No. 45487-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

LEOVIGILDO PEREZ GUTIERREZ, JR.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable John McCarthy, Judge

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PM 5-31-14

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

FEDERAL CASELAW

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove appellant Leovigildo Perez Gutierrez, Jr., guilty as an accomplice to identity theft and forgery committed by another man.

2. The insufficiency was exacerbated by the prosecutor's flagrant, prejudicial and ill-intentioned misconduct in repeatedly misstating the law of accomplice liability and counsel's ineffectiveness in failing to object to that misconduct.

3. There was insufficient evidence to prove appellant committed identity theft and possession of stolen property as a principal.

4. The trial court erred as a matter of law in failing to comply with RCW 10.01.160(3) when imposing discretionary legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove appellant guilty as an accomplice to identity theft and forgery committed by another, the prosecution had to show that he participated in some way or took some acts with intent to facilitate the crimes.

   Was there insufficient evidence to prove Gutierrez, Jr., was guilty as an accomplice when the evidence showed only that he and others arrived in a car driven by the man who tried to pass a bad check, was present in the room when the other man took those actions and got upset when the clerk refused to return the other man's identification and check?

2. Did the prosecutor commit flagrant, prejudicial and ill-intentioned misconduct by repeatedly misstating the law of accomplice liability by telling the jury that the law was that a defendant was "in for a penny, in for a pound?" Was counsel prejudicially ineffective in failing to take any steps to mitigate the prejudice to his client?

3. Was there insufficient evidence to prove a second count of identity theft and possession of stolen property based solely on simple possession of the credit card of another without any evidence that the card had been used or attempted to be used or that Gutierrez, Jr., intended to use it?

4. Under RCW 10.01.160(3), did the trial court err as a matter of law in failing to determine the defendant's actual ability

to pay and the potential effect of the imposition of several thousand dollars on the indigent defendant before imposing discretionary legal financial obligations?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Leovigildo Perez Gutierrez, Jr., was charged by corrected amended information with three counts of second-degree identity theft, two counts of forgery and one count of second-degree possession of stolen property. CP 59-61; RCW 9.35.020(3), RCW 9A.56.140(1), RCW 9A.56.150(1)(c), RCW 9A.60.020(1)(a)(b). After pretrial continuances and other matters on March 20, 2013, before the Honorable Ronald Culpepper, and on May 8, July 1, August 1 and September 17, 2013, before the Honorable Bryan Chuschcoff, a jury trial was held before the Honorable John McCarthy on October 2, 3, 7 and 8, 2013.[1] The jury could not agree and a mistrial was declared on one count of second-degree identity theft and one count of forgery. CP 103-108. The jury convicted Gutierrez, Jr., of two counts of second-degree identity theft, one count of forgery and one count of possession of stolen property. CP 103-108.

On October 18, 2013, Judge McCarthy imposed standard-range sentences. CP 109-21. Gutierrez, Jr. appealed and this pleading follows.

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[1]The verbatim report of proceedings in this case consists of 11 volumes, not all of which are chronologically paginated. They will be referred to as follows:
the proceedings of March 20, 2013, as "1RP;"
May 8, 2013, as "2RP;"
July 1, 2013, as "3RP;"
August 1, 2013, as "4RP;"
September 4, 2013, at "5RP;"
September 17, 2013, as "6RP;"
the four chronologically paginated volumes containing the trial proceedings of October 2, 3, 7 and 8, 2013, as "7RP;"
the sentencing proceeding of October 18, 2013, as "SRP."

See CP 125.

2. Testimony at trial

In early February, 2013, a man named Jimmy Visario went into a "Checkmate" check-cashing store to get a "payday" loan. RP 289. Jeannette Abdon was working at Checkmate that day and remembered helping Visario with that transaction. RP 289. Part of what she had done involved calling his bank, verifying his identification and verifying his job with his employer. RP 289-90.

A few days later, on February 7, 2013, Abdon said, "customer Jimmy" came in seeming happy, saying he was going to pay off his payday loan and cash a check. RP 291. He presented a check to Abdon and she noted that the company listed on it was different than the one Visario had listed as his employer a few days earlier. RP 292. She told him she would need to call the employer to verify the check was issued to him and Visario said, "okay." RP 292.

The check had Valley Medical Center as the payee so Abdon called there. RP 293. A senior accountant at Valley Medical Center testified about being contacted about the check, running Visario's name through the company database and determining that he was not listed as an employee. RP 27-476. She did further research and found that the check Visario was trying to cash was actually issued to someone named Mary Franklin. RP 276. Franklin, a registered nurse at Valley Medical Center, testified that her paycheck had not arrived in her mailbox in January of that year. RP 267. She did not know anyone named Visario. RP 267-68.

After Abdon got off the phone, she told Visario that she was going

to have to call the "cops" because that was what the Valley Medical Center people had told her to do. RP 293. Abdon, who still had Visario's identification and the check he had tried to present, said Visario seemed "nervous" at that but that he told her everything was "fine," because the check was made out to him and there was nothing wrong with it. RP 294. A guy who was with Visario got upset, however, telling the clerk to give Visario back his identification and saying "that they didn't want to cash a check with us." RP 294. Abdon said she told that guy to calm down, that it was "Jimmy's check" and did not involve him. RP 294-95.

Several officers went to the Checkmate after Abdon's call. Detective Thomas Gow of the Fife Police Department (FPD) testified about arriving, frisking Visario and reading him his rights. RP 368-73. FPD Detective Michael Malave contacted the other man, later identified as Leovigildo Perez Gutierrez, Jr., telling him he was being detained and then trying to search him. RP 319-22. The officer said that the man seemed "reluctant" and pulled away with his hands in his pockets so the officer put him in handcuffs. RP 319-22.

Jeff Nolta, also with FPD, arrived and spoke to Abdon, getting her version of events. RP 226-34. Abdon said there were some other people also involved who were in a vehicle outside. RP 232, 296. Nolta had another officer track those people down and speak to them. RP 199-200. That officer, patrol Commander David Woods, said he "detained" those people but "the information obtained from them was determined they were not involved with the call" and were only "associated." RP 185-86. As a result, Woods released them. RP 187, 200.

Woods, Malave and Gow all said that, at some point, Nolta told them there was probable cause to arrest Visario and Gutierrez, Jr. RP 186, 322-23, 368-73. Malave searched Gutierrez, Jr., finding a billing statement for insurance in Visario's name, a partially filled-out money transfer form from Western Union with Gutierrez, Jr.'s, name on it, and an Alaska Airlines Visa card in the name of Wilbur Bowen. RP 278, 364-65. Bowen testified that he was expecting to get a new Visa card at the end of 2012 but it did not arrive. RP 278. He did not think he got any bills for his card for things he did not incur and he just got another card. RP 281-85.

At that point, Nolta conducted a search of the car the men had arrived in after getting Visario's consent. RP 187. Nolta admitted that he asked for Visario's consent (not that of Gutierrez, Jr.) because Visario was the registered owner of the vehicle. RP 208-210. Inside the car, on the center console between the front passenger's seat and the driver's seat, was a brown vinyl envelope with a number of documents inside. RP 239-40. One of the documents was a check which was verified to be a valid check drawn on an account Visario had. RP 242-43. Another document was a check for thirty dollars which appeared to have "payer" information erased. RP 245. There was also a check in the amount of $406 which appeared to have the payee portion erased and Visario's name added. RP 245-46.

Also inside the envelope was a credit card application for an American Express card. RP 248. The application was filled out with the name Vickie D. Friend and had a date of birth and social security number

on it. RP 248-49. The application also had a mailing address written on it which was crossed out. Another address was added and an officer stated that the address was listed on Gutierrez, Jr.'s driver status at the time of trial. RP 249. Vickie Friend testified that it was her name and social security on the application but the wrong phone number and address. RP 311-312. No account had ever been opened or charges made on her accounts or anything similar. RP 312-22.

An officer admitted that the envelope could have been reached by a passenger in the front seat, the driver, or by either passenger in the back seat. RP 240. Another officer testified that the inside of the pouch would have been an "ideal" place to recover fingerprints. RP 265.

The jury hung on the charges of identity theft and forgery for the application for Vickie Friend but convicted of the other offenses as charged. CP 103-108.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE ALL THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES AND THE PROSECUTOR'S REPEATED MISSTATEMENTS OF THE LAW WERE FLAGRANT, ILL-INTENTIONED MISCONDUCT

Under both the state and federal due process clauses, the state has the burden of proving each element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994), reversed on other grounds on petition for writ of habeus corpus sub nom Hanna v. Riveland, 87 F.3d 1034 (9th Circ. 1996); 14th Amend.; Art. 1, § 3. When the prosecution fails to meet that burden,

reversal and dismissal with prejudice is required. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

In this case, this Court should hold, first, that there was insufficient evidence to prove guilt beyond a reasonable doubt for counts I and II, the second-degree identity theft and forgery charges for the Valley Medical Center check Visario tried to cash at Checkmate. Second, this Court should hold that there was insufficient evidence to prove guilt beyond a reasonable doubt for counts IV and V, the second-degree identity theft and second-degree possession of stolen property of W. Bowen. In addition, the prosecutor committed serious, flagrant and ill-intentioned misconduct in repeatedly misstating the law of accomplice liability and that misconduct prejudiced Gutierrez, Jr., in his defense. To the extent the misconduct might have been cured, counsel was ineffective in failing to make that attempt.

First, there was insufficient evidence to prove that Gutierrez, Jr., was guilty beyond a reasonable doubt as an accomplice to the second-degree identity theft and forgery charges based on Visario's attempt to cash the apparently forged check which had Visario's name on it. Evidence is sufficient to support a conviction when, taken in the light most favorable to the state, the evidence could support a rational trier of fact finding guilt beyond a reasonable doubt. See Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), reversed in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

As Visario was the person whose name was on the check, who

presented the check, who was trying to get the benefit from the check and who was engaging in the interactions with the clerk about it, the only theory under which Gutierrez, Jr., could have been found guilty was as an accomplice to Visario's efforts to cash the check. A person is guilty as an accomplice if, "with knowledge that it will promote or facilitate the commission of the crime," he solicits, commands, encourages or requests that someone commit a crime or aids or agrees to aid that person in planning or committing the crime. RCW 9A.08.020(3). In this context, "the crime" means "the charged offense," so that an accomplice cannot be found guilty of crimes he did not know would be committed but only those crimes he was proven to have had knowledge that his "accomplice" acts would facilitate. See State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000); State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000).

Put another way, the accomplice must "have the purpose to promote or facilitate the particular conduct that forms the basis for the charge," and the prosecution must prove that intent. Roberts, 142 Wn.2d at 511. Further, a person is not guilty as an accomplice unless he associates himself with the venture and takes some action to help make it successful. See State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). "Mere presence" without aiding the principal is not sufficient to support liability as an accomplice, even if the defendant knows of the ongoing criminal activity. Id.

Thus, in Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979), there was insufficient evidence to prove a juvenile guilty as an accomplice when he was part of a group which had stolen

weatherstripping, tied it into a rope and then strung it across a road. In finding the evidence insufficient, the Supreme Court noted that Wilson was not actually seen holding the rope nor had he been seen participating in the theft other than being present. This was not enough, the Court held, because "even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt." 91 Wn.2d at 491-92. Instead, there must be more than just evidence of presence and resulting encouragement - there must be evidence that the presence was for the *purpose* of encouragement, with the intent to assist or aid in the commission of the crime. Id.

Similarly, here, there was insufficient evidence to prove that Gutierrez, Jr., was more than just a bystander to Visario's forgery or attempts to cash the Valley Medical Center check at Checkmate. There was no evidence that Gutierrez, Jr., ever touched the check, or was involved in Visario's apparent amendment of it, in any way. It was Visario, not Gutierrez, Jr., who tried to present the check, Visario in whose name it was made out and Visario who had already created a relationship with Checkmate a few days before, setting up for the efforts the day he tried to pass off the Valley Medical Center check as his own. And it was Visario who drove the car in which he, Gutierrez, Jr., and the others arrived. Gutierrez, Jr., was shown only to have been in Visario's car, gone into the Checkmate with Visario and stood around while Visario approached the clerk, gave her the document and tried to pass it off as his own. Further, Gutierrez, Jr.'s alleged agitation when the clerk would not

give back Visario's license did not prove that Gutierrez, Jr., was involved in Visario's crimes - Visario was the driver of the car in which Gutierrez, Jr., had arrived and with whom he was presumably planning to leave - a driver who could not leave without the license the clerk would not give back.

At most, the prosecution proved that Gutierrez, Jr., was present when Visario tried to commit the crimes, not that Gutierrez, Jr., was a part of them, knew of them or was ready to assist in their commission. The prosecution failed to prove beyond a reasonable doubt that Gutierrez, Jr., was an accomplice to Visario's crimes involving the Valley Medical Center check.

Notably, throughout trial, the prosecutor repeatedly misled the jury about what was required to convict Gutierrez, Jr., as an accomplice, misstating the law of accomplice liability and reducing the state's burden of proof for these very charges. And these arguments were serious, prejudicial and ill-intentioned flagrant misconduct.

Because of their status as "quasi-judicial" officers, prosecutors have special duties not imposed on other attorneys, such as the duty to seek justice instead of acting as a "heated partisan" by trying to gain conviction at all costs. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in this duty, he not only deprives the defendant's of the due process right to a fair trial but also denigrates the integrity of the prosecutor's role. Charlton, 90 Wn.2d at

664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18. Ordinarily, when counsel fails to object to misconduct below, the issue is waived for appeal unless the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. See State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Here, that standard is amply met. In opening argument, the prosecutor specifically declared:

> May it please the Court, counsel, members of the jury. **If you are in for a penny, you are in for a pound. Sometimes when you lie down with dogs, you get fleas**. This is a case about two men who were acting in concert on February 7, 2013, to commit fraud. Only one of those men, the defendant, Mr. Gutierrez,[Jr.,] is on trial.
>
> This case essentially comes down to holding him accountable for his own actions for crimes that day and for his complicity in the actions of his friend, Jimmy Visario.

RP 169 (emphasis). The prosecutor returned to this theme in closing argument, reminding the jury:

> At the outset of this case, I told you that **when you are in for a penny, you are in for a pound,** and sometimes when you lie down with dogs, you get fleas.
>
> And the reason I use those metaphors **is because that's what we are dealing with in this case.**

RP 406 (emphasis added).

With these arguments, the prosecutor committed serious, flagrant and ill-intentioned misconduct. It is serious misconduct for a public

prosecutor, with all the weight of his office behind him, to mislead the jury as to the relevant law, especially in a way which deprives a defendant of his full rights. See, e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). The "in for a penny, in for a pound" or "in for a dime, in for a dollar" theory of accomplice liability has been repeatedly rejected as a misstatement of law by our courts. See Cronin, 142 Wn.2d at 578-79; Wilson, 169 Wn. App. at 392. In Cronin, the Supreme Court condemned the argument as a misstatement of the prosecution's burden, which required proof, beyond a reasonable doubt, that the accomplice actually intended to facilitate the particular conduct that forms the basis of the charge. See Cronin, 142 Wn.2d at 578-79. The discredited "in for a penny" theory is wrong because it incorrectly suggests that a person who goes along with and agrees to engage in *any* criminal conduct with someone is liable for *all* crimes that person ends up committing, regardless whether there is evidence the first person had knowledge that their acts would be facilitating such other crimes. Id.

There can be no question that the repeated "theme" was flagrant, ill-intentioned misconduct when used here. Where courts have specifically condemned an argument, it is such misconduct for the prosecutor to nevertheless rely on the argument in making an effort to gain a conviction. See State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). Here, the prosecutor made the arguments more than 10 years after they were condemned in Cronin and Roberts - and they were made by an experienced prosecutor.

Further, this ill-intentioned misconduct was clearly an effort to

convince the jury to convict Gutierrez, Jr., based something far less than proof beyond a reasonable doubt of his guilt. Instead, the prosecutor was urging the jury to convict Gutierrez, Jr., based on his association with Visario- i.e., "lie down with dogs, you get fleas" and being present when Visario committed his crimes, *even if* the jury did not believe that Gutierrez, Jr., knew about Visario's plan to commit the crimes, because he was guilty of whatever Visario did regardless of Gutierrez, Jr.'s own knowledge or intent - i.e., "in for a penny, in for a pound." By repeatedly telling the jury that Gutierrez, Jr., was "in for a penny, in for a pound," and that he should be found guilty as a result, the prosecutor relieved himself of the full weight of his burden of actually proving that Gutierrez, Jr. was, in fact, an accomplice under the law, instead of based solely upon presence and association. Because there was only presence and association, the result was that the jury convicted based on insufficient evidence.

This kind of evocative argument is not the type of "bell" which can be "unrung" by instruction. Even our learned courts have struggled with the complex issue of what, exactly, a person must do to be found guilty as an accomplice to the crimes of another. See, e.g., Cronin, 142 Wn.2d at 578-79. Indeed, experienced attorneys and judges actually drafted and relied on pattern jury instructions *misstating* that law for years in mistaken belief it was correct. Id.

Further, the emotional impact of the argument cannot be overstated. The type of "catchphrase" argument is easy to remember and likely to be consistent with the everyday beliefs of jurors about when someone is responsible, at least in some way, for the acts of another.

Even if the repeated theme of the prosecutor misstating accomplice liability could have been cured, however, this Court should find counsel ineffective for his failure to object to the improper theme below. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.3d 563 (1996); Sixth. Amend.; Art. I, § 22. Counsel is ineffective despite a strong presumption to the contrary if his conduct falls below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). Here, given that the bulk of the prosecution's case against Gutierrez, Jr., was based on the theory of accomplice liability, the prosecutor's repeated, evocative misstatements of the requirements for such liability were extremely likely to have a highly prejudicial effect. Yet counsel sat mute, allowing these remarkable, flagrant and ill-intentioned arguments to be made to the jury not only at the beginning of the case but again at the end.

There was insufficient evidence to prove Gutierrez, Jr., was guilty of Visario's forgery and identity thefts as an accomplice. The prosecutor's misconduct went directly to this issue and cannot be deemed harmless in any way. Further, to the extent the highly improper arguments might have been able to be cured, counsel was ineffective in failing to at least attempt to mitigate the prejudice to his client. This Court should so hold.

There was also insufficient evidence to prove Gutierrez, Jr., guilty of identity theft and possession of stolen property charges for Bowen's credit card. To prove identity theft, the prosecution had to prove that the

defendant knowingly obtained, possessed, used or transferred "a means of identification or financial information of another person" with intent to commit or "aid or abet" any crime. RCW 9.35.020(1). Possession of stolen property requires proof that the defendant not only possessed property which was not his but had knowledge the property was stolen. RCW 9A.56.140.

The prosecution failed to present sufficient evidence to prove either of these crimes. Intent may be inferred from all the circumstances as a matter of logical probability. See State v. Yarbrough, 151 Wn. App. 66, 87, 210 P.3d 1029 (2009). Here, however, the evidence showed that Gutierrez, Jr., possessed a credit card in someone else's name, but did not show any attempts to use it at all or other evidence that Gutierrez, Jr., had any "intent" to use the card for a crime. Aside from his possession of the card, there was no evidence of any "intent" or attempted use or exploitation of the "identity" involved.

The possession of stolen property charge similarly was based solely upon mere possession of the card. Indeed, the prosecutor argued in closing that the jury should infer the essential element of knowledge that the card had been stolen simply based upon the fact that Gutierrez, Jr., possessed someone else's card:

> Again, you have to draw inferences because we are not reading minds here. But this card has been stolen for sometime, and it's in the defendant's wallet. You know, one doesn't normally find other people's credit cards in one's wallet. It's a fairly reasonable, easy conclusion to make.
>
> That the defendant withheld or appropriate the property to the use of someone other than the true owner or person entitled

> thereto. **Well, he kept it. Let's say you did find a stolen credit card in your wallet.** There is kind of one thing you do. **You either call up the card issuer, or if you can find the person whose card it is , you call them, or you call the police. You don't hold onto it and keep it and appropriate it to yourself.**

RP 422-23 (emphasis added). Thus, the prosecutor effectively argued a presumption that one who is in possession of any stolen access device is, by definition, aware that it is stolen because they know it is not theirs. But such a presumption improperly conflates two essential elements of possession and knowledge/intent into one. And such a presumption creates a due process problem by relieving the state of its responsibility to prove all essential elements of the charged crime, beyond a reasonable doubt. State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996).

Notably, in creating the crime of possessing stolen property, the Legislature *did* choose to create a rebuttable presumption of knowledge that items were stolen, but it applies only when the defendant is in possession of "stolen access devices issued in the names of two or more persons" - something not present here.

There was insufficient evidence to support the convictions for identity theft and forgery as an accomplice to Visario. There was insufficient evidence to show that Gutierrez, Jr., was guilty as a principal of identity theft and possession of stolen property. And the prosecutor's flagrant, ill-intentioned and prejudicial misconduct invited the jury to decide the case on a wholly improper basis, on a theory of accomplice liability repeatedly rejected by our courts. This Court should reverse and dismiss the convictions.

2. THE TRIAL COURT ERRED IN FAILING TO COMPLY WITH STATUTORY REQUIREMENTS IN IMPOSING LEGAL FINANCIAL OBLIGATIONS

Like other parts of sentencing in this state, the authority to order a defendant in a criminal case to pay court costs is wholly statutory. See, State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992); RCW 9.94A.760. Where a court acts without statutory authority in ordering a sentence, that issue may be raised for the first time on appeal. See State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Here, the court acted outside its statutory authority in ordering recoupment of discretionary costs at sentencing. The prosecutor asked for the following costs to be imposed: a $500 "crime victim" fee, a $100 fee for "DNA," a $200 court filing fee, and $1,500 for "recoupment" of the costs of appointed counsel. SRP 2-3. The trial court imposed "the costs requested by the State" without further discussion. CP 113. The total legal financial obligations imposed was $2,300. CP 113.

The trial court failed to comply with the statutory requirements in imposing discretionary legal financial obligations. Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence, but another subsection of the same statute prohibits a court from entering such an order without considering the defendant's financial situation:

> 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.

RCW 10.01.160(3).

Here, no such findings were actually made in relation to the specific facts and circumstances of this case. In a pre-printed portion of the judgment and sentence, the document provided:

> 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 the defendant's financial resources and the likelihood 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. RCW 9.94A.753.

CP 112. Boilerplate language also imposed interest "from the date of the judgment until payment in full." CP 112-13.

But there was no evidence whatsoever to support this bald declaration, apparently pre-printed on *every* judgment and sentence in the county. Such a "boilerplate" finding is not evidence that the trial court actually gave independent thought and consideration to the facts of the particular case. See, e.g., Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011). Indeed, there is not even a "box" next to the preprinted language for the judge to "check off" if she makes the relevant finding in the particular case - the "boilerplate" finding is presumptively entered in *every* case, regardless of the evidence or circumstances involved.

Thus, the "boilerplate" language did not amount to a proper finding by the court sufficient to show compliance with the mandates of RCW 10.01.160(3). See, e.g., State v. Bertrand, 165 Wn. App. 393, 404 n. 13, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012). And while the Supreme Court has held that there is no constitutional requirement that a court enter formal, specific findings regarding ability to pay, where, as

here, an unnecessary finding is made in "boilerplate" language, that "finding" is subject to this Court's scrutiny. See Curry, 118 Wn.2d at 918; Bertrand, 165 Wn. App. at 404 n. 13. The trial court's "boilerplate" "finding," included by virtue of being in the judgment and sentence in every case, was unsupported by the record and wholly improper.

There was thus no true finding or consideration under RCW 10.01.160(3) before imposition of the costs in this case.

Recoupment of costs under RCW 10.73.160 was held constitutional in State v. Blank, 131 Wn.2d 230, 237, 930 P.2d 1213 (1997), because the trial court must consider ability to pay and because procedures for modification of the financial obligation existed for those with the inability to pay. The failure to include a pre-imposition consideration of ability to pay was upheld because the defendant might later acquire the means to pay but could raise an objection to enforcement later based on inability to pay and/or ask for "remission" of those costs later. 131 Wn.2d at 242-43. And the Supreme Court specifically required that "ability to pay (and other financial considerations) must be inquired into before enforced payment or imposition of sanctions for nonpayment" and relied on the remission procedures in concluding that RCW 10.73.160 was not unconstitutional. 131 Wn.2d at 246-47.

Now, however, we know that, in fact, the remission process is broken, as are many of the protections detailed in Blank. The imposition of costs and their substantial impact on the lives of indigents has recently been detailed at length by the ACLU, which discovered that lower courts in this state are requiring people to give up public assistance and other

public monies given to cover their basic needs and even imprisoning poor people for failure to pay on such debt. *See* ACLU/Columbia Legal Services Report: Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor (February 2014).[2]

Similarly, a study from the Washington State Minority and Justice Commission examined the impact of such costs, finding that the imposition of them reduces income, worsens credit ratings, makes it more difficult to secure stable house, hinders "efforts to obtain employment, education, and occupational training" and has other serious effects "which in turn prevents people from restoring their civil rights" and becoming full members of society. *See* Washington State Minority and Justice Commission, The Assessment and Consequences of Legal Financial Obligations in Washington State (2008).[3]

Further, once such an order is entered, the defendant may be subject to arrest for failure to pay and is immediately liable not only for the amount ordered but also to pay the astronomical interest rate of 12%. RCW 10.82.090.

Gutierrez, Jr., is aware that the Supreme Court has a similar issue before it in State v. Blazina, 174 Wn. App. 906, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013), in which the defendant did not object to the trial court's failure to comply with the requirements of RCW 10.01.160. He is also aware that this Court recently held, in State v.

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[2]Available at aclu-wa-org/news/report-exposes-modern-day-debtors-prisons-washington.

[3]Available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013), that a lower court order imposing legal financial obligations is not "ripe for review" until the prosecution tries to enforce them, as Division One held in State v. Calvin,176 Wn. App. 1, 302 P.3d 509 (2013) (as amended 10/22/13), review granted, __ Wn.2d __ (2014) (currently stayed pending Blazina).

Regarding the latter issue, however, our 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"). And the 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 development and involve a final decision of the court. Bahl, 164 Wn.2d at 751. Here, the order of costs is immediately enforceable as of the day of its entry and starts gathering interest upon that date and the issue is legal - did the trial court act outside its statutory authority in ordering costs? No further factual development or proceedings are required for that question to be answered by this Court.

Notably, in its decision in Calvin, Division One focused solely on whether there was a *factual* issue with the trial court's decision below, finding that the failure to identify such a dispute below had waived the issue on appeal. The issue here, however, is legal - did the trial court act outside its statutory authority in failing to comply with RCW 10.01.060 in

imposing the discretionary legal financial obligations. See, e.g., State v. Burns, 159 Wn. App. 74, 77, 244 P.3d 988 (2010).

RCW 10.01.160(3) mandates that a court "shall not order a defendant to pay costs" unless and until the court finds the defendant "is or will be able to pay them," and further that the court "shall" take the defendant's financial resources and the nature of the financial burden into account before imposing it. Here, the state provided no evidence establishing ability to pay, nor did it ask to have the trial court make any determination under RCW 10.01.160 in asking for imposition of the costs. This Court should hold that the trial court failed to comply with statutory requirements in imposing the discretionary costs for attorney's fees in this case, and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should grant the requested relief.

DATED this 30th day of May, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office, first class postage prepaid to 946 County City Building, 930 Tacoma Ave. S, Tacoma, Wa. 98402, and to Mr. Leovigildo Perez Gutierrez, Jr., at 7512 4th St. S., Seattle, WA. 98118.

DATED this 30th day of May, 2014.

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