NO. 44414 3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEFFERY A. WILLIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming

No. 11-1-04302-1

BRIEF OF RESPONDENT

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2. Whether the court abused its discretion in admitting evidence of the defendant's prior convictions where the defendant "opened the door" to such impeachment?

3. Whether the State adduced sufficient evidence to prove all the elements of the crimes charged, beyond a reasonable doubt?

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B. STATEMENT OF THE CASE.

1. Procedure

On October 24, 2011, the Pierce County Prosecuting Attorney (State) charged Jeffery Willis, the defendant, with one count of unlawful possession of a firearm in the first degree (UPF1) and one count of unlawful carrying or handling a weapon. CP 1. Just before trial, the State amended the Information to delete the aggravating circumstance. CP 4.

The case was assigned to Hon. Frederick Fleming for trial. Trial began on April 16, 2012. 1 RP 3. After hearing all the evidence, the jury returned verdicts of guilty on both counts. CP 13, 14.

On May 4, 2012, the court sentenced the defendant to 102 months in prison on the UPF1. CP 43. The court entered a suspended sentence of 365 days on count II. CP 49. In the judgment, the court ordered that the defendant pay legal financial obligations (LFOs) totaling $800. CP 41.

The defendant filed an untimely notice of appeal on December 31, 2012. CP 61. On February 21, 2013, the Court of Appeals granted his motion to file a late notice of appeal.

2. Facts

On the night of October 21, 2011, the defendant went to Latitude 84, a bar near South 84th and Hosmer Street in south Tacoma. 1 RP 20, 3 RP 5. The defendant went alone, but expected to see friends there. 3 RP 8. The defendant was celebrating the completion of a car repair project he had been working on at Clover Park Technical College. 3 RP 8.

The defendant remained at the bar, drinking, until nearly closing time. 1 RP 26. By that time, the defendant had consumed at least 5 double vodkas, if not more. 3 RP 10, 58, 63. Because the bar was closing, the defendant was directed to urinate outside. 3 RP 50. The defendant went

out to the parking lot to urinate. 3 RP 43. Apparently, another bar patron, "Norman", found the defendant urinating on Norman's car. 1 RP 26, 3 RP 44. Norman struck the defendant. 3 RP 44.

The defendant re-entered the bar. An argument with Norman ensued. 1 RP 27. The defendant challenged Norman to fight outside. *Id.* As they were leaving, the two men began fighting inside the bar. 1 RP 27, 2 RP 13. The bartender ordered the defendant to leave. 1 RP 31. The bartender and the security person escorted the defendant out the door. 1 RP 28, 2 RP 13.

Perry Griffin, another person whom had been ejected from the bar, was still sitting in his vehicle in the parking lot. 1 RP 34. Griffin got out of his vehicle and handed the defendant a gun. *Id.*, 2 RP 15. The defendant tripped and fell, dropping the gun. 1 RP 35. The defendant picked up the gun, pointed it in the air, and tried to fire it. 1 RP 35, 42, 46. The magazine slipped out of the gun and fell to the ground. *Id.* The defendant paced back and forth in front of the bartender and security person, holding the gun in his hand. 1RP 36. The defendant demanded that they let him into the bar to continue the fight with Norman. 1 RP 36, 50, 2 RP 15. The bartender and security person blocked the defendant from re-entering the bar. 1 RP 36, 2 RP 15.

After the defendant's unsuccessful efforts to continue his confrontation with Norman, Griffin got out of his vehicle and took the gun back from the defendant. 1 RP 38, 45. Griffin then drove off. 1 RP44. Some friends of the defendant's came by and drove the defendant to a parking lot across the street. 2 RP 28, 42. Police arrested the defendant there. *Id.*

Police located Griffin nearby. 2 RP 51. They arrested him. *Id.* Griffin had the gun with him. 2 RP 53.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO INSTRUCT THE JURY REGARDING "PASSING CONTROL" IN A POSSESSION CRIME.

An appellate court reviews a trial court's refusal to give a jury instruction for abuse of discretion. ***State v. Buzzell***, 148 Wn. App. 592, 602, 200 P.3d 287 (2009). To be given, the proposed instruction must be supported by sufficient evidence. *See, e.g.*, ***State v. Workman***, 80 Wn.2d 443, 448, 584 P. 2d 382 (1978). When determining whether the evidence was sufficient to support giving an instruction, the Court views the evidence in the light most favorable to the party requesting the instruction. ***State v. Fernandez–Medina***, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000). A trial court abuses its discretion only when its decision is

"manifestly unreasonable or is based on untenable reasons or grounds." ***State v. C.J.***, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A discretionary decision is manifestly unreasonable if it "is outside the range of acceptable choices, given the facts and the applicable legal standard." ***State v. Lamb***, 175 Wn.2d 121, 128, 285 P.3d 27 (2012) (quoting ***State v. Powell***. 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

To establish actual possession of an illegal article, the State must prove that the defendant had "actual control, not a passing control which is only a momentary handling." ***State v. Callahan***, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); ***State v. George***, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). Thus, the question of momentary handling goes to whether the evidence is sufficient to allow the trier of fact to find possession beyond a reasonable doubt. *See* ***State v. Staley***, 123 Wn.2d 794, 800–801, 872 P.2d 502 (1994). To possess means to have "actual control, care and management of, and not a passing control ..."*Id.*, at 801 (citing ***U.S. v. Landry***, 257 F.2d 425 (7th Cir.1958)). In this inquiry, the duration of the handling is only one factor to be considered. ***Staley***, at 801. A momentary handling, along with other sufficient indicia of control over the firearm, can support a finding of possession under the totality of the circumstances. ***Staley***, at 802; ***State v. Summers***, 107 Wn. App. 373, 386–87, 28 P.3d 780

(2001). As courts have pointed out, passing or momentary control of contraband is not a legal excuse. ***Staley***, at 802; ***Summers***, at 387.

In ***Summers***, Division II of the Court of Appeals conducted a detailed examination of "momentary" or "passing" control of a firearm. There, the gun was found under a pillow on a bed in the basement. *Id.*, at 378. A defense witness testified that the gun belonged to the witness, and that the defendant had not been informed of the gun's presence until just before the police arrived. *Id.*, at 379. The defendant had proposed an instruction stating in part:

> If in considering the evidence you find that the control exercised by the defendant over the alleged firearm, if any, was passing or momentary only, then you must find the defendant not guilty[.]

107 Wn. App. at 387.

The Court said that passing control is not merely a temporal concept. ***Summers***, 107 Wn. App. at 385; *see, also* ***Staley***, at 802. To determine whether a defendant had dominion and control, the court looks not just at the length of the possession, but on the quality and nature of that possession. ***Summers***, at 386. A defendant's momentary handling of an item, along with other sufficient indicia of control, can support a finding of possession. 107 Wn. App. at 386. The totality of the

circumstances determines possession. *Id. See also* ***State v. Partin***, 88 Wn.2d 899, 906, 567 P. 2d 1136 (1977).

In ***Summers***, the Court also held that the defendant's proposed instruction was properly declined because it was an inaccurate statement of the law. *Id.*, at 387. The same was true in ***Staley***, at 802. In ***Staley***, the Court pointed out that the defendant may be entitled to an instruction further explaining "possession" by including language on the theory of passing control. *Id.* However, the defendant must draft an instruction that accurately states the law. *Id.*

Because "momentary" or "passing" control is only one factor and is not dispositive, the defendant's proposed instruction is erroneous. Here, the defendant proposed this instruction:

> Possession is not established if, at most, there is passing control. Passing control is momentary handling.
>
> It is not enough that the defendant might have been in close proximity to the firearm or that he might have momentarily handled it with a brief and passing control.

CP 8. This is an inaccurate statement of the law. As in ***Staley***, the proposed instruction is incomplete and misleading. It does not tell the jury to consider the totality of the circumstances. The words "might have" are also inaccurate and misleading. The State's burden is to prove beyond a reasonable doubt that the defendant *did* possess the firearm, not that he "might have."

It is true that the defendant is entitled to instructions which allow him to argue his theories of the case, if supported by the law and sufficient evidence. *See* ***Staley***, at 803; ***State v. Allen***, 161 Wn. App. 727, 734, 255 P.3d 784 (2011). However, here, the defense was not "passing control," but general denial and lack of knowledge via voluntary intoxication. 3 RP 18. The defendant could not remember possessing the gun. 3 RP 12, 15-16, 22-23. He "blacked out." 3 RP 18-19. Even when shown photographs and the surveillance video of him holding and trying to fire the pistol, he refused to concede that the person in the video was him. 3 RP 42, 46.

Unfortunately, he also asserted that he would never possess a gun; because of his high regard for his children and his caution under the law as a convicted felon. 3 RP 17-18. This lead to the introduction of his three prior UPF convictions, which will be discussed in detail below. Not only was there insufficient evidence of "passing control" to justify an instruction, such a legal concept was not part of the defense theory.

"Passing control" is literally that. For example, the ***Summers*** court points out and distinguishes the facts in ***State v. Werry***, 6 Wn. App. 540, 494 P.2d 1002 (1972). ***Summers***, 107 Wn. App. at 385. In ***Werry***, a friend brought a paper bag containing marijuana and LSD to Werry's house. *Id.* at 542. Werry saw the police outside and went to speak with them. Another defendant, Cline, who was a guest at a house, grabbed the bag of

drugs and threw it into the bathroom to hide it from the police. *Id.,* at 542. As momentary as this handling was, the Court of Appeals found that this evidence *did not* support an instruction on "passing control." *Id.*, at 548.

Also, in ***State v. Spruell***, 57 Wn. App. 383, 788 P.2d 21 (1990), Luther Hill was at Spruell's home when police served a search warrant. As police entered, they heard what sounded like a dish striking the back door. *Id.*, at 384. Police found Hill and another man in the kitchen. There was drug residue and paraphernalia on the table. *Id.* Police found more white powder residue around the door, and a plate located about a foot and a half from the door. There were chunks of white powder on the floor and caked powder between a chair and cupboards. *Id.* The white powder in the kitchen was later identified as cocaine. *Id.* There was insufficient powder residue on the plate for testing. A fingerprint of Hill's was found on the plate. *Id.* While, arguably, this evidence showed that perhaps Hill had thrown the plate from the table, it was not enough to prove actual or constructive possession. *Id.*, at 388.

A frequently cited case of this concept is ***Callahan***, *supra*. In that case, the premises, a houseboat, was Callahan's (who was a co-defendant, but did not join the appeal). 77 Wn. 2d at 28. There was no evidence introduced that Michael Hutchinson (the actual appellant) was in actual physical possession of the drugs. The only evidence of dominion and

control was his presence, his close proximity to the drugs at the time of his arrest, and the fact that he had told one of the officers that he had handled the drugs earlier. *Id.*, at 31. He was an overnight guest. There was no evidence that he had constructive possession; dominion or control, over the drugs.

Because it is a constructive possession case, ***Callahan*** is inapposite to the present case. Here, the defendant had actual, not constructive possession. He was not charged with possessing a gun that was in someone else's house or car, like the drugs for Hutchinson in ***Callahan***.

This is not a case where the defendant briefly and "casually examined" someone else's gun. *See* ***Summers***, 197 Wn. App. at 385, citing, ***Werry***, at 6 Wn. App. at 548. Or that someone handed it to him and he quickly tossed it aside, as in ***Spruell*** and ***Werry***. Witnesses testified that the defendant carried, handled, and tried to fire a handgun. He carried it, dropped it, picked it up, and advanced on two witnesses with it. These acts are on surveillance photographs and video. The defendant's possession of the gun was not "passing;" he actually held it and used it. The evidence did not support an instruction on "passing control." The trial court did not abuse its discretion in declining to give the defendant's proposed instruction. CP 8.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF CERTAIN PRIOR CONVICTIONS WHERE THE DEFENDANT RAISED THE ISSUE DURING HIS TESTIMONY.

When a party introduces evidence that would be inadmissible if offered by the opposing party, that party opens the door to the explanation or contradiction of that evidence. ***State v. Ortega***, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). "[A] trial court has discretion to admit evidence that might otherwise be inadmissible if the defendant opens the door to [that] evidence." ***State v. Warren***, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006). The appellate court reviews a trial court's determination that a party has opened the door for abuse of discretion. ***Ortega***, 134 Wn. App. at 626.

A criminal defendant who places his character in issue by testifying as to his own past good behavior opens the door to examination of specific acts of misconduct unrelated to the crime charged that would be otherwise inadmissible. ***Warren***, at 64–65. Warren was charged with molesting a child. In his testimony, he attempted to create the impression that he was not the type of person who would touch the sexual parts of a child's body. This opened the door to evidence of his prior conviction for child molestation. 134 Wn. App. at 64.

Here, notwithstanding the court's evidentiary rulings, the defendant's testimony opened the door to evidence of his prior DUI and

UPF convictions. He attempted to create the impression that he was an infrequent drinker, that the effects of alcohol were unexpected, and that this activity was out of character for him. 3 RP 11, 12. He wept on the stand, apparently overcome by these accusations. 3 RP 11. The defendant also testified that possessing a firearm would be out of character for him; that he would not possess one in the first place because of concerns for the law and his child. 3 RP 17-18.

The trial court considered this testimony before ruling. 3 RP 28-29, 30, 32-33. The defendant opened the door to potentially prejudicial impeachment evidence and then argued that it should be excluded as too prejudicial. 3 RP 29, 31. Before the impeachment evidence came out, the court cautioned the jury with a limiting instruction. 3 RP 40, CP 12. It is presumed that the jury properly followed this instruction. *See, e.g.*, ***State v. Montgomery***, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). The trial court committed no error.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL ELEMENTS OF THE CRIMES CHARGED, BEYOND A REASONABLE DOUBT.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt,

viewing the trial evidence in the light most favorable to the State. ***State v. Brockob***, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Direct and circumstantial evidence are equally reliable. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P. 3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. ***Thomas***, at 874-875; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Under RCW 9.41.040, convicted felons cannot possess firearms. Often, as the present case, the issue is "possession." Possession of a firearm may be actual or constructive. ***State v. Staley***, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); ***State v. Lee***, 158 Wn. App. 513, 517, 243 P.3d 929 (2010). Actual possession means that the person charged with possession had "personal custody" or "actual" physical possession. ***Staley***, 123 Wn.2d at 798. *See* ***State v. Callahan***, 77 Wn.2d, 27, 29, 459 P.2d 400 (1969). In this case, the only issues are "possession" and the "identity" of the firearm. App. Br. at 20-21.

The appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. ***State v. Thomas***, 150 Wn.2d 821, 874–875, 83 P.3d 970 (2004).

In the present case, two witnesses testified that the defendant held and brandished a silver-colored pistol. 1 RP 35, 45, 2 RP 16. The defendant pointed the gun in the air and pulled the trigger. 1 RP 35, 42, 46, 2 RP 15. The witnesses saw the magazine drop out of the pistol in the defendant's hand. 1 RP 35. The defendant did this 5-10 feet from the two witnesses. 1 RP 35, 52, 2 RP 17. All of this was recorded on surveillance video. Exh. 16. The witnesses used photographs taken from the video, pointing out what they depicted. Exh. 1-6.

The pistol was delivered to the defendant by Perry Griffin. 1 RP 34. After the defendant's unsuccessful use of the pistol, Griffin took it back. 1 RP 35, 38, 45. Police stopped Griffin nearby. 2 RP 51. He had only one gun with him. 2 RP 53. The gun matched the description given by the witnesses. Exh. 18, 2 RP 56.

This is all evidence that the defendant admits is true. *See* ***Salinas***, *supra*. Likewise, he concedes all the inferences that can reasonably be drawn from the evidence. *Id.* Based upon all this direct and circumstantial evidence, the jurors could certainly conclude that the gun found with the person who was seen to give the gun to the defendant, and then take it back, was the same gun the defendant possessed and tried to fire. They could also find the rest of the elements beyond a reasonable doubt.

4. THE TRIAL COURT LAWFULLY ORDERED THE DEFENDANT TO PAY LEGAL FINANCIAL OBLIGATIONS.

a. The trial court did not err in ordering the defendant to pay legal financial obligations.

Pursuant to RCW 10.01.160, the court may require defendants to pay court costs and other assessments associated with bringing the case to trial:

> (1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

RCW 10.01.160(1).

Different components of defendant's financial obligations require separate analysis because some LFO's are mandatory and some are discretionary. ***State v. Baldwin***, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); ***State v. Curry***, 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992). The sentencing court's determination of a defendant's resources and ability to pay legal financial obligations is reviewed under the clearly erroneous standard. ***Baldwin***, 63 Wn. App. at 312.

The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime

victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

As in ***State v. Lundy***, - Wn. App. - , 308 P.3d 755 (2013), the defendant in the present case does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. *See* RCW 9.94A.505, RCW 9.94A.753(4) and (5); ***Lundy***, at 759. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g.*, ***State v. Kuster***, 175 Wn. App. 420, 306 P.3d 1022 (2013). In the present case, the court only imposed mandatory fees: CVPA, filing fee, and DNA. CP 41. The trial court followed the law. There was no error.

Even though the court only imposed mandatory LFOs, the record shows that the defendant has the present and future ability to pay the LFOs. Unlike ***State v. Bertrand***, 165 Wn. App. 393, 267 P.3d 511 (2011), the record here shows that the defendant is able-bodied. Among other

things, the record shows that the defendant is a 35 year-old man with many friends and family. 3 RP 5, 5 RP 6. As the Court noted in ***Calvin***, *Order Granting*, at 4, the defendant in the present case had the resources or financial support to pay private counsel. Before his arrest, the defendant was employed fulltime at Milgard Windows. 3 RP 5, 5 RP 6. At the same time, he was also enrolled in a training program at Clover Park Technical College for a career as an auto mechanic or auto body repairman. 3 RP 5, 5 RP 6.

This Court should affirm the trial court's imposition of LFOs because, in conjunction with statutory authority which compels the court to impose LFOs, the court properly found that the defendant has the present or future ability to pay LFOs. There was sufficient evidence in the record for the court to determine that the defendant has the ability to pay his LFOs.

b. The ***Calvin*** opinion was recently changed to agree with ***Blazina*** and ***Lundy***.

The defendant relies extensively on ***State v. Calvin***, - Wn. App. - , 302 P.3d 509 (2013). App. Br. at 22-24. However, Division I has changed the relevant holding of that case. On October 22, 2013, Division I of the Court of Appeals filed an Order granting reconsideration and amending its opinion in ***State v. Calvin***. *See Order Granting* (attached as Appendix).

The Court reversed itself and deleted the section which had previously found no evidence to support the trial court's findings. *Order Granting*, at 1. The Court deleted and replaced section V of ***Calvin***, at 20-22. The new section V declines to review the LFO issue for the first time on appeal. *Order Granting*, at 3. The Court goes on to say that, substantively, the trial court's "finding" was supported by the record and therefore was not clearly erroneous. *Id.*, at 3-4. Regarding the LFO issues, the Court affirmed the trial court in all aspects.

Division I also rejected this argument in ***State v. Parmelee***, 172 Wn. App. 899, 917, 292 P.3d 799 (2013), where the defendant argued that the trial court erred by imposing discretionary legal financial obligations without finding that he had any ability to pay. Division I held that the court's discretionary LFO order did not require findings (citing ***Curry***, 118 Wn.2d at 916) and that the issue of ability to pay would be considered when the State tried to collect (citing ***Blank***, 131 Wn.2d at 242). *Id.*, at 918.

c. The issue was not preserved for appeal.

RAP 2.5(a) grants the Appellate Court discretion in refusing to review claims of error not raised at the trial court level. RAP 2.5(a) also provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to

establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P. 3d 492 (2013), *review granted*, 178 Wn.2d 1010 (2013), the Court of Appeals declined to review the LFO issue for the first time on appeal. *See also* ***State v. Lundy***, - Wn. App. - , 308 P.3d 755, 763 (2013); ***State v. Ralph***, 175 Wn. App. 814, 827, 308 P.3d 729 (2013) (Johanson, A.C.J., concurring in both cases). In ***Calvin***, *supra*, Division I likewise now declines to review the issue for the first time on appeal.

In this case, the defendant does not claim any of the three circumstances listed under RAP 2.5(a) in which an issue could be raised for the first time on appeal. The defendant made no objection to the imposition of LFO's. 5 RP 4-6. In fact, he provided information regarding his past employment history and his vocational training program. 5 RP 6. Therefore, the defendant did not properly preserve this issue for appeal. The Court of Appeals should not review this issue.

d. The issue is not ripe for review.

Trial courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. RCW 10.01.160(3) requires the trial court to consider a defendant's ability to pay:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment 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.

Within the statute are constitutional safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs. RCW 10.01.160(4):

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* ***State v. Blank***, 131 Wn.2d 230, 930 P.2d 1213 (1997); ***State v. Smits***, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of

whether the defendant either has or will have the ability to pay is clearly somewhat speculative. ***Baldwin***, at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." ***Blank***, 131 Wn.2d 230, 241–242.

Here, the judgment and sentence recites that the court considered or, in the language of the statute, "took account" of, the defendant's present and likely future financial resources:

> The court has considered the total amount owing, the defendant's past, present and future ability to pay future legal financial obligations, including the defendant's financial resources and the likelihood that that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 41. That recitation satisfies the prerequisites for imposing financial obligations.

The "boilerplate" finding of ability to pay on the Judgment and Sentence is likely an effort to standardize compliance with RCW 10.01.160(3) and ***State v. Curry***, 118 Wn.2d 911, 829 P.2d 166 (1992). As the Court of Appeals observed in its original opinion in ***Calvin***, 302 P.3d at 521, and ***Lundy***, 308 P.3d at 760, it is unnecessary under the statute.

In ***Lundy***, the Court notes that confusion stems from a misreading of the fifth factor in ***Curry***, 118 Wn.2d at 915: "A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end." Division II points out that ***Curry*** does *not* say that "a repayment obligation may not be imposed unless it appears from the record that there is a likelihood that the defendant will have the future ability to pay legal financial obligations." 308 Wn. App. at 760, n.9. Although the trial court also "found" that the defendant had the present or likely future ability to pay the financial obligations, that conclusion or finding is immaterial and does not warrant relief even if it is not supported by the record. *See* ***State v. Caldera***, 66 Wn. App. 548, 551, 832 P.2d 139 (1992). As pointed out above, in the present case, the record included more than enough information to support the trial court's "finding."

The defendant has the burden to show indigence. *See* RCW 10.01.020; ***Lundy***, 308 Wn. App. at 759, n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs because compliance with the conditions imposed under a Judgment and Sentence are essential. ***State v. Woodward***, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by

seeking employment, borrowing money, or raising money in any other lawful manner. ***Bearden v. Georgia***, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); ***Woodward***, 116 Wn. App. at 704.

In this case, the defendant challenges the court's imposition of LFOs claiming it erred in when it found the defendant had the present or future ability to pay costs. Here, the State has not attempted to collect legal financial obligations from the defendant nor established when he is expected to begin repayment of these obligations. *See* CP 42. The State has not sought enforcement of the costs; therefore, the determination as to whether the trial court erred is not ripe for adjudication. *See* ***Lundy***, 308 P. 3d at 761.

The time to challenge the costs is at the time the State seeks to collect them because while the defendant may or may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, the defendant's challenge to the court costs is premature. The challenge to the order requiring payment of legal financial obligations is not ripe for review.

D. CONCLUSION.

The defendant received a fair trial where he was able to argue the law and his theory of the case. The evidence was more than enough to prove the elements beyond a reasonable doubt. The trial court followed the law in imposing legal financial obligations. The State respectfully requests that the judgment be affirmed.

DATED: December 6, 2013

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THOMAS C. ROBERTS
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WSB # 17442

Certificate of Service: E-FILE
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/6/13 [signature]
Date Signature

APPENDIX "A"

Order Granting

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

STATE OF WASHINGTON, Respondent, v. DONALD L. CALVIN Appellant.	)	No. 67627-0-I ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION AND AMENDING OPINION

The respondent, State of Washington, filed a motion for reconsideration. The appellant, Donald Calvin, has filed an answer. A panel of the court has determined that the motion should be granted, and the published opinion filed May 28, 2013 shall be amended. Now, therefore, it is hereby

ORDERED that the motion is granted; it is further

ORDERED that the published opinion filed May 28, 2013 be amended as follows:

DELETE the last two sentences of the first paragraph on page 1 that read:

We affirm his convictions. Because there is no evidence to support the trial court's finding that Calvin has the ability to pay court costs and the record does not otherwise show that the trial court considered Calvin's financial resources, we remand for the trial court to strike the finding and the imposition of court costs.

REPLACE those sentences with the following sentence:

We affirm.

DELETE section V. Legal Financial Obligations, which begins on page 20 and ends on page 22, in its entirety.

REPLACE that section with the following:

V. Legal Financial Obligations

The trial court ordered Calvin to pay a total of $1,300 in legal financial obligations (LFOs), including $450 in court costs. It also entered a boilerplate finding stating that had the ability to pay LFOs:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

Calvin challenges the imposition of $450 in court costs, arguing that the boilerplate finding is not supported by evidence, and that the trial court was required to determine whether he had the ability to pay before ordering the payment of costs. The State argues that Calvin did not preserve this issue for review and cannot raise it for the first time on appeal. We agree with the State.

Under RCW 10.01.160(3), "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment 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." Our Supreme Court has made several things clear about this

statute. First, the sentencing court's consideration of the defendant's ability to pay is not constitutionally required. State v. Blank, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997) ("the Constitution does not require an inquiry into ability to pay at the time of sentencing"). Accordingly, the issue raised by Calvin is not one of constitutional magnitude that can be raised for the first time on appeal under RAP 2.5(a).

Second, the imposition of costs under this statute is a factual matter "within the trial court's discretion." State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Failure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002); In re Pers. Restraint of Shale, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007). Calvin's failure to object below thus precludes review.

Third, "[n]either the statute nor the constitution requires a sentencing court to enter formal, specific findings" regarding a defendant's ability to pay. Curry, 118 Wn.2d at 916. The boilerplate finding is therefore unnecessary surplusage. If a challenge to the court's discretion were properly before us, striking the boilerplate finding would not require reversal of the court's discretionary decision unless the record affirmatively showed that the defendant had an *inability* to pay both at present and in the future.

Finally, even if the finding were properly before us for review, we would conclude that it is not clearly erroneous.[1] Calvin testified to his high school

education, some technical training, and his past employment as a carpenter, including a brief time in the union. Calvin also had retained, not appointed, counsel at trial. These facts are sufficient to support the challenged finding under the clearly erroneous standard.

Calvin also challenges the imposition of a $250 fine pursuant to RCW 9A.20.021. That provision, however, merely enumerates the maximum sentence for Calvin's convictions. It does not contain a requirement that the court even take a defendant's financial resources into account before imposing a fine, let alone enter findings. Calvin has not articulated any basis for striking the fine.

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[1] We review the trial court's decision to impose discretionary financial obligations under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646, 837 P.2d 646 (1991). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" Schryvers v. Coulee Cmty. Hosp., 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

DELETE the first paragraph on page 24 with reads:

We affirm Calvin's convictions and remand for the trial court to strike the finding that Calvin has the present or future ability to pay LFOs and the imposition of $450 in court costs.

REPLACE that paragraph with the following paragraph:

We affirm.

DATED this 22nd day of October, 2013.

Appelwick, J.

WE CONCUR:

Spearman, A.C.J.

Grosse, J.

PIERCE COUNTY PROSECUTOR

December 06, 2013 - 2:45 PM

Transmittal Letter

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Court of Appeals Case Number: 44414-3

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