Supreme Court No.: 94396-6
Court of Appeals No.: 33909-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS LIMPERT,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Nicholas Limpert, appellant below, requests this Court grant review of the Court of Appeals decision in *State v. Limpert*, No. 33909-2-III, filed March 21, 2017. RAP 13.4(b). A copy is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review because the trial court's admission of Desarae Dawson's statements to law enforcement, which directly implicated Nicholas Limpert, and where Ms. Dawson did not testify, violated Mr. Limpert's constitutional right to confront witnesses? RAP 13.4(b)(1), (2), (3).

2. While the trial court recognized Mr. Limpert was indigent, the court imposed legal financial obligations (LFOs) without considering his inability to pay and the Court of Appeals affirmed. Should this Court grant review to consider whether any LFOs can be imposed without consideration of ability to pay. RAP 13.4(b)(1) & (4).

3. Whether the Court should grant review of the sufficiency of the evidence in light of the jury's verdict? RAP 13.4(b)(1), (4).

4. Whether the Court should grant review in the public interest where the trial court imposed consecutive sentences despite Mr.

Limpert's understanding that concurrent sentences would be imposed? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Makelle Hamilton, an admitted addict, claimed she was not paid the full amount for her boyfriend's Suboxone pills,[1] which she was illegally selling. RP 245-51. She arranged for the sale through her ex-boyfriend, Brenden McCullough. RP 251-52. Ms. Hamilton claimed she let Mr. McCullough into the motel room in which she was staying, gave him the pills, and he gave her insufficient funds and a cell phone as collateral. RP 252-53, 269, 281-82. Ms. Hamilton claimed Mr. McCullough told her an individual named Desarae Dawson was in the parking lot, she wanted to buy the pills, and he would bring up the rest of the money after Ms. Dawson received them. RP 253.

Ms. Hamilton claims that Michelle Pearson came into her room after Mr. McCullough left, trying to get the phone back. RP 255-56, 270-73. However, Ms. Hamilton said she refused to return the phone until she had all the money. *Id.* Ms. Hamilton did not remember how

[1] Suboxone is an opiate blocker that can be used as a replacement for heroin or to achieve "a high if you don't do heroin." RP 247-48.

many pills she was selling, but vaguely remembered the price as $300. RP 250, 268-69.

Next, Makelle Hamilton claims Nicholas Limpert and Ms. Dawson came into her motel room asking for the cell phone back. RP 256, 273-74. Ms. Hamilton could not remember who let them into the room, but she was not going to give the phone back to anyone but Mr. McCullough. RP 256, 270-74. Ms. Hamilton's brother, Patrick, who was also in the room, vouched for Ms. Limpert and Mr. Dawson and left to find Mr. McCullough and have everything resolved. RP 257-58, 273. Ms. Hamilton claims while she was alone with Mr. Limpert and Ms. Dawson, Mr. Limpert pulled out a knife then put it away and started choking her. RP 258, 262-63, 289. According to Ms. Hamilton, after her brother returned, they all became friendly and Mr. Limpert offered to help get the rest of the money or her boyfriend's pills back. RP 259-60, 262-63. She gave them the phone and wrote her name and number down so that they could reach her. RP 276-77, 293-94.

Ms. Hamilton admitted the incident was "a blur." RP 260; *see* RP 250-51 (she was using heroin and methamphetamine at the time), 267 (she was high when she arranged for sale), 285 (she was using pain medications and heroin but not methamphetamine). She testified she

was staying in the motel because she was otherwise homeless, but four days later law enforcement met with her in her apartment. *Compare* RP 244-45 *with* RP 263-64, 357. And although the State agreed not to charge Ms. Hamilton with selling controlled substances if she testified and cooperated, she was a reluctant witness, who did not appear for trial on several occasions. RP 8-12, 17-18, 25-31, 33-51, 55-70, 266-67, 291.

Additional evidence called into question Makelle Hamilton's credibility. For example, she testified that she never talked to her friend Zacariah Tesch about this incident. RP 279. Yet, Mr. Tesch testified that Ms. Hamilton told him a month after the incident that Mr. Limpert never assaulted her. RP 363-67. Ms. Hamilton also claimed not to know a Randall Smeltzer or Renee Palmer, but Mr. Smeltzer testified they were friends and Ms. Hamilton told him no assault occurred. RP 280-81, 371-75.

Patrick Hamilton, Makelle's brother, testified he had no recollection of the day as he was "heavy into heroin and opiates" and took some pills provided by his sister. RP 298-302. *But see* RP 317-23 (Patrick approached police and directed them to sister's motel).

Michelle Pearson testified that she and Ms. Hamilton got into a physical altercation when Ms. Pearson went into the motel room to get her cell phone. RP 379, 382-87. Ms. Pearson also testified that Mr. Limpert and Ms. Dawson were not involved in the planning of the drug purchase. RP 388-89.

Based on Makelle Hamilton's account and Ms. Dawson's and Mr. Limpert's statements to law enforcement following arrest, the State charged Mr. Limpert with conspiracy, robbery and attempted assault. CP 1-2; RP 327-37, 344 (Limpert denied assaulting Makelle Hamilton). Ms. Dawson was also charged with conspiracy and robbery, but the State did not charge Mr. McCullough with any crimes. The jury acquitted Mr. Limpert and Ms. Dawson of first-degree robbery and conspiracy to commit first-degree robbery. CP 1-2, 112, 114; RP 460-61. However, Mr. Limpert was convicted of attempted assault in the second-degree with intent to commit the felony of robbery. CP 1-2, 113.

The Court of Appeals affirmed in an unpublished opinion. Appendix.

D. ARGUMENT IN SUPPORT OF GRANTING REVIEW

1. Mr. Limpert's constitutional right to confront witnesses was violated when his codefendant's out-of-court statements implicating Mr. Limpert were admitted at trial without testimony from the codefendant.

A criminal defendant is denied the right of confrontation under the Sixth Amendment to the United States Constitution and article I, section 22 when a nontestifying codefendant's confession that names the defendant as a participant in the crime is admitted at a joint trial, even where the court instructs the jury to consider the confession only against his codefendant. *Bruton v. United States,* 391 U.S. 123, 135-36, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The *Bruton* Court recognized the "powerfully incriminating" effect of the extrajudicial statements of a codefendant "who stands accused side-by-side with the defendant." *Id.*

At trial, Officer Tofsrud testified about statements Ms. Dawson made to him hours after the alleged crimes. RP 334-37. The officer's testimony included statements that facially incriminated Mr. Limpert. *See State v. Fisher*, 185 Wn.2d 836, 842, 374 P.3d 1185 (2016) (confrontation problem arises when nontestifying codefendant's statements facially incriminate defendant). The jury learned Ms.

Dawson reported she heard the complaining witness say "He just pulled a knife." RP 334-35. This statement directly implicated Mr. Limpert because he was the only male reportedly in the room at the time and the only one accused of possessing a knife. RP 257-58, 288-89; CP 1-2.

Officer Tofsrud further testified that Ms. Dawson told him she understood that "they" were "going after . . . a phone that the victim would not return." RP 335. "They" referred to her alleged coconspirator, Mr. Limpert.

The statements were not redacted in any way to eliminate reference to Mr. Limpert. Rather, the statements directly implicated him. *See Fisher*, 185 Wn.2d at 842-48 (redactions are sufficient only if they eliminate references to defendant's name and existence). His codefendant, Ms. Dawson, did not testify. Therefore, the admission of these statements violated Mr. Limpert's constitutional confrontation rights.

The Court of Appeals held Mr. Limpert could not raise this issue for the first time on appeal. Appendix (Slip Op. at 7-8). But as the Court acknowledged, the error is plainly constitutional. *Id.* Further, this Court should review the issue and determine the error is

manifest and can be raised for the first time on appeal. *See* Appendix (Slip Op. at 7 & n.5).

Upon review, it is also clear the error was prejudicial. The State has the burden of demonstrating beyond a reasonable doubt that a confrontation violation did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Coristine,* 177 Wn.2d 370, 380, 300 P.3d 400 (2013). "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The remedy for a violation of the Confrontation Clause is reversal and remand for a new trial. *Gray v. Maryland,* 523 U.S. 185, 197, 118 S. Ct. 1151, 140 L. Ed. 294 (1998).

Here, the untainted evidence was far from overwhelming. *See Fisher*, 185 Wn.2d at 848. The complaining witness, Makelle Hamilton's, credibility was severely tarnished. She testified only under agreement not to be prosecuted for selling her boyfriend's prescription medication. RP 266-67, 291. She is a recovering drug addict and was admittedly using at least heroin at the time the incidents purportedly

occurred. RP 246, 250-51 (she was using heroin and methamphetamine at the time), 267 (she was high when she arranged for sale), 285 (she was using pain medications and heroin but not methamphetamine).

Specific portions of Makelle Hamilton's testimony were inconsistent. *Compare* RP 244-45 *with* RP 263-64, 357 (inconsistent bases for hotel stay); RP 279, 363-67 (inconsistent testimony about contact with a third party); RP 280-81, 371-75 (same).

Showing the doubtfulness of the State's case, the jury acquitted Mr. Limpert and Ms. Dawson of the robbery and conspiracy charges. During deliberations, the jury also questioned whether the cell phone could form the basis for a robbery. CP 108-11 (jury question and response). Yet, Ms. Dawson's statements implicating Mr. Limpert regarded the count for which he was convicted—attempted assault. Thus, the admission of Ms. Dawson's statements that they went into the hotel room to get the cell phone (intent to rob) and that Ms. Hamilton said Mr. Limpert pulled a knife (attempted assault) was not harmless as to attempted assault in the second degree. RP 334-35.

The Court should grant review to examine the confrontation clause violation, which the Court of Appeals denied.

2. This Court should review the prosecutor's misconduct, which occurred when he analogized this case to O.J. Simpson's highly-publicized, out-of-state robbery where the facts of that case were not in evidence at Mr. Limpert's trial.

As this Court has held, every prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and "to act impartially in the interest only of justice." *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *accord State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). Prosecutors must ensure justice is done and the accused receive a fair and impartial trial. *E.g.*, *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

A "prosecutor's duty is to ensure a verdict free of prejudice and based on reason." *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). Yet here the prosecutor relied on inflammatory argument to secure a conviction. He likened the case against Mr. Limpert to the successful armed robbery conviction of O.J. Simpson. The prosecutor argued,

> Please take a look at Instruction No. 15 when you get it. That's the definition for robbery and it talks about how the taking of personal property off of the person of another by use of force, threat of force, intimidation,

> that's a robbery. A great example is O.J. Simpson. He's in prison in Nevada right now for going into a motel room –

RP 420-21. The argument was cut off by Mr. Limpert's objection. RP 421. The court allowed the State to finish its analogy, but the prosecutor continued with the facts of this case. RP 421.

O.J. Simpson's criminal cases have been among the most widely followed and storied in recent American popular culture.[2] His acquittal for the murder of his ex-wife and her friend and subsequent conviction for armed robbery and kidnapping invoke intense emotions about the criminal justice system, celebrities and race in our country.[3] The prosecutor's attempt to liken Mr. Limpert's case to O.J. Simpson's sought to play on the jury's passions and prejudices.

The argument is improper also because it relies on facts not in evidence. *Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). The

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[2] *E.g.*, Francis McCabe, "O.J. Simpson appeal denied by Nevada Supreme Court," Las Vegas Review-Journal (Oct. 22, 2010), *available at* http://www.reviewjournal.com/news/oj-simpson-appeal-denied-nevada-supreme-court; John C. Meringolo, The Media, the Jury and the High-Profile Defendant: A Defense Perspective on the Media Circus, 55 N.Y.L. School L. Rev. 981 (2010/2011).

[3] *E.g.*, *id.*; Earl Ofari Hutchinson, More Than a Sentence for O.J. Simpson," The Huffington Post (Dec. 4, 2008), *available at* http://www.huffingtonpost.com/earl-ofari-hutchinson/more-than-a-sentence-for_b_148418.html.

jury received no evidence about O.J.'s Simpson's trial or conviction. The jury had no basis on which to compare Mr. Limpert's case to O.J. Simpson's. Presumably, the State did not want the jury to conduct a rational evaluation, however; the State used the analogy to pique the jury's emotional rancor. For this reason, the argument was improper.

Because the trial court overruled Mr. Limpert's objection the jury was free to use this emotional basis to convict Mr. Limpert. This Court should review the matter, regardless of its affect, because the lower courts remain unfamiliar with the law in this area. *See* RP 421 (overruling objection); Appendix (slip op. at 11-12) (deciding only that error, if any, was harmless). Further, the admission was not harmless in light of the weaknesses in the State's case: a largely incredible complaining witness, defense evidence that directly challenged with the State's case, and acquittals on the robbery and conspiracy charges.

3. This Court should grant review and strike the legal financial obligations because Mr. Limpert lacks the ability to pay.

At sentencing, the court imposed a $500 victim assessment; a $100 DNA collection fee, a $200 criminal filing fee, and a $100 DNA fee. CP 135. These fees bear interest at the 12 percent statutory interest rate. CP 136. The court stated at sentencing that it does not

"believe in" fines and costs, but was imposing the victim impact fee, court costs, and DNA fee. RP 489. The court noted, "I have to impose them even though they've been imposed on Mr. Limpert multiple times before." *Id.*[4]

Our legislature mandates 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). This means "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); *accord State v. Duncan*, 185 Wn.2d 430, 185 Wn.2d 430 (2016) (remanding to trial court for resentencing with "proper consideration" of defendant's ability to pay).

The Court should grant review and hold that *Blazina* applies to all LFOs, even those that have been proclaimed to be "mandatory."

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[4] The judgment contains a boilerplate statement that Mr. Limpert has the ability to pay. CP 131. But that finding was not discussed and lacks support. On the same day, the trial court found Mr. Limpert indigent for purposes of appeal. CP __ (Sub # 113, 114). The presumption of indigency continues on appeal. RAP 15.2(f). Mr. Limpert's continued indigency is further supported by the attached Report as to Continued Indigency. Appendix; *see* Court of Appeals, Div. III, In re the Matter of Court Administration Order re: Request to Deny Cost Award (Jun. 10, 2016).

As the Court recognized in *Blazina*, regardless of the type, 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." *Blazina*, 182 Wn.2d at 835. LFOs accrue interest at a rate of 12 percent and can accrue collections fees; on average 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. 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. *Blazina*, 182 Wn.2d at 837; *Duncan*, 185 Wn.2d 430 (recognizing the "ample and increasing evidence that unpayable LFOs 'imposed against indigent defendants' imposed significant burdens on offenders and our community" (quoting *Blazina*, 182 Wn.2d at 835-37)).

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.

Further, it proves a detriment to society by increasing hardship and recidivism. *Blazina*, 182 Wn.2d at 837.

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(2)(h) (convicted criminal defendants "shall be liable" for a $200 fee); *State v. Lundy,* 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(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.

It would be particularly problematic to require Mr. Limpert to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants. *Cf. Blazina*, 182 Wn.2d at 857 (noting significant disparities in administration of LFOs across counties). This means that at worst, 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*, 183 Wn.2d at 712 ("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 same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties); RCW 9.94A.010(3) (stating that a sentence should "[b]e commensurate with the punishment imposed on others committing similar offenses").

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. *See Jafar,* 177 Wn.2d at 528-29; *Blazina*, 182 Wn.2d at 857.

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.

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). The government certainly has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like him 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.[5]

[5] The other divisions have recently held that despite the equal hardships imposed by "mandatory" and "discretionary" LFOs, the above statutory interpretation and constitutional grounds were insufficient to reverse the imposition of "mandatory fees." *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016); *State v. Lewis*, 194 Wn. App. 709, 379 P.3d 129 (2016); *State v. Shelton*, 194 Wn. App.

4. The Court should grant review to determine whether the State proved intent to rob when the jury acquitted of attempted robbery and conspiracy to commit robbery but convicted of attempted assault with intent to rob.

The State charged robbery, conspiracy to commit robbery and attempted assault with intent to commit robbery. The jury acquitted Mr. Limpert of robbery and conspiracy to commit robbery. Therefore, the evidence of robbery was insufficient.

However, the jury convicted Mr. Limpert of the attempted assault charge. That charge required the State to prove beyond a reasonable doubt that Mr. Limpert had the intent to rob when he attempted to assault Makelle Hamilton. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); RCW 9A.36.021(1)(e) (second-degree assault by intent to commit felony). This intent element, specifically intent to commit robbery, was contained in the court's instructions. The Court should grant review because, as addressed in Mr. Limpert's statement of additional grounds, the State could not prove intent to rob when it failed to prove a robbery

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660, 378 P.3d 230 (2016). For the reasons set forth above, this Court should not follow these decisions.

occurred. Ms. Hamilton testified she gave Mr. Limpert the phone. RP 277, 293-94. There was no intent to commit robbery.

5. This Court should grant review of the trial court's imposition of consecutive sentences.

Although the parties intended for the separate identity theft charge to be tried after this case, this case was delayed due to problems hailing into court the State's primary witness, Makelle Hamilton. Because of the State's trouble securing its witness, Mr. Stephens accepted a plea to a drug offender sentencing alternative on the identity theft charge before the conclusion of this case. The trial court then imposed consecutive sentences without making any findings. This Court should grant review and hold due process required the court to impose concurrent sentences under the facts of this case. *See* U.S. Const. amend. XIV; Const. art. I, § 3.

E. CONCLUSION

Nicholas Limpert respectfully requests this Court grant review of the above-noted issues.

DATED this 14th day of April, 2017.

Respectfully submitted,

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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. NICHOLAS A. LIMPERT, Appellant, DESARAE M. DAWSON, Defendant.	)	No. 33909-2-III UNPUBLISHED OPINION

KORSMO, J. — Nicholas Limpert appeals his conviction for attempted second degree assault, arguing that the court should not have admitted statements made by his codefendant at trial, and that the prosecutor committed misconduct in closing argument. We affirm.

FACTS

Mr. Limpert and Deserae Dawson jointly were charged with conspiracy to commit robbery and robbery in the first degree. Mr. Limpert was also charged with attempted second degree assault. The charges arose out of a failed narcotics transaction at a Spokane hotel.

There is a reasonably large cast list for this production. In simplified form, victim Makelle Hamilton, her brother, and her boyfriend had excess narcotics they wanted to sell. They contacted an acquaintance, Brenden McCullough, and let him know they had pills for sale. McCullough in turn contacted Mr. Limpert and Ms. Dawson, and the three of them devised a plan to "short" Ms. Hamilton by disguising the size of the payment and leaving with the full amount of drugs for a partial payment.[1]

McCullough purchased the drugs by giving the undervalued amount of currency and also leaving, as collateral, the telephone belonging to another acquaintance, Michelle Pearson. McCullough, however, had no intention of ransoming the telephone with the remaining balance owed on the transaction. He departed with the drugs.

Ms. Pearson learned about the misuse of her telephone and went to Ms. Hamilton to retrieve it. Hamilton refused to return the phone and ejected Pearson from the hotel room. Pearson alerted Limpert and Dawson that she needed help to recover her telephone. Meanwhile, Ms. Hamilton's boyfriend had left to find McCullough, and then her brother left to find both men. Limpert and Dawson arrived at the hotel room to find Ms. Hamilton alone.

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[1] The plan used the time-honored "big roll" method of providing a roll of money with the largest denomination on top and a large number of $1 bills underneath in order to leave the impression that the full amount of payment was present.

The duo demanded the return of Pearson's phone, with Limpert displaying a knife. Hamilton questioned the need to use a knife against a woman, so Limpert put it away and began choking Hamilton.[2] The victim's brother returned to the room and broke up the fight. After the defendants departed, Hamilton's brother reported the incident to a detective. The police investigated by contacting Ms. Hamilton and, later, Mr. Limpert and Ms. Dawson. The pills were recovered from Dawson's vehicle. She told police that she had not seen Limpert display a knife in the hotel room, but she had heard Hamilton say, "he just pulled a knife." The statement was later qualified for admission at the CrR 3.5 hearing. Neither of the attorneys for the two defendants objected to use of the statement.

At trial, Ms. Hamilton described the confrontation with Limpert and told jurors that he had pulled a knife on her. After putting the knife away, he choked her. The prosecutor subsequently called the detective to testify and elicited, without objection, the statement that Dawson reported Hamilton saying that "he just pulled a knife." When Limpert's counsel cross-examined the officer about where the two defendants had said they went after leaving the hotel room, the prosecutor objected, stating that "by not separating the defendants we're getting into the possibility of mixing some *Bruton*

[2] Although Limpert continues to deny choking her, the jury verdict establishes otherwise.

issues." Report of Proceedings (RP) at 344. Limpert's counsel then clarified his question by asking where *Ms. Dawson* had said the two were going.

The State rested at the conclusion of the detective's testimony. Mr. Limpert's counsel then called two witnesses who had discussed the incident with Ms. Hamilton. Both testified that Hamilton told them there was no physical altercation and there was no knife. Limpert's counsel then called Pearson to the stand. She testified that she had been involved in an altercation with Hamilton during her unsuccessful initial attempt to recover the telephone.

In closing, the prosecutor told jurors that taking a property by force or intimidation constituted robbery. "A great example is O.J. Simpson. He's in prison in Nevada right now for going into a motel room—." Defense counsel objected, stating "that's another state's law." The court overruled the objection and the prosecutor concluded that Simpson "thought he was going to get personal property of his own when he went into that motel room." RP at 420-421. Limpert's counsel attacked Hamilton's credibility and stressed her statements to the two defense witnesses that there was no altercation and no knife. He stressed that any assault Hamilton reported likely was the encounter with Pearson, not with Limpert and Dawson.

The jury acquitted Limpert of the robbery and conspiracy to commit robbery counts, but convicted him of attempted second degree assault.[3] After sentencing, Mr. Limpert timely appealed to this court.

ANALYSIS

This appeal raises three issues.[4] First, we consider Mr. Limpert's contention that his confrontation clause rights were violated by Hamilton's "he pulled a knife" statement. Second, we consider his claim that the prosecutor committed misconduct by referencing the O.J. Simpson robbery case. Finally, we summarily address the contention that the trial court erred by imposing mandatory court costs totaling $800.

Confrontation Clause

Mr. Limpert argues that his right to confront Ms. Dawson was violated when the detective elicited Dawson's statement reciting Hamilton's statement about Limpert pulling a knife. Because of the failure to raise this claim at trial, he has not established

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[3] Ms. Dawson likewise was acquitted on the robbery and conspiracy charges.

[4] Mr. Limpert also filed a statement of additional grounds raising two contentions. First, he argues that the acquittal on the robbery count was inconsistent with the attempted assault conviction because the prosecutor had to prove an intent to commit robbery in both charges. However, the failure to prove robbery does not necessarily mean that there was no intent to commit robbery. The jury may have been dissatisfied with some other element of the charge. Second, he contends that it was improper to run the assault sentence consecutive to an identity theft conviction arising from an incident after the assault incident. However, the court had absolute discretion to run the two sentences concurrently or consecutively as it saw fit. RCW 9.94A.589(3).

that there was manifest constitutional error justifying review of this issue, which also was at worst harmless error.

The confrontation clause of the Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him. U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This right, which applies to the states via the Fourteenth Amendment's due process clause, necessarily speaks to a defendant's right to cross-examine adverse witnesses. *Pointer v. Texas*, 380 U.S. 400, 404-405, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). This protection has special significance in the context of co-defendants when one of them has made statements to the police that implicate the other defendant. *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). There the court ruled that the defendant Bruton's confrontation rights were violated when the codefendant's statement, implicating Bruton in a robbery, was admitted into evidence at their joint trial even though it was accompanied by a limiting instruction that told the jury only to consider the statement against the confessing defendant. *Id.* at 124-126.

Modern confrontation clause analysis is driven by *Crawford.* There the court concluded that the right of confrontation extended only to "witnesses" who "bear testimony" against the accused. 541 U.S. at 51. This "testimonial" hearsay rule reflected "an especially acute concern with a specific type of out-of-court statement." *Id.* "An

accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.*

RAP 2.5(a)(3) provides that an issue of "manifest error affecting a constitutional right" may be raised for the first time on appeal. While the Sixth Amendment is clearly a constitutional right, the question of whether the confrontation clause itself presents an issue of "manifest error" typically is not one that initially can be decided on appeal. The reason for that is that the confrontation right must be asserted at trial lest it be waived. *State v. O'Cain*, 169 Wn. App. 228, 247-248, 279 P.3d 926 (2012); *State v. Schroeder*, 164 Wn. App. 164, 168, 262 P.3d 1237 (2011).[5] This rule was reasserted, post-*Crawford*, in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). There the Court stressed that the States were free to require that confrontation rights be asserted in order to be preserved:

> The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. . . . It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. . . . There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial.

Id. at 327 (citations omitted).

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[5] This rule has long been followed by both the United States and Washington Supreme Courts. *See, e.g.*, *State v. Nelson*, 103 Wn.2d 760, 763, 697 P.2d 579 (1985) (citing cases in context of sentence revocation proceeding).

By not objecting below, Mr. Limpert waived the confrontation claim on appeal. Accordingly, there is no manifest error that he can assert in this proceeding. The facts of this case also show why the waiver doctrine is important in this context. First, the "pulled a knife" statement is not even testimonial hearsay under *Crawford* that would violate the confrontation clause. The statement was made by Ms. Hamilton to the two defendants. This was not "testimony" being provided to the government for the purpose of trial. It was a remark between acquaintances.[6] Second, both the original declarant (Ms. Hamilton) and the ultimate declarant (the detective), testified at trial, so there was no confrontation clause violation as to either of them. The only person who was not available to testify was Ms. Dawson. Yet, Mr. Limpert's counsel repeatedly and successfully questioned the detective to get the substance of Dawson's interview with the detective before the jury.[7] It appeared to be the joint strategy of both defendants to downplay Hamilton's credibility by impeaching her "knife" testimony with the statements she subsequently made to the two defense witnesses denying that a knife was used. To that end, Dawson's statement that Hamilton claimed a knife was present was useful testimony for the defense.

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[6] *See State v. Wilcoxon*, 185 Wn.2d 324, 373 P.3d 224, *cert. denied* 137 S. Ct. 580 (2016) (statement by one defendant to other acquaintance not testimonial hearsay despite *Bruton* doctrine).

[7] Interestingly, when the prosecutor warned of possible *Bruton* problems with the phrasing of a defense question, Limpert's counsel immediately rephrased his questions in a manner that expressly brought the confrontation problem to the fore. The decision was clearly tactical.

These facts demonstrate why the alleged confrontation clause violation was not manifest in this case. The statement itself was not testimonial and could only be turned into an arguable confrontation clause issue by use of an unavailable middle person in the hearsay chain. But, that evidence was part of the defense theory to paint Hamilton as an unreliable witness. Having made use of Dawson's evidence, Mr. Limpert should not now be allowed to claim constitutional error.

Regardless, any error in admitting Ms. Hamilton's statement also was harmless. "It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986); *Chapman v. California*, 386 U.S. 18, 21, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *Guloy*, 104 Wn.2d at 425.

Here, the original declarant testified at trial that she made the statement, so the evidence was at most cumulative to her direct evidence. Additionally, the knife testimony went to the robbery and conspiracy charges that resulted in acquittals, while the attempted assault count was based on the unchallenged testimony that Limpert strangled Hamilton. The "pulled a knife" statement simply did not affect the verdict in the least.

The first argument is without merit. The claim of error was waived and, at most, amounted to no more than harmless error.

Prosecutor's Argument

Mr. Limpert next argues that the prosecutor committed misconduct by referencing the conviction of sports figure O.J. Simpson for robbery in Nevada. He challenged the analogy on different grounds in the trial court and fails here to establish such significant error that he is entitled to any relief.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was both improper and resulted in prejudice in light of the context of the entire record and the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Prejudice exists only where there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 442-443. When a defendant fails to object to an improper remark, he or she waives a claim of error unless the remark is "'so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *Id.* at 443 (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). Thus, a properly challenged statement will be reviewed for a "substantial likelihood" that it affected the verdict, while unchallenged statements will be considered only if the error was too egregious for a timely objection to be worthwhile. This court reviews alleged improper comments in the context of the total argument, the issues in the case, the evidence addressed in the

argument, and the instructions given to the jury. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

The challenged comment falls in between the two noted extremes because the argument Mr. Limpert presents now is different than the one he presented to the trial court. There he argued the comment was improper because it involved the law of another state, but here he claims that referencing the divisive figure of O.J. Simpson is an appeal to passion and prejudice as well as a reference to evidence outside the record. Thus, because the objection in the trial court is not the one he makes now, this claim is best treated as if he made no objection at trial. His original objection gave the trial court no reason to consider whether mere mention of the name of O.J. Simpson was affecting his right to a fair trial or required reference to evidence outside of the record, let alone whether some curative statement to the jury would have been in order.

We need not consider whether the remark constituted error since it is quite clear that it did not likely affect the verdict. The purpose of the analogy was to open the prosecutor's remarks on the robbery charge with the reminder of a similar robbery conviction resulting from an attempt to reclaim one's personal property in a hotel room. Since the jury acquitted on the robbery and the associated conspiracy count, we are quite certain that the O.J. Simpson analogy was not prejudicial to Mr. Limpert. Accordingly, even if the remark constituted such egregious misconduct that a proper objection was

excused, Mr. Limpert would not prevail because the comment simply did not harm his case.

The misconduct claim is meritless.

Legal Financial Obligations

The trial court imposed $800 worth of legal financial obligations (LFOs) that the legislature has mandated be imposed at sentencing—the crime victim's compensation penalty, the filing fee, and the DNA testing fee. Mr. Limpert argues that the court should have conducted the individualized inquiry into his ability to pay before imposing any LFOs.

This argument has been rejected many times and we will not add to what has been said previously. *See generally State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

Accordingly, the judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 33909-2-III
	)	
NICHOLAS LIMPERT,	)	
	)	
PETITIONER.	)	

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