No. 92785-5
COA No. 32824-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CARL K. MATHENY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Robert G. Swisher

PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Carl Matheny asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Carl Keith Matheny*, No. 32824-4-III (January 12, 2016). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Prior acts of a defendant are not admissible simply to prove he acted in conformity with a particular character trait. Prior acts may be admissible if relevant and they fall within one of the designated exceptions enumerated in ER 404 (b). Here, in a possession of methamphetamine prosecution, the trial court admitted evidence that Viagra powder was discovered in the rear seat of the police car in which Mr. Matheny had ridden without identifying the purpose for which the evidence was admitted and without balancing the probative value of the evidence against its prejudice. Is an issue of substantial public interest presented where the trial court's error in admitting the

Viagra powder evidence was not harmless where the overwhelming prejudice of this evidence outweighed any limited probative value?

2. A court may impose discretionary LFOs only after making an individualized assessment of the defendant's financial situation and determining his ability to pay. This finding must be made on the record. The court here imposed over $2900 in discretionary LFOs without making any finding regarding Mr. Matheny or his ability to pay. Is Mr. Matheny entitled to reversal of his sentence and remand for a new sentencing hearing where the court will be required to make the necessary findings?

3. The trial court may place the burden on the defendant of proving a defense that negates an element of the offense without offending due process. Unwitting possession negates the element of knowledge in a possession of a controlled substance prosecution, yet the court placed the burden of proving unwitting possession on Mr. Matheny. Is a significant issue under the United States and Washington Constitutions presented where the trial court violated due process in impermissibly shifting the burden onto Mr. Matheny?

D. STATEMENT OF THE CASE

The police conducted a traffic stop of Carl Matheny after he committed a traffic violation. RP 30-31. Mr. Matheny was arrested for Driving While License Suspended (DWLS). RP 31. Mr. Matheny was transported to jail, where upon his removal from the police car, the police found white powder on the seat and a similar residue on Mr. Matheny's fingers. RP 33-34. This substance was tested and determined to be Viagra. RP 74.

While searching Mr. Matheny incident to arrest, the police found a pen with methamphetamine residue inside. RP 31. Mr. Matheny was charged with possession of methamphetamine, driving while license suspended in the second degree, and possession of a dangerous weapon (butterfly knife). CP 6-8. Prior to trial, Mr. Matheny moved the trial court to prohibit the State from eliciting any evidence of the Viagra powder found in the rear of the police car. RP 10-12, 25-26. The State argued that the evidence "shows some knowledge by the defendant of his culpability either for the driving while suspended or possibly possession of some drug." RP 13. The trial court denied Mr. Matheny's motion and allowed the evidence of the white powder to be admitted without identifying the purpose for which it was admitted or

balancing the probative value against the prejudice. RP 26 ("Okay. Well, it was tested, so we'll let it in.").

The trial court instructed the jury in Court's Instruction 9 on unwitting possession:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded considering all of the evidence in the case that it is more probably true than not true.

CP 21; RP 104.

At the conclusion of the jury trial, Mr. Matheny was found guilty as charged. RP 141-42. The court imposed $3,570 in LFOs of which only $600 were mandatory fees, without making an inquiry into Mr. Matheny's financial situation and without making an on the record finding that he had the present or future ability to pay. CP 108-10; RP 163-64.

The Court of Appeals ruled the trial court erred in admitting the evidence of the Viagra powder, but that the admission was harmless. Decision at 5-6. The Court also ruled that placing the burden of proving

unwitting possession did not offend due process and that the trial court did not err in imposing the discretionary costs. Decision at 7-9.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. **The Evidence of the Viagra Powder Admitted Pursuant To ER 404(B) Proved Nothing More Than Mr. Matheny Acted In Conformity With A Character Trait Which Violated His Right To A Fair Trial**

The Court of Appeals ruled that the evidence of the Viagra powder was error, but nevertheless harmless. Decision at 5-6.When a court erroneously admits prior bad acts evidence under ER 404 (b), reversal is required where, "within reasonable probability, materially affected the outcome of the trial." *State v. Gresham,* 173 Wn.2d 405, 433, 269 P.3d 207 (2012). The State's argument at trial was that since Mr. Matheny possessed the Viagra, *ergo* he necessarily also possessed the methamphetamine:

> Now, concerning that, let me talk about a few things the defendant talked about, the defense attorney. This Viagra that was on the seat. Weird, weird deal. You know, we hadn't really talked about what was going on there, but I would argue to you the one thing that you can conclude by the fact that the defendant has his hands behind him, Corporal Schwarder hadn't transported anybody, made sure his car was clean, and when he gets to the station, all this residue is there, and it turns out it's Viagra. Okay. You know, weird, weird deal. Strange deal.

> But the one thing you can conclude is that the defendant was secreting something on his person. That's the one thing we know. And he was trying to hide things. That's -- you know, who knows why he didn't just come clean about that and say, "You know, I've got some Viagra on me," instead of trying to crush it up and make some secret about it. But that's what he did. That's what he did with respect to Viagra. He couldn't crush up that pen. It's a pen. He couldn't crush it up like he could with a pill. But he's definitely trying to secrete things on his person. That's the importance of the Viagra.

RP 133-34. This argument stressed the evidence was admitted solely as propensity evidence.

Further, the jury was never instructed the evidence could only be used for a limited purpose or what that purpose was since the trial court failed to articulate it, thus allowing the jury to use the evidence of the Viagra powder for whatever purpose it wished, including an improper purpose such as propensity. As a result, there was a reasonable probability the admission of this evidence materially affected the outcome of the trial. Contrary to the Court of Appeals conclusion, the error in admitting the evidence of the unrelated Viagra was not a harmless error.

Mr. Matheny asks that this Court grant review and reverse his conviction.

2. **The trial court erred in imposing court costs and attorney's fees without making a finding regarding Mr. Matheny's inability to pay**

The allowance and recovery of costs is entirely statutory. *State v. Nolan,* 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." *See also State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015), *citing* RCW 10.01.160 and requiring court to make individualized inquiry into defendant's ability to pay. In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs. *Blazina* held that 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. 182 Wn.2d at 828, *citing* RCW 10.01.160(3).

Only the victim assessment and DNA collection fee were mandatory fees that could not be waived. *State v. Curry,* 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson,* 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory). All of the other fees imposed by the court were discretionary and could have been waived.

The *Blazina* court was very clear in the sentencing court's responsibility prior to imposing Legal Financial Obligations (LFOs):

> We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an *individualized inquiry into the defendant's current and future ability to pay* before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 839 (emphasis added).

The Court of Appeals ruled the trial court "heard about Mr. Matheny's employability as well as financial obligations in another case. " Decision at 9. The discussion between the court and Mr. Matheny at sentencing did center on the fact he was a firefighter for

four years and wanted to get his job back. RP 161-64. Lacking in this discussion was any questioning about Mr. Matheny's current income, his debts and obligations and his overall ability to pay; both now and in the future. *See* RCW 10.01.160(3) ("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.)." This inquiry is not advisory, it is required.

In addition, the fact of this felony conviction renders any discussion of his employability meaningless since it is highly unlikely he will be able to get his firefighting job back. Thus, the sentencing court's failure to make the individualized inquiry into Mr. Matheny's ability to pay requires remand for a new sentencing hearing. *Blazina*, 182 Wn.2d at 838-39.

This Court should accept review and find the trial court's inquiry fell substantially short of that required by this Court in *Blazina*. Mr. Matheny asks this Court to remand for a new sentencing hearing.

3. **Placing the burden of proving unwitting possession on Mr. Matheny violated his right to due process which requires the State to prove all elements of the offense beyond a reasonable doubt.**

> Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of trial and applies to every element necessary to constitute the crime.

Davis v. United States, 160 U.S. 469, 487, 16 S. Ct. 353, 40 L. Ed. 499 (1895). The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

> *Mullaney* [*v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)] . . . held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

Patterson v. New York, 432 U.S. 197, 215, 97 S. Ct. 2319, 52 L. Ed. 2d 281 (1977).

Thus, in addition to the elements of an offense, the State must disprove a defense where (1) the statute indicates the Legislature's intent to treat the absence of a defense as "one of the elements included in the definition of the offense of which the defendant is charged;" or (2) the defense negates an essential ingredient of the crime. *State v. McCullum*, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983); *see also State v. Deer*, 175 Wn.2d 725, 734, 287 P.3d 539 (2012) ("when a defense 'negates' an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense"), *cert. denied*, 133 S. Ct. 991 (2013).

Applying this framework to the issue of unwitting possession in a possession of a controlled substance prosecution it is clear the State must bear the burden of proving knowing possession beyond a reasonable doubt. This is because unwitting possession negates the element of knowledge, that is to say that proof of unwitting possession will necessarily disprove knowingly possessing.

In *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), the Court reexamined its prior decisions and ruled that consent is not an affirmative defense to forcible compulsion on which the burden of proof may be placed on the defendant, as it had previously held on a

number of occasions. 181 Wn.2d at 768-69. Rather, the Court concluded that consent negated the element of force, thus the burden of proving the lack of consent must necessarily fall upon the State. *Ibid.*

The Court came to this conclusion by overruling its previous decisions which had consistently rejected the argument that placing the burden of proving consent on the defendant violated due process, instead mistakenly and repeatedly labeling consent as an "affirmative defense." *W.R.*, 181 Wn.2d at 768-69, *overruling State v. Camara,* 113 Wn.2d 631, 781 P.2d 483 (1989), and *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006).

The Court of Appeals relied upon this Court's decision in *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006 (1982), in rejecting Mr. Matheny's argument. Decision at 7. In *Cleppe,* this Court held that knowledge is not a required element of unlawful possession because the Legislature had removed the *mens rea* requirement from a previous version of the bill, thus intending to omit knowledge as an element of unlawful possession. *Cleppe,* 96 Wn.2d at 378, 380. More than twenty years later, in *Bradshaw,* the Supreme Court again examined at the issue and specifically declined to overrule *Cleppe,* 152 Wn.2d at 539. In *Bradshaw*, the Court noted that the

Legislature had amended RCW 69.50.401 seven times since *Cleppe* and had not added a *mens rea* element to the unlawful possession statute. *State v. Bradshaw,* 152 Wn.2d 528, 533, 98 P.3d 1190, *cert. denied,* 544 U.S. 922 (2005).

Cleppe and *Bradshaw* suffer from the same infirmity as *Camara* and *Gregory* did in *W.R.*; the refusal to recognize that unwitting possession, as did consent in *Camara*, negates the implied element of knowledge. One's possession of a controlled substance cannot be unwitting if one has knowledge of the controlled substance. Thus, unwitting possession negates the element of knowledge. Whether the element is explicitly stated in the statute or implied by the courts is of no moment; if that element is negated by a "defense," the defendant cannot be forced to bear the burden of proving the "defense" without violating due process.

Further, there are no instructions which could properly convey to a jury the State's burden of proof on knowledge all the while telling the jury that the defendant must prove unwitting possession by a preponderance of the evidence. As *State v. Lynch* recognized, attempting to prove the "defense" by a preponderance of the evidence is a far greater burden than simply establishing a reasonable doubt on

forcible compulsion. 178 Wn.2d 487, 494, 309 482 (2013) (error to instruct on consent where defendant objected and his trial strategy was to show to the jury the State had not proven forcible compulsion). The effect of any instruction would be to tell the jury that the defendant must prove by a preponderance of the evidence that a reasonable doubt exists as to unwitting possession. More than just a logically impenetrable question, such an instruction is contrary to the guarantees of due process.

A state may not designate a "defense" which actually represents negation of an element of the crime charged, then require the defendant carry the burden of persuasion on the defense. *Mullaney*, 421 U.S. at 684. Requiring a defendant to prove unwitting possession does just that. *Cleppe* and *Bradshaw* are incorrect and must be reexamined.

This Court should accept review and reexamine its decisions in *Cleppe* and *Bradshaw* and find placing the burden of proof on the defendant to prove unwitting possession offends due process. Mr. Matheny then asks this Court to reverse his conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Matheny asks this Court to accept review and reverse his conviction or sentence.

DATED this 8th day of February, 2016.

Respectfully submitted,

s/Thomas M. Kummerow
THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Service e-mail : wapofficemail@washapp.org
Washington Appellate Project – 91052
1511 3rd Ave. Ste 701
Seattle, WA 98101
Phone: 206-587-2711
Fax : 206-587-2710
Attorneys for Petitioner

FILED
JAN. 12, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CARL KEITH MATHENY, Appellant.	)	No. 32824-4-III UNPUBLISHED OPINION

KORSMO, J. — In this appeal, Carl Matheny challenges his convictions for possession of a controlled substance, possession of a dangerous weapon, and driving while license suspended. He primarily argues that the court erred in admitting evidence that after arrest he was covered with powdered Viagra and in denying his request for a Drug Offender Sentencing Alternative. We affirm.

FACTS

Mr. Matheny was stopped for a traffic infraction and immediately got out of the car and told the officer that he was going to jail. Corporal Schwarder of the Benton County Sheriff's Office arrested him after learning that Matheny's driver's license had been suspended. A search incident to the arrest revealed a butterfly knife and a hollow portion of a pen. Field testing disclosed the presence of methamphetamine residue in the pen.

Mr. Matheny was placed in the back of a patrol car and driven to the Benton County Jail. When removing Mr. Matheny from the car, Corporal Schwarder noticed white residue on the back seat and on Mr. Matheny's hands. The corporal gathered as much of the material as he could. Testing later identified the powder as Viagra.

The noted charges were filed and the matter proceeded to jury trial. Defense counsel moved to exclude evidence of the white powder, arguing that it had not been tested. The prosecutor indicated that the powder had been tested and determined to be Viagra. Defense counsel noted that Viagra was not a controlled substance and might confuse the jury. The prosecutor subsequently argued that the Viagra was admissible to show that Mr. Matheny was "secreting something" on his person. Defense counsel responded that it was not relevant and that it had "prejudicial value." The trial court permitted the testimony.

Mr. Matheny testified in his own defense that he had picked up the pen at a friend's house and removed it so that little kids would not pick it up. He knew that the pen had been used for drugs, but did not know there was any residue in the pen. Without objection from either party, the court instructed the jury on the defense of unwitting possession. The instruction placed the burden on the defendant to prove unwitting possession by a preponderance of the evidence. Clerk's Papers (CP) at 21. Neither counsel examined Mr. Matheny about the powder.

The prosecutor did not address the Viagra evidence until rebuttal argument. There he told the jury that "the one thing you can conclude" from the Viagra "is that the defendant was secreting something on his person." Report of Proceedings (RP) at 133. Unable to destroy the pen, he destroyed the Viagra.

The jury convicted the defendant as charged. Armed with a supportive evaluation from a chemical dependency evaluator, Mr. Matheny sought a Drug Offender Sentencing Alternative (DOSA). The court rejected the request, stating "I don't think he's ready for treatment. He doesn't want treatment." RP at 162. The court noted that Mr. Matheny had denied that he had a drug problem and claimed to be acting the hero rather than acknowledging his drug problem. A standard range term was imposed.

Before imposing sentence, the court heard from the defendant and his counsel. The defense indicated that Mr. Matheny had worked as a smoke jumper and a mechanic, but would soon be reporting to prison upon the issuance of the mandate in the appeal of an earlier conviction. The court then imposed legal financial obligations (LFOs) totaling $3,070.[1] That figure included $1,170 in discretionary costs and a $1,000 fine.[2] The court

[1] Erroneously tallied as $3,570 in the judgment. CP at 109. The judgment form notes assessed amounts of $500, $1,370, $1,000, $100, and $100; those figures total $3,070. The total should be corrected by the trial court.

[2] The context of the sentencing discussion suggested this was a VUCSA fine, but that box on the judgment and sentence form is not checked, nor is the deferral box checked. CP at 109. If error, this also should be corrected by the trial court.

initially indicated it was imposing a "mandatory" $2,000 fine, but reduced it to $1,000 at defense request due to financial hardship that included the fines imposed in the other case.

Mr. Matheny then timely appealed to this court.

ANALYSIS

Mr. Matheny presents four arguments in support of his appeal. He contends that the court erred in admitting the powdered Viagra evidence, erroneously instructed the jury on the burden of proof concerning unwitting possession, erred in ordering the discretionary LFOs without adequate consideration of his finances, and erred in not granting a DOSA. We address those four concerns in the order indicated.

Powdered Viagra Evidence

Mr. Matheny first argues that the court erred in admitting the powdered Viagra evidence in violation of both ER 401 and ER 404. We agree that the evidence was not relevant, but also conclude any error was harmless.[3]

ER 401 provides in part that evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable." Evidentiary rulings are reviewed for abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 429-430, 705 P.2d 1182 (1985). "In close cases, the balance must be tipped in favor of the defendant." *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

[3] We thus need not decide if ER 404(b) was violated.

An erroneous evidentiary ruling is not prejudicial "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

The prosecutor argued that "secreting" the Viagra was relevant to show that Mr. Matheny also was secreting the pen. We disagree. Whether or not the pen was secreted was determined by its own facts. Here, the pen was found in the defendant's pocket, a typical place for carrying a pen. It does not appear to have been secreted.[4]

Moreover, the purpose of showing that the pen was secreted was to establish the defendant's guilty knowledge of his possession of the methamphetamine. However, the prosecutor had no obligation to prove knowledge. Knowledge only became an issue, as noted in the next section of this opinion, once the defendant contended that his possession was unwitting. The defendant's knowledge was not at issue during the State's case.

We thus believe the court erred in admitting the evidence. However, we do not believe the evidence materially affected the verdict. The charged offense involved the pen found at the time of the arrest, not the powder subsequently discovered in the car. The issue presented for the jury was whether or not Mr. Matheny knew the miniscule amount of the controlled substance was present in the pen. The Viagra evidence was

---

[4] The pen had already been seized and tested before Mr. Matheny undertook to destroy the Viagra, thus strongly suggesting that the purpose of his actions was related to his possession of the Viagra rather than the pen's contents.

very briefly mentioned in argument, and only then in the limited context of whether it showed that Mr. Matheny had also secreted the pen containing the methamphetamine. Mr. Matheny did not testify about the powder. There also is nothing inherently bad about possessing Viagra, a widely advertised substance. In sum, the destruction of the Viagra tablet had nothing to do with the jury's verdict about whether or not Mr. Matheny possessed the methamphetamine.

Accordingly, although it was error to admit the evidence, the powder did not impact the verdict.

Unwitting Possession Instruction

Mr. Matheny also argues that the jury instructions improperly placed the burden of proving unwitting possession on the defense. His argument is controlled by binding Washington State Supreme Court precedent to the contrary.[5]

The Washington legislature did not include a knowledge element in the unlawful possession statute. Our court subsequently concluded that the omission was intentional and that a knowledge element should not be read into the statute. *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981). Reviewing the issue a generation later, our court again concluded that *Cleppe* was correctly decided. *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d

[5] We therefore do not address the question of whether Mr. Matheny has established manifest constitutional error that permits him to raise this issue initially on appeal. RAP 2.5(a)(3).

1190 (2004). Those decisions are binding on this court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

In order to ameliorate the harshness of strict liability, the court created a common law defense of unwitting possession. *Cleppe*, 96 Wn.2d at 381. The defense can be applied either when the defendant does not know he is in possession of a controlled substance or if he did not know the nature of the substance in his possession. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). The burden of proof is on the defendant. *Cleppe*, 96 Wn.2d at 381.

Mr. Matheny now argues that the defense cannot bear the burden of proof on an affirmative defense after *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). That decision does not support his position. There the court concluded that the consent defense to rape negates the forcible compulsion element of the crime and that due process therefore requires the State to disprove consent. *Id.* at 765-768.

In contrast to the rape charge at issue in *W.R.*, the affirmative defense of unwitting possession does not negate any element of the crime of possession of a controlled substance. Instead, it involves a judicially-created *excuse* for the offense. Due process does not therefore require that the State disprove a defense that negates an element of the crime. *W.R.* is inapplicable.

The court properly instructed the jury on the defense of unwitting possession.

Legal Financial Obligations

Mr. Matheny also argues that the trial court erred in imposing significant discretionary LFOs without making the inquiry required by RCW 10.01.160(3). Since the trial court attempted to fulfill its statutory obligations, we conclude that any error is not manifest in light of Mr. Matheny's failure to object and decline to address the merits of the claim.

RCW 10.01.160(3) states:

> 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.

The statutory inquiry is required only for *discretionary* LFOs. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (mandatory fees, which include victim restitution, victim assessments, DNA fees, and criminal filing fees, operate without the court's discretion by legislative design); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (victim assessment and DNA collection fee mandatory). Trial courts are not required to enter formal, specific findings. *Lundy*, 176 Wn. App. at 105.

In *Blazina*, our court concluded that the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). To that end, the appellate courts retain discretion whether or not to consider the issue initially on appeal.

Id. The *Blazina* court then decided to exercise its discretion in favor of accepting review due to the nationwide importance of the general issue concerning LFOs and to provide guidance to our trial courts. *Id.* The court noted that trial judges have a statutory obligation to consider RCW 10.01.160(3) at sentencing and make an individualized determination of the defendant's ability to pay discretionary LFOs. *Id.* at 837.

Mr. Matheny argues that this court likewise should exercise its discretion and remand his case for a new sentencing proceeding. However, he is not situated similarly to the defendants in *Blazina*. There the trial court made no attempt to satisfy its statutory obligations. *Id.* at 831-832. In contrast, here the trial court heard about Mr. Matheny's employability as well as his financial obligations in another case. Using that information, the court reduced the drug fine by 50 percent. He made no similar request concerning his other obligations and did not object to the trial court's ruling.

In these circumstances, we are not convinced that we should exercise discretion to hear this unpreserved error. *Blazina* requires an individualized inquiry into the ability to pay and a consideration of various factors that weigh on that issue. *Id.* at 838. The inquiry in this case probably was not sufficient to satisfy *Blazina*. However, unlike those cases where *no* inquiry was attempted, here the trial court made an effort to satisfy the statute. Given that Mr. Matheny did not object to the trial court's efforts, which did benefit him, we decline to find that there clearly was error below.

Accordingly, we decline to address this issue.

Consideration of DOSA Request

The final argument presented is a contention that the trial court did not consider a DOSA sentence in retaliation for the defendant exercising his right to a jury trial. This issue, too, is controlled by a factually similar case. We affirm.

The governing law is clear. RCW 9.94A.660(1) contains seven criteria for determining eligibility for a DOSA sentence. If the offender is eligible, the trial court may impose a standard range sentence that is spent half in treatment and half in community custody. RCW 9.94A.660(3); .662; .664. The trial court's decision to grant or deny DOSA is not reviewable. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005); *State v. Hender*, 180 Wn. App. 895, 900, 324 P.3d 780 (2014). The trial judge has the discretion to determine whether use of the sentencing alternative is appropriate. *Hender*, 180 Wn. App. at 901. However, the trial court abuses its discretion if it does not actually consider the request. *Id.*

Mr. Matheny contends that the trial court did not actually consider his request because he took the case to trial. That view misapprehends the trial court's decision. As noted previously, the trial judge denied DOSA because Mr. Matheny was not forthcoming about his drug problem. The essence of his defense was that the drugs were not his and he had not used the pen to consume the methamphetamine. The trial court was free to understand his trial testimony as refusing to acknowledge that there was a drug problem. It did not have to accept his statements to the treatment evaluator.

The trial court faced a similar situation in *Hender*. There the defendant had pleaded guilty to delivering methamphetamine, but denied that methamphetamine had made him a criminal. The trial court rejected the defendant's DOSA request due to the defendant's refusal to accept responsibility for his conduct. 180 Wn. App. at 902. We concluded the opinion with this observation:

> Although many behavioral scientists disagree, many recognize that one who blames others for his wrongs is detached from reality and this detachment interferes in one's ability to benefit from treatment. If a user does not take responsibility for his behavior, he is not likely to be receptive to change in the behavior. Alcohol and drug addiction are common causes of a blaming attitude. Thus, the trial court did not abuse its discretion when concluding that a DOSA sentence does not fit the predisposition of Ronald Hender.

Id.

Similarly here, the trial court could conclude from Mr. Matheny's own testimony that he was not taking responsibility for his actions and not acknowledging his problems, thus making him a poor candidate for treatment. Drug treatment should not be wasted on those not ready to make the effort to overcome their problem. Trial judges have the discretion to determine who to trust or not trust. Given the conflicting pronouncements by Mr. Matheny, the trial court had a tenable basis for concluding he was not a good candidate for DOSA at this time. There was no error.

The judgment is affirmed. The trial court is directed to correct the noted scrivener's error(s).

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

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 32824-4-III
	)	
CARL MATHENY,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	ANDREW MILLER [prosecuting@co.benton.wa.us] BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	LAUREL HOLLAND US ATTORNEY'S OFFICE 402 E YAKIMA AVE STE 210 YAKIMA, WA 98901	(X) ( ) ( )	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	CARL MATHENY 733858 TRI-CITIES WORK RELEASE 524 E BRUNEAU KENNEWICK, WA 99336	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF FEBRUARY, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711