No. 45933-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOHNNIE MURREL COOLEY,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-00268-1
The Honorable Thomas Larkin, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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2. Did trial counsel provide ineffective assistance when he failed to request an instruction limiting the jury's consideration of an out of court statement admitted for a purpose other than the truth of the matter asserted, which allowed the jury to consider the statement for the improper purpose of establishing Johnnie Cooley's guilt? (Assignment of Error 2)

3. Was the improper admission of an out of court statement, coupled with the lack of a limiting instruction, prejudicial where the statement was the only direct evidence tying Johnnie Cooley to the telephone number used to send threatening texts and place phone calls to the victim, and where the prosecutor used the statement in her closing argument as proof that Johnnie Cooley was guilty? (Assignment of Error 1 & 2)

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III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Johnnie Murrel Cooley with four counts of violating a domestic violence court order (RCW 26.50.110). (CP 1-3) The State also alleged that the four offenses were domestic violence incidents (RCW 10.99.020). (CP 1-3) The jury found Cooley guilty as charged. (CP 30-37; 12/19/13 RP 3-4)[1] The trial court sentenced Cooley to a standard range sentence of 60 months, and imposed both mandatory and discretionary legal financial obligations. (02/12/14 RP 288-89; CP 50, 52) This appeal timely follows. (CP 58)

B. SUBSTANTIVE FACTS

Amy Lutter and Johnnie Cooley were romantically involved for twelve years, during which time they lived together and had two

[1] The transcripts will be referred to by the date of the proceeding contained therein.

daughters. (12/17/13 RP 71-72) The relationship did not end well, and Lutter obtained a protection order precluding Cooley from knowingly and purposefully contacting her in person or by any other means. (12/17/13 RP 73; CP 6-7; Exh. P2, P3)

In January of 2013, Lutter and her daughters were staying at Lutter's parents' house in South Tacoma. (12/17/13 RP 74) At the time, Cooley lived about a half-mile away, in the area of South 70th and South Sheridan Streets. (12/17/13 RP 74, 78) Around 8:00 on the morning of January 17, Lutter decided to walk from her parents' house to Cooley's home because, according to Lutter, Cooley had been calling and texting her, and she wanted to talk to Cooley's landlord because she thought he could make Cooley stop contacting her. (12/17/13 RP 78, 79)

As she neared Cooley's home, she saw Cooley's truck turn the corner and drive towards her. (12/17/13 RP 79) Lutter testified that Cooley was driving the truck, and that he drove up onto the curb towards her as she stood on the sidewalk. (12/17/13 RP 79) Lutter jumped out of the way and fell to the ground. (12/17/13 RP 79) As Cooley drove away, Lutter picked up a rock and threw it at his truck, cracking a window. (12/17/13 RP 79)

At 8:07 that morning, a call came into 911 dispatch, and a

male caller reported that his ex-girlfriend had broken his car window with a rock. (12/17/13 RP 177, 179, 123) The caller told dispatch that he would wait for police officers at the intersection of South L and South 70th Streets. (12/17/13 RP179)

When officers responded to that location, they found Lutter standing at the scene, and she appeared to be upset and shaken. (12/17/13 RP 124-25, 185) Lutter told them that her boyfriend had tried to run her over, and she showed the officers tire tracks that appeared to go from the street onto the planting strip and back to the street. (12/17/13 RP 125-26, 185)

Officer Christopher Yglesias escorted Lutter to a nearby police substation. (12/17/13 RP 83, 129) While they were there, Lutter's received multiple calls from telephone number 253-906-7459, which Lutter said was Cooley's number. (12/17/13 RP 84-85, 129) Officer Yglesias told Lutter to answer one of the calls and to turn on the speaker. (12/17/13 RP 88-89, 131) Officer Yglesias testified that he heard a male caller make threatening statements to Lutter. (12/17/13 RP 131) Lutter testified the male caller was Cooley. (12/17/13 RP 88-89)

Lutter also showed Officer Yglesias several threatening text messages that she claimed to have received from Cooley on January

13, 2013. (12/17/13 RP 85, 86-87, 88, 91-93; 131-33) The State presented photographs of incoming calls and several threatening text messages sent to Lutter's phone from telephone number 253-906-7459. (Exh. P8-P11, P25; 12/17/13 RP 86-87, 88; 12/18/13 RP 206-07)

The State played an audiotape of the 911 call. (12/17/13 RP 182) On the recording, the 911 operator can be heard asking the male caller if he placed the call from telephone number 253-906-7459. (Exh. 1) The male caller indicates that the number is probably correct. (Exh. 1) Lutter testified that the voice of the male 911 caller belonged to Cooley. (12/17/13 RP 93-94)

Officer Yglesias eventually located Cooley walking in the neighborhood. (12/17/13 RP 135-36) Cooley told the Officer that he was walking to Lutter's parents' house to get money to fix the cracked truck window. (12/17/13 RP 137) He said the tire marks were made when he tried to swerve to avoid the rock thrown by Lutter. (12/17/13 RP 137) Cooley denied calling or texting Lutter, but did acknowledge calling 911. (12/17/13 RP 137, 169)

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IV. ARGUMENT & AUTHORITIES

A. ADMISSION OF THE 911 OPERATOR'S STATEMENT CONFIRMING THE CALLER'S TELEPHONE NUMBER WAS PREJUDICIAL ERROR, BECAUSE IT WAS NOT ADMITTED FOR A RELEVANT PURPOSE AND NOT ACCOMPANIED BY A LIMITING INSTRUCTION.

Cooley objected to the portion of the 911 call where the operator asks the caller whether his telephone number is 253-906-7459, and the caller responds that if that is what the operator has as the number, "that must be it." (12/16/13 RP 54-55; Exh. 1) Cooley argued that the operator's statement is hearsay and its admission would violate his right to confront witnesses against him because the State did not plan to call the speaker to testify. (12/16/13 RP 54-55, 57) The trial court concluded that the operator's statement could be played for the jury, but not for the truth of the matter asserted. Instead, it was admissible to show "what the defendant did as a result of that [statement] or what he said." (12/16/13 RP 57)

1. *Admission of the 911 operator's statement was error because the purpose for which it was admitted was not relevant to any fact at issue in this case.*

ER 801(c)[2] permits admission of statements that would otherwise be excludable as hearsay when they are not offered for

[2] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

the truth of their contents but for another relevant purpose. *See* State v. Aaron, 57 Wn. App. 277, 278-79, 787 P.2d 949 (1990). Evidence is relevant if it has "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. The relevancy of evidence in a given case will depend on the circumstances of the particular case and the relationship of the facts to the ultimate issue. ER 401.

In Aaron, Division 1 found that the trial court abused its discretion in admitting evidence related by a 911 dispatcher to a police officer who testified at trial. 57 Wn. App. at 278-79. The officer was told by the 911 dispatcher that a burglary suspect used a blue jeans jacket to push through some bushes to retrieve stolen property. A blue jeans jacket and stolen goods were found in a car that Aaron occupied just before his arrest. 57 Wn. App. at 278-79.

At trial, Aaron challenged as hearsay the police officer's testimony that the dispatcher told him about the blue jeans jacket. The trial court overruled the hearsay objection and admitted the statement not for the truth of the matter asserted, but instead to show the officer's state of mind in explaining why he acted as he did. The trial court also refused to give a limiting instruction requested by the

defense. 57 Wn. App. at 279-80.

On appeal, Division 1 reversed, reasoning that because the legality of the search and seizure preceding Aaron's arrest was not at issue, the officer's state of mind was also not at issue. Thus, the officer's state of mind was not relevant to any fact of consequence. The court went on to say that the true purpose of the evidence was "solely to suggest to the jury that the jacket containing [the stolen property] belonged to Aaron." 57 Wn. App. at 279-80.

In this case, the caller did not acknowledge that the number recited by the operator was in fact correct, so the caller's verbal response to the 911 operator's statement sheds no light on any fact at issue. Similarly, what the caller did in response to the dispatcher's statement was neither known nor relevant. The caller's response simply did not make "determination of the action more probable or less probable than it would be without the evidence." ER 401. Accordingly, the dispatcher's statement was not relevant for the purpose cited by the trial court, or for any other purpose.

As in Aaron, the true purpose of the admission of the 911 operator's statements was to establish guilt. Its true purpose was to allow the State to connect Cooley to that specific telephone number. This purpose is evidenced by the fact that the prosecutor referred to

the recording in closing statements as proof that Cooley called 911 from that exact cellular phone number. (12/18/13 RP 246)

This evidence directly tied Cooley to the phone number used to text and call Lutter on January 13 and January 17, 2013. The only other evidence connecting Cooley to that telephone number came from Lutter herself. Cooley vigorously challenged Lutter's credibility throughout trial. (12/17/13 RP 103-09; 12/18/13 RP 255-72) The jury's determination of guilt or innocence rested on its opinion of Lutter's credibility. It is impossible to say that the jury would have necessarily found her testimony credible if it had not been improperly bolstered by the operator reciting the phone number connected to the texts and calls.

2. *The error in admitting the 911 operator's statement was compounded because trial counsel failed to request that the jury be instructed on the limited purpose for which the evidence was supposed to have been admitted.*

When trial counsel failed to request an instruction limiting the purpose for which the jury could consider the statement, he failed to provide effective assistance of counsel. Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d

460, 471, 901 P.2d 286 (1995). To show ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the outcome of his trial. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's error results in prejudice when there is a reasonable probability that the outcome of trial would have differed absent the errors. Thomas, 109 Wn.2d at 226. However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693.

When evidence is admitted for a limited purpose and the party against whom it is admitted requests a limiting instruction, the court is obliged to give it. State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001); ER 105.[3] The 911 operator's statement was admitted for a limited purpose. (12/16/13 RP 57) Thus, if Cooley's trial counsel had requested a limiting instruction, it would have been given.

The limiting instruction would have prevented the jury from

[3] "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105.

using the evidence as proof that Cooley owned or used a telephone assigned the number 253-906-7459, which was the number associated with the threatening texts and telephone calls. As noted in Aaron, "[w]hile there may be some doubt as to the efficacy of a limiting instruction in effectively controlling jury deliberations, it is of vital importance that counsel have the benefit of the instruction to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt." 57 Wn. App. at 281.

Trial counsel here opposed the admission of the operator's statement but failed to act to limit its impact on the jury. This failure fell below objective standards of reasonableness. The admission of the operator's statement was prejudicial, as argued above, and there can be no legitimate purpose for failing to limit its prejudicial impact.

The improper admission of the hearsay evidence, coupled with the lack of a limiting instruction, was therefore prejudicial error requiring reversal of Cooley's convictions. See Aaron, 57 Wn. App. at 282-83 (finding that the trial court's admission of irrelevant hearsay coupled with a failure to give a limiting instruction was prejudicial error requiring reversal of Aaron's convictions).

B. THE TRIAL COURT'S FAILURE TO CONSIDER COOLEY'S ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON DIRECT APPEAL.

1. *The record fails to establish that the trial court actually took into account Cooley's financial circumstances before imposing discretionary LFOs.*

At sentencing, the State asked the trial court to impose legal financial obligations (LFOs) totaling $3,300.00, including $2,500.00 in non-mandatory DAC attorney fees. (02/21/14 RP 284) Cooley told the court that his child support payments to Lutter had recently been reduced to zero because he would be incarcerated with no ability to pay, and that he was concerned for the financial welfare of his children. (02/21/14 RP 288) The trial court ordered Cooley to pay legal costs in the amount of $2,300.00, which included discretionary costs of $1,500 for appointed counsel, stating only: "I've given you a thousand dollars there as well . . . [t]hose daughters could use that money when you get out." (02/21/14 RP 288-89; CP 50)

The Judgment and Sentence includes the following boilerplate language:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past,

> present and future ability to pay legal financial obligations, including 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.

(CP 49)

RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

> [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.

RCW 10.01.160 (3) (emphasis added). The word "shall" means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). Hence, the trial court was without authority to impose LFOs as a condition of Cooley's sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider

the defendant's individual financial circumstances and made an individualized determination that he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The record does not establish the trial court actually took into account Cooley's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing Cooley's ability to pay or ask it to make a determination under RCW 10.01.160 when it asked that LFOs be imposed.[4] (RP 2390) While acknowledging that Cooley would have financial burdens that come with raising children when he is released from confinement, the trial court made no further inquiry into Cooley's financial resources, debts, or employability. There was no specific evidence before the trial court regarding Cooley's past employment or his future educational opportunities or employment prospects.

[4] It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

The boilerplate finding in section 2.5 of the Judgment and Sentence does not establish compliance with RCW 10.01.160(3)'s requirements. Such a boilerplate finding is insufficient to show the trial court actually gave independent thought and consideration to the facts of Cooley's case. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011). The Judgment and Sentence form used in Cooley's case contained a pre-formatted conclusion that he had the ability to pay LFOs. It does not include a checkbox to register even minimal individualized judicial consideration. (CP 49) Rather, every time one of these forms is used, there is a pre-formatted conclusion that the trial court followed the requirements of RCW 10.01.160(3), regardless of what actually transpired. This type of finding therefore cannot reliably establish that the trial court complied with RCW 10.01.160(3). And the trial court made no contemporaneous statements at sentencing regarding Cooley's ability to pay. (02/21/14 RP 288-89)

In sum, the record fails to establish the trial court actually took into account Cooley's financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should vacate that portion of the Judgment and Sentence.

Where the sentencing court fails to comply with a sentencing statute when imposing a sentencing condition, remand is the remedy unless the record clearly indicates the court would have imposed the same condition anyway. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)). The record in this case does not expressly demonstrate the trial court would have found sufficient evidence of Cooley's ability to pay the LFOs. At sentencing, the State failed to point to any evidence establishing Cooley's past or future educational and employment prospects. It cannot be said this record expressly demonstrates the sentencing court would have imposed the same LFOs if it had actually taken into account Cooley's individual financial circumstances. As such, the remedy is remand for resentencing. Parker, 132 Wn.2d at 192-93.

2. *Cooley's challenge to the LFO order can be raised for the first time on appeal and is ripe for review.*

This Court recently held, in State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), that the defendant's failure to object at sentencing to a boilerplate finding of ability to pay LFOs precluded him from raising a challenge for the first time on appeal.[5] The holding

[5] Our State Supreme Court has granted review of the Blazina decision. 178 Wn. 2d 1010, 311 P.3d 27 (2013).

was in error, however, because Washington courts have repeatedly held that a defendant may challenge sentencing rulings for the first time on appeal when the ruling in question is in violation of statutory requirements. *See e.g.* State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) ("when a sentencing court acts without statutory authority in imposing a sentence, the error can be addressed for the first time on appeal"); State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999). Like other parts of sentencing in this state, the authority to order a defendant in a criminal case to pay LFOs is wholly statutory. *See* Curry, 118 Wn.2d 918; RCW 9.94A.760.

There is also a line of cases that holds that a challenge to an LFO order is not "ripe for review" until the prosecution tries to enforce it.[6] But our State Supreme Court has rejected the idea that challenges to sentencing conditions are not "ripe" where, as here, the issues are primarily legal, do not require further factual

[6] See, e.g., Lundy, 176 Wn. App. at 108-09 (holding "any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review" until the State attempts to collect); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) (determining defendant's constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce LFO order); State v. Phillips, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (holding defendant's constitutional objection to the LFO order based on the fact of his indigence was not ripe until the State sought to enforce the order); State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (concluding the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

development, and involve a final decision of the trial court. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Bahl, 164 Wn.2d at 751.

First, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160 prior to issuing the order. Second, no further factual development is necessary. As explained above, Cooley is challenging the sentencing court's failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue (the statute and the sentencing record) are fully developed.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing that debt in the first place is not subject to change. In other words, while the defendant's obligation to complete payment of LFOs that have been ordered may be "conditional," the original

sentencing order imposing LFOs is final.[7] Accordingly, all three prongs of the ripeness test are met.

Also, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant and non-payment may subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at an unconscionably high 12% interest rate. RCW 10.82.090.

The hardships that might result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people LFOs result in:

> ...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnarling some in the criminal

[7] Division 1 previously concluded a trial court's LFO order is "conditional," as opposed to final, because the defendant may seek remission or modification at any time. State v. Smits, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009). However, it did so in the context of reviewing a denial of the defendant's motion to terminate his debt on the basis of financial hardship pursuant to RCW 10.01.160(4). Thus, Division I's analysis was focused on the defendant's conditional obligation to pay rather than on the legal validity of the initial sentencing order. Smits, 152 Wn. App. at 523.

> justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).[8]

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on the remission process to correct the error imposes its own hardships.

First, during the remission process, the defendant is saddled with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013). The defendant is not required to disprove this. See, e.g. Ford, 137 Wn. App. at 482 (stating the defendant is "not obligated to disprove the State's position" at sentencing where it has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for

[8] This report can be found at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains with the State.

Second, an offender who is left to fight his erroneously ordered LFOs through the remission process will have to do so without appointed legal representation. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given the petitioner's financial hardships, he will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se.

For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. *See* Legal Financial Obligations in Washington State at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties. Legal Financial Obligations in Washington State at 46-47. Permitting a challenge to an erroneous

LFO order on direct appeal would enable an offender to challenge his or her debt with the help of counsel and before the financial burden grows to overwhelming proportions.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that may otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. *See* State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources). Allowing the matter to be addressed on direct appeal will emphasize the importance of undertaking the necessary factual consideration when imposing LFOs in the first place and not rely on the remission process to remedy errors.

For all these reasons, this Court should hold Cooley's challenge to the legal validity of the LFO order *can* be raised for the first time on appeal and *is* ripe for review.

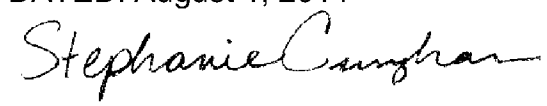
V. CONCLUSION

Trial court should not have admitted the 911 operator's

statement because the purpose for which it was admitted was irrelevant to any matter at issue in the trial. This error, coupled with trial counsel's ineffective performance in failing to request a limiting instruction, was prejudicial and likely impacted the outcome of the trial. Other than Lutter's testimony, it was the only direct evidence tying Cooley to the telephone number used to send threatening texts and place phone calls to Lutter, and the prosecutor improperly used the statement in her closing argument as proof that Cooley was guilty. Cooley's convictions should therefore be reversed.

Furthermore, the trial court's failure to comply with the sentencing statute when it imposed discretionary LFOs constitutes a sentencing error that may be challenged for the first time on direct appeal, and is ripe for review. Because the record fails to establish that the trial court did in fact consider Cooley's ability to pay before imposing discretionary LFOs, Cooley's case should be remanded for resentencing.

DATED: August 1, 2014



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Johnnie Murrel Cooley

CERTIFICATE OF MAILING

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Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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