 (2012). However, Mr. Cole bears a heavy burden with regard to trying to strike down these statutes: "A statute is presumed constitutional and the party challenging the constitutionality of a legislative enactment has the burden of proving [its unconstitutionality]." *State v. Maciolek*, 101 Wn.2d 259, 263, 676 P.2d 996 (1984).

With regard to the crime of unlawful possession of a controlled substance, Mr. Cole argues that the Constitution requires

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[1] Mr. Cole raises his argument under both the Fourteenth Amendment and Washington's Article I, § 3. Washington, however, interprets its due process clause in lock-step with the due process clause of the Fourteenth Amendment. *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

imposition of a *mens rea* element. However, Mr. Cole ignores the fact that the Washington State Supreme Court has unequivocally held that neither knowledge, nor intent, are required elements of the crime of simple possession. *State v. Cleppe*, 96 Wn.2d 373, 378, 635 P.2d 435 (1981); *State v. Bradshaw*, 152 Wn.2d 528, 530, 98 P.3d 1190 (2004) (reaffirming *Cleppe*). Notably, when the Supreme Court reaffirmed *Cleppe* in *Bradshaw*, it did so in spite of a claim similar to the one here that the possession statute unconstitutionally shifted the burden of proof to the defendant. *Bradshaw*, 152 Wn.2d at 534, 537-38. Unless and until the Supreme Court changes its opinion, this Court is bound to uphold the law as it has existed for more than thirty years. *State v. Gore*, 101 Wn.2d 481, 486-487, 681 P.2d 227 (1984); *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006).

Putting aside *Cleppe* and *Bradshaw*, Mr. Cole also turns a blind eye to over 90 years of United States Supreme Court precedent. Most importantly, Mr. Cole ignores the case of *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922). In *Balint*, the Supreme Court had to decide whether the Narcotic Act of

1914 was unconstitutional because it did not require proof that the defendant knew the substance he had was an inhibited drug. *Balint*, 258 U.S. at 251. Writing for the unanimous Court, Chief Justice Taft held:

> Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferable to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion. We think the demurrer to the indictment should have been overruled.

Id. at 254. Thirty years later, the Supreme Court took up the issue again in *Morissette* and both reaffirmed and distinguished *Balint* based on the character of the crimes at issue as either traditional common law crimes requiring a *mens rea* or modern statutory crimes that do not require a *mens rea* in every circumstance. *Morissette v. United States*, 342 U.S. 246, 260, 96 L. Ed. 288, 72 S. Ct. 240 (1952) ("The conclusion reached in the *Balint* and *Behrman* cases

has our approval and adherence for the circumstances to which it was there applied.").

Because Mr. Cole failed to even cite *Cleppe*, *Bradshaw*, *Balint*, and *Morissette* and explain how a now overruled U.S. District Court case in Florida can overrule decades of case law from the Washington State Supreme Court and the United States Supreme Court, this Court cannot say that Mr. Cole has satisfied his burden of proving RCW 69.50.401 unconstitutional beyond a reasonable doubt. Accordingly, this Court should decline to review Mr. Cole's claimed error as not adequately briefed and as not within this Court's purview under *Gore*. *See also In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (The Supreme Court will abandon precedent only if it is clearly shown to be incorrect and harmful.).

If this Court does review the issue, it should adhere to the precedent established by Division II late last year in *State v. Schmeling*, No. 46218-4-II, slip op. at 5-7 (2015) (holding that RCW 69.50.4013 does not violate due process by not requiring a culpable mental state).

Regarding the crime of bail jumping, Mr. Cole argues that it too violates due process principles because it punishes an unintentional failure to appear in court. Despite Mr. Cole's claims, the crimes of bail jumping and simple possession are not similarly situated. Unlike possession, bail jumping is not a strict liability crime. A *mens rea* element already exists, requiring the State to prove that the defendant knew or should have known about his court date: "the State must prove [that the defendant] was given notice of his court date." *Carver*, 122 Wn. App. at 306; RCW 9A.76.170(1) ("with knowledge of the requirement of a subsequent personal appearance"). Given that there is already a *mens rea* element, Mr. Cole's argument in the preceding portions of his brief has no applicability to the question here of whether the State should instead be required to prove guilty intent, as opposed to guilty knowledge. Given that Mr. Cole fails to cite to any authority or make any argument as to under what circumstances due process requires intent, as opposed to merely knowledge, this Court should decline to review his argument as another naked casting into the constitutional sea. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)

("[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.").

Finally, Mr. Cole argues that the bail jumping statute violates due process principles because the affirmative defense requires him to negate an element of the crime, meaning that it requires the defendant to prove his innocence. If that were true, the bail jumping convictions would have to be reversed. *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014) ("when a defense necessarily negates an element of an offense, it is *not* a true affirmative defense, and the legislature may not allocate to the defendant the burden of proving the defense") (emphasis in original). However, Mr. Cole fails to identify or explain which particular element of RCW 9A.76.170(1) is negated by RCW 9A.76.170(2).

Moreover, a plain reading of the two unambiguous subsections shows that Mr. Cole is wrong. Bail jumping requires proof that the defendant (1) was admitted to bail or personal recognizance, (2) had knowledge of a requirement of a subsequent personal appearance, and (3) failed to appear as required. RCW 9A.76.170(1). On the other end, the affirmative defense requires

proof (1) of an uncontrollable circumstance that prevented the appearance and (2) the defendant did not recklessly create/contribute to the uncontrollable circumstance. RCW 9A.76.170(2). Even if uncontrollable circumstances prevented Mr. Cole from appearing, the fact is that he still failed to appear, he still had knowledge of a subsequent personal appearance, and he was still admitted to bail/personal recognizance—said another way, none of the elements of bail jumping are negated by proof of the affirmative defense's elements. There is simply nothing in RCW 9A.76.170(2) that would require Mr. Cole to disprove any element of RCW 9A.76.170(1). All that RCW 9A.76.170(2) does is excuse conduct that would otherwise be punishable, which has, time and again, been held to not violate due process principles. *W.R.*, 181 Wn.2d at 762. Accordingly, this Court should affirm Mr. Cole's convictions.

6. The sentencing court had ample evidence from which to find that Mr. Cole had the likely future ability to pay discretionary legal financial obligations.

Finally, Mr. Cole challenges the imposition of discretionary LFOs by the sentencing court. The court should decline to review this issue because trial counsel failed to preserve the issue for appeal

by not objecting to the imposition of the discretionary LFOs. RP 347 (court's imposition of LFOs); RAP 2.5(a).

If the Court chooses to review this issue, the Court should be aware that only $1,050 of the $1,850 in LFOs imposed by the court were discretionary. The $500 victim assessment, $200 criminal filing fee, and $100 DNA collection fee were all mandatory, and therefore are not subject to the defendant's challenge. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013); *State v. Stoddard*, No. 32756-6-III, slip op. at 3 (2016). Accordingly, the only fees at issue here are the following: $250 jury demand fee, $450 public defender fee, $100 crime lab fee, and $250 drug enforcement fund cost.

When imposing discretionary LFOs, "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." *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Here, the court did more than just sign a boilerplate statement in the judgment and sentence. During sentencing, the court expressly considered Mr. Cole's ability to work on the record when making its finding. RP 347. Specifically, the court noted Mr. Cole's testimony at trial about his work. During the trial, Mr. Cole testified that he worked recovering timber under a grant with the Forest Service. RP 220 (6/19/15) (Testimony of Charles Cole). He also testified that he is a 46 year old, honorably discharged veteran who served in the first Gulf War. RP 219-220.

On appeal, Mr. Cole's counsel characterizes his work as an indigent collecting scraps of firewood to sell in town, but that image of Mr. Cole does not square with the image he presented at trial of a person who is working under a grant program with the federal government and who is an able-bodied honorably discharged veteran. Although this Court cannot physically see Mr. Cole, the court can infer—just as the lower court did—from Mr. Cole's history and the physically demanding line of work that he does that he has training and skills that will be transferrable to other job types after being released from incarceration (e.g. construction,

contracting, roofing, landscaping, timber recovery, etc.). The fact that the sentencing court did not orally go over every minute detail of Mr. Cole's resume should not be a prerequisite for a court to find that someone is an able-bodied employable individual who will, in the future, have the ability to pay LFOs.

To hold otherwise would effectively overrule the Supreme Court's decision in *Curry*, which held that "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Importantly, the Supreme Court had the opportunity to overrule *Curry* last year with *Blazina*, but chose not to.

Furthermore, to hold otherwise would be for this court to substitute its judgment for that of the lower court on a matter of discretion. Typically LFO challenges are reversed as a matter of law because the sentencing court did not expressly consider the defendant's current or likely future ability to pay. But, when faced with the situation here of a court that expressly considered the matter and a defendant who simply disagrees with the court's assessment,

the issue becomes a matter of discretion for the lower court. Accordingly, this Court should affirm the lower court's imposition of discretionary LFOs in this case as meeting the minimum requirements established by statute.

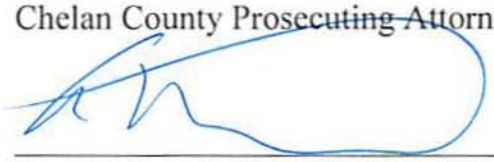
D. CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests this Court affirm Mr. Cole's convictions and the sentencing court's imposition of discretionary LFOs.

DATED this 15th day of January, 2016.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. CHARLES D. COLE, Defendant/Appellant.	No. 33575-5-III Superior Court No. 14-1-00367-7 DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 15th day of January, 2016, I electronically transmitted to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
500 N. Cedar Street
Spokane, WA 99201

AND deposited in the United States Mail properly stamped and addressed envelopes directed to:

Thomas M. Kummerow
Washington Appellate Project
1511 3rd Avenue, Ste. 701
Seattle, WA 98101-3647

Charles D. Cole #985772
300 River Street
Cashmere, WA 98815

said electronic transmission and envelopes containing true and correct copies of Brief of Respondent.

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PROSECUTING ATTORNEY
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Wenatchee, WA 98807
(509) 667-6202

Signed at Wenatchee, Washington, this 15th day of January, 2016.

Cindy Dietz

Cindy Dietz
Legal Administrative Supervisor
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