FILED
DECEMBER 15, 2014
Court of Appeals
Division III
State of Washington

NO. 32587-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN CHILDS

Appellant.

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

The Honorable Scott Gallina, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel when his attorney failed to renew a motion to sever which the trial court had erroneously denied prior to trial and failed to request an instruction informing the jury that each charge is to be considered separately.

2. The trial court erred when it ordered appellant to pay discretionary legal financial obligations (LFOs) without first considering his ability to pay.[1]

3. The trial court erred in ordering no contact with the complainant as part of appellant's sentence without specifying the duration of the no contact order.

Issues Pertaining to Assignments of Error

1. Appellant's two cases were tried jointly. The first case involved one count of second degree assault and one count of burglary. The other case involved one count of second degree assault and one count of witness tampering. The cases involved different complainants, different weapons, dissimilar locations, and no common motive or plan. The incidents took place six days

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[1] Appellant does not challenge the mandatory financial obligations imposed.

apart. Before trial, defense counsel moved to sever the cases. The trial court denied the motion. Counsel did not renew the motion to sever at trial and failed to request an instruction that informed the jury it had to consider the charges separately. Where the consolidation of these matters allowed the jury to unfairly cumulate the evidence against appellant and improperly diluted appellant's defenses, was defense counsel ineffective for failing to renew the motion to sever and failing to request an instruction indicating the jury must consider the charges separately?

2. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary LFOs as part of appellant's sentence, thereby making the LFO order erroneous and challengeable for the first time on appeal?

3. Where appellant's Judgment and Sentence includes a no-contact provision but does not also include a specified duration or expiration date, is the sentence insufficiently definite?

B. <u>STATEMENT OF THE CASE</u>

1. <u>Procedural Facts</u>

On November 8, 2013, the Asotin County prosecutor charged appellant Benjamin Childs with one count of burglary

under cause number 13-1-00182-1. CP 1-2. The alleged victim in that case was Ron Perrigo. CP 1-2.

On December 2, 2013, the information was amended to include one count of second degree assault against Perrigo. CP 24-25. A second count of second degree assault was also added. CP 24-25. The alleged victim was Michael Provost. CP 24-25. This charge included a deadly weapon enhancement. CP 24-25.

On January 24, 2014, at the State's request, the assault against Provost count was severed from the other charges and filed under cause number 14-1-00009-1. CP 34,168-169. The prosecutor filed a second amended information under cause number 13-1-00182-1, charging only the burglary and assault pertaining to Perrigo. CP 26-27.

The cases were set for trial in late February, but the trials were delayed after Childs made a particular jail call to his family. CP 34. On March 10, 2014, the State added a witness tampering charge to the information filed under cause number 14-1-00009-1. CP 177-78. The State then moved to consolidate all the charges against Childs and join the cases for trial. CP __ (sub. 18 "Motion to Consolidate").

Defense counsel objected to consolidation and countered with a motion to keep the cases severed. She explained the defense would be unduly prejudiced if the cases were heard together, because the accumulation of evidence would unfairly add strength to the State's individual cases, which were weak standing alone. CP 32-36. Defense counsel also explained she had prepared defenses for separate trials based on the State's decision to separate the cases, and the persuasiveness of the defenses would be undermined in a consolidated context. CP 32-36.

On May 17, 2014, Judge Scott Marinella heard argument on the motions. RP 5-11. He granted the State's motion to consolidate and denied Childs' motion to keep the cases severed. RP 11-12. In so ruling, Judge Marinella noted:

> I understand the cumulative evidence concerns, and that's where the court comes into the -- the appropriate jury instructions, and the instructions to the jury that just because they have multiple counts, you have to find these individually. So I think there is a proper recourse here.

RP 12. The Defense moved for revision, but Judge William Acey upheld the ruling. RP 24-29; CP 32-38, 42.

The case went to trial with Judge Scott Gallina presiding. RP 30. Defense counsel failed to renew the motion for severance

and failed to procure a limiting instruction telling the jury it must decide each count separately. CP 79-102. A jury found Childs guilty as charged. CP 103-04; 182-84.

At sentencing, the State asked the trial court to run appellant's sentences consecutively because his high offender score left some crimes unpunished. RP 449-51.

In response, defense counsel asked for a standard range sentence with concurrent sentences. RP 545. She argued that Childs was already prejudiced by the joinder of the cases so the State should not be allowed to separate them out for sentencing. RP 451-53. Specifically, counsel stated:

> They separated the cases out. Then we have an end run where for some reason they decided they wanted to put the cases back together again. And I fully believe that was because they didn't have evidence in one case and they needed to have the other case [to] support the first. And I do believe, I do believe that was to the disadvantage of Mr. Childs.
>
> I still to this day believe that if the cases were tried separately that at least one of those cases he would have been acquitted on.

RP 451-52.

Responding to this argument, Judge Gallina stated:

> I was present, not as a judge, during the pretrial phase of this, but I – remember sitting here watching it and questioning some things that went on myself. Those are questions to be answered by another court

> on another day. Right now I am bound to administer a sentence in accordance with Washington state law . . .

RP 465.

Under cause number 13-1-00182-1, Childs was sentenced to 100 months for the burglary charge to run concurrent with the assault charge. CP 157-58. Under cause number 14-100009-1, Childs was sentenced to sixty months on each count to run concurrently. CP 188-89. A 12-month enhancement was imposed, for a total sentence of 72. CP 188. The trial court then stacked the 100-month sentence on top of the 72-month sentence, for a total of 172 months. CP 188.

Childs was also ordered to pay LFOs. CP 159,190. These included (for each case): $750 for appointed representation; and a $500 fine. CP 159,190. At sentencing, there was no discussion, inquiry, or findings regarding appellant's ability to pay. RP 448-468.

Childs was also ordered to have no contact with Michael Provost. CP 192. However, the Judgment and Sentence fails to include a specific term for the no contact order. CP 192. This appeal follows. CP 165-66.

2. Substantive Facts

(i) The Perrigo Incident

On November 5, 2013, at approximately 8:30 p.m., Clarkston Police Officer Michael Babino responded to the home of Rob Perrigo. RP 76-77. When he arrived, he found Perrigo dousing his face with a garden hose. RP 77. Perrigo's face was red and he was coughing. RP 79. He had mucus running from his nose and mouth. RP 79. Perrigo told Babino he had been sprayed with bear mace. RP 78.

At trial, Perrigo claimed that Childs came to his door that evening looking for Perrigo's cousin Amber Haning. RP 41. Haning was temporarily residing with Perrigo along with Childs' sister Cherokee Escallier. RP 41, 228. Haning and Childs were a couple, but Perrigo claimed they were fighting at the time. RP 40-41. Witnesses testified Perrigo often acted sexually infatuated with Haning. RP 250, 294.

According to Perrigo, after he refused to let Childs into his house, Perrigo tried to shut the door, but Childs pushed it partially open and sprayed bear mace across the door and into Perrigo's face. RP 41-42, 69.

After calling the police, Perrigo called Escallier and Haning to report what Childs had supposedly done. RP 238, 288. They went to Perrigo's house. RP 238. They observed the inside of the house had been exposed to mace to such a degree they could hardly breath in there. RP 238, 289. The substance was all the way back in the bedrooms and kitchen. RP 289. However, Haning observed there was no mace on the outside of the front door. RP 289.

Haning said she had left her own can of bear mace on her dresser that day, but she has never seen it since then. RP 291. Haning saw Childs later that night and said there was no indication he had been exposed to bear mace. RP 296.

At trial, Childs' little brother, Jarryd Von Tersch, testified Childs was with him the night of the incident. RP 328. He said Childs arrived about 7:00 p.m. and they watched T.V. and then surfed the internet. RP 328-29. He testified that Childs was at the house the entire night except from 10:30 to midnight. RP 330.

After Perrigo alleged Childs maced him, he became fixated on Childs. RP 268. He bought a BB gun that looked like a real gun. RP 50. One day, he shot at the car Haning and Escallier were riding in. RP 298-300. Perrigo claimed Childs had jumped

out of the trunk and threatened him, but no one corroborated this. RP 49, 241, 298. Instead, Haning's child and a different friend were in the car. RP 298. No one had gotten out of the car or threatened Perrigo. RP 299.

Perrigo was arrested and charged with assault for that incident. RP 48, 73-74. While in jail, Perrigo stated to two inmates that he thought Childs was a bad guy and that is why he did what he did. RP 335-36; 348. The inmates interpreted this to mean Perrigo had set Childs up by making false accusations. RP 337, 349.

(ii) The Provost Incident

On November 11, 2013, at approximately 2:50 a.m., Asotin sheriff deputy Jesse Carpenter was dispatched to Michael Provost's home. RP 159-60. He found Provost holding his head with a towel and observed a superficial wound that was bleeding. RP 160-61. There was also a broken lamp on the floor. RP 135, 146.

Provost told Carpenter he had been struck over the head with a machete. RP 162. Carpenter observed that Provost's wound was not consistent with being struck with the sharp end of a

machete. RP 177. Instead, it was consistent with being struck with a blunt object. RP 177.

Provost claimed that Childs struck him over the head after he permitted Childs and Haning to come in the house to warm up. RP 105-06. He said they claimed they were out of gas. RP 105-06.

Provost knew Haning as a former tenant. RP 104. Provost also knew Childs as a result of Provost's own drug use. RP 126, 142. Just a month prior to the alleged incident, Childs had stiffed Provost on a drug deal – taking his money but providing no drugs. RP 126-31; 141, 144. However, Provost was not forthcoming with this information until forced by defense counsel to reveal it. RP 126-31.

Haning testified she was not at Provost's home that evening. RP 303. She said she was with Childs at his mother's birthday party, where they went to one of the bedrooms in that house, had sex, and then slept through the night together. RP 304-06. Childs' sister Eshaniah McGahuey testified she saw Haning and Childs at the house that night when she got up to go to the bathroom in the middle of the night. RP 318-21. She said Childs was also there in the morning. RP 318-21.

On February 20, 2014, Childs made a call to his mother's home from jail. RP 190-93. During the call, he told his sister that Provost needed to "be high as fuck" on Monday (the day before Childs' upcoming trial). He told his sister to have someone get Provost high. RP 223. This call formed the entire evidentiary basis of the witness tampering charge. CP 177-78. Childs' defense was that he was just joking and never intended for anyone to take him seriously. RP 427-30. There was no evidence that any one had actually approached Provost or attempted to get him high. RP 223, 227.

C. ARGUMENT

I. CHILDS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO RENEW THE MOTION TO SEVER DURING TRIAL AND FAILED TO REQUEST A LIMITING INSTRUCTION.

Defense counsel was ineffective for failing to renew the severance motion during trial. A renewed severance motion would likely have been granted, and there is a reasonable probability that the outcomes of separate trials would have been different. Additionally, counsel was ineffective for not seeking the necessary limiting instruction informing the jury it was to consider the charges separately.

The federal and Washington constitutions guarantee the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. A defendant is denied the right and is entitled to reversal of his convictions when his attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2d 155 (1996) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The 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. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694.

Counsel's performance in not renewing her motion for severance was objectively unreasonable. Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. State v. Russell, 125 Wn.2d 24, 62–63, 882 P.2d 747 (1994).

CrR 4.4 governs severance of counts in a criminal trial. Counts that are properly joined may be severed "to promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). A defendant's motion to sever "must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require." CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2). Failing to renew an unsuccessful severance motion constitutes a waiver. State v. Henderson, 48 Wn. App. 543, 545, 551, 740 P.2d 329 (1987).

Joinder is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). A defendant may be prejudiced by having to present separate defenses, the jury may use evidence of one or more of the charged crimes to infer a criminal disposition, or the jury may cumulate evidence of the charges and find guilt when, if considered separately, it would not. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

The record in this case reflects no legitimate strategic or tactical reason for counsel's failure to move for a severance at trial. As evidenced by counsel's pretrial motions and counsel's statements

during sentencing affirming her belief the trial court's refusal to sever the cases led to an unmerited guilty verdict, trial counsel was well aware of the significant prejudice inherent in the joinder of the charges. RP 452; CP 32-38.

Counsel had an opportunity to have the issue looked at by a new judge who just may have seen the issue differently, especially after presiding over trial. As was later revealed by Judge Gallina's statements at sentencing, he had questioned some of the pretrial joinder/severance actions and might have been open to reconsidering the decision. RP 465. There is no legitimate justification for trial counsel's failure to renew the motion to sever before Judge Gallina.

Trial counsel's failure to request a limiting instruction also cannot be justified as a legitimate trial tactic. It is well established through case law that instructing the jury to consider the counts separately is critical to limiting the prejudice inherent in joining charges. E.g., State v. Sutherby, 165 Wn.2d 870, 885, 204 P.3d 916 (2009). Moreover, based on Judge Marinella's statements, trial counsel was specifically placed on notice that such an instruction was critical to preventing the jury from unfairly cumulating evidence to Childs' detriment.

Nothing happened during trial to mitigate the prejudice counsel anticipated when bringing the motion in the first place. Thus, there was no reasonable trial strategy that would lead counsel to abandon the motion to sever offenses or to fail to request the necessary limiting instruction. Counsel simply neglected to renew the motion as required by the rules and neglected to insure the proper limiting instruction was given. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect demonstrates deficient performance. Sutherby, 165 Wn.2d at 887.

Where counsel's failure to litigate a motion to sever is objectively unreasonable – as here – prejudice is demonstrated by showing the motion should have been granted, and that, but for counsel's deficient performance, the outcome of the proceeding likely would have been different. Id.

In determining whether to sever charges, the trial court considers (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) whether the court instructs the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for

trial. Sutherby, 165 Wn.2d at 884-85. In light of the evidence presented at trial, and after proper application of the four severance factors, this record demonstrates the trial court likely would have granted a renewed motion for severance and the outcome in at least one of the cases would have been different.

First, the strength of State's case as to Perrigo was minimal. The case was unfairly strengthened by consolidation. There were no eyewitnesses. There was no physical evidence implicating Childs. There was evidence Perrigo had a motive to set Childs up, because he was infatuated with Childs' girlfriend and wanted to drive a wedge between them. Two witnesses testified Perrigo suggested to them that he had falsely set Childs up. Moreover, Childs also offered an alibi witness. Standing alone, this case left room for reasonable doubt.

The strength of the State's evidence as to the Provost assault charge, standing alone, was also minimal. There was no eyewitness to corroborate Provost's testimony. There was no physical evidence implicating Childs. Provost's wound was inconsistent with the alleged weapon. Provost had been deceitful about his prior attempted drug deal with Childs – a fact that provided a motive for him to frame Childs. Childs had multiple alibi

witnesses. However, there was one factor that strengthened the Provost assault charge – the witness tampering charge.

Evidence of witness tampering is relevant and admissible to establish a consciousness of guilt. State v. Sanders, 66 Wn. App. 878, 833 P.2d 452 (1992). Childs' alleged tampering was aimed at Provost alone. Thus, the facts pertaining to the witness tampering would be relevant and admissible in a trial on the Provost assault, arguably indicating Childs' guilty conscious.

By contrast, there was no witness tampering charge to bolster the strength of the Perrigo charge. Indeed, the jury would have never heard about it because that charge was irrelevant to the facts of that case, and because Childs' never testified. Thus, if the cases had been severed, the jury for the Perrigo charges would not have been permitted to consider the tampering charge. Given that the cases were consolidated, and the jury was never instructed to consider the charges separately, however, there is a high likelihood that the jury wrongly applied the consciousness of guilt evidence when determining guilt as to all the charges. This was wrong.

The trial court's denial of the motion to sever allowed the jury to cumulate evidence such that the State's weak case as to the Perrigo charges was unfairly strengthened. See State v.

Hernandez, 58 Wn. App. 793, 801, 794 P.2d1327 (1990) ("where the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case[.]"), review denied, 117 Wn.2d 1011 (1991), disapproved on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 99, 812 P.2d 86 (1991). If considered separately, it is reasonably likely that the jury would have acquitted Childs of the assault against Perrigo and of the burglary, based on the relative weakness of the evidence. Hence, the first factor weighs in favor of severance.

The second factor, clarity of defenses, also favored severance. General denial and alibi were Childs' defenses to the assault and burglary counts. However, his defense to the witness tampering was that he was simply joking with his family members and never made any real attempt to influence Provost's testimony.

It would have been difficult for a jury to separate Childs' attempt to joke about witness tampering with family members who would eventually be called upon to support an alibi defense on the other charges. Indeed, a juror might infer that Childs was willing to speak openly with his family about influencing Provost's testimony

because he knew his family would undertake devious acts to secure a verdict in Child's favor. In this way, there is a reasonable likelihood that Childs' defense to witness tampering weakened his alibi defenses.

Even more problematic here, however, was the way in which Childs' joined defenses to the assault charges were weakened by joinder. A juror might be inclined to believe a defendant's alibi and claim of being wrongfully accused where it involves one incident and one person who is out to frame the defendant. When a defendant offers similar alibis and similarly accuses the complainant of setting him up as part of a revenge plot in two cases, however, the jury will be far less inclined to believe that these circumstances could happen twice to the same defendant.

Here, Childs was forced to present his defense to all charges to one jury, diluting the potency of each separate defense. As such, joinder was prejudicial.

The third factor also supports severance. The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. The use of a limiting instruction informing the jury it must decide each

count separately is, therefore, a paramount consideration. E.g., Sutherby, 165 Wn.2d at 885.

The jury in this case was not given such an instruction. Thus, it was not informed it had a duty to compartmentalize its consideration of the evidence and determine guilt on each count separately. Without this instruction it is likely the jury did what comes naturally – accumulated evidence and charges when considering guilt as to each count. See State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) ("A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended."), review denied, 116 Wn.2d 1020 (1991). This is fundamentally unfair.

The failure to give the jury this limiting instruction is particularly concerning here because Judge Marinella, who denied the motion to sever and consolidated the cases, expressly noted that he understood the risks that might be posed by cumulative evidence. However, Judge Marinella believed the risks could be sufficiently dealt with by giving a limiting instruction. RP 11; CP 31. Given this record, there was a substantial likelihood Judge Marinella would not have ruled as he did if he had known the jury would not be given a limiting instruction.

The fourth factor also favors severance because the evidence of the defendants other bad acts was not cross-admissible. Notably, the trial court never entered a finding that the charges were cross-admissible. RP 11-12; CP 31-32. While the trial court found the cases involved a few similar witnesses, these witnesses did not testify to facts that were cross-admissible.

The State offered no theory or evidence that the Provost charges and the Perrigo charges involved a common plan or scheme. Such evidence is relevant only if the method employed in the commission of both crimes is so unique that mere proof that the accused committed one of them creates a high probability that he also committed the act charged. State v. Watkins, 53 Wn. App. 264, 271, 766 P.2d 484 (1989). That was not the case here.

There were substantial differences between the Provost assault charge and the Perrigo charges. The complainants were different, with no apparent connection between them. The alleged weapons were different. The facts and circumstances leading up to the assaults varied. There was no apparent similarity in the locations, and six days separated the two incidents. Indeed, the only facts they had in common were that the complainants both knew Childs' girlfriend and they both claimed Childs had assaulted

them in some way. However, Haning's prior interactions with Provost were irrelevant to the Perrigo charges, and vice versa. Thus, this similarity does not support cross-admissibility.

Given the different circumstances involved in each case, the only purpose for which the evidence of one assault could have been used was to show Childs has a propensity to assault others and, therefore, must have been guilty of the charges. However, this is the "forbidden inference" ER 404(b) is designed to prevent. State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). The trial court, therefore, likely would have found the evidence was not cross-admissible had there been a proper motion to sever made at trial.

In sum, Childs's constitutional right to effective assistance counsel was violated. Defense counsel's failure to renew the motion to sever and to procure a limiting instruction constituted deficient performance. It was also highly prejudicial. As discussed above, trying the charges together artificially strengthened the State's weaker case and unfairly diluted the defense in each case. This is especially so given the lack of a limiting instruction which was recognized by Judge Marinella as necessary to mitigate the

prejudice inherent in trying these counts together. Because Childs was denied effective assistance of counsel, reversal is required.

II. THE TRIAL COURT'S FAILURE TO CONSIDER CHILDS'S ABILITY TO PAY BEFORE IMPOSING LFOs CONSTITUTES A SENTENCING ERROR REVIEWABLE FOR THE FIRST TIME ON APPEAL.

RCW 9.94A.760 permits the trial court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 10.01.160(3) permits the sentencing court to order an offender pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability or likely future ability to pay. The record here does not show the trial court in fact considered Childs' ability or future ability to pay before it imposed LFOs. Because such consideration is statutorily required, the trial court's imposition of LFOs was erroneous and the validity of the order may be challenged for the first time on appeal.

(i) The Legal Validity of the LFO Order May Be Challenged For The First Time On Appeal As An Erroneous Sentencing Condition.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137

Wn.2d 427, 477-78, 973 P.2d 452 (1999) (citing numerous cases where defendants were permitted to raise sentencing challenges for the first time on appeal); see also, State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community custody could be challenged for the first time on appeal). Specifically, the Washington Supreme Court has held a defendant may challenge, for first time on appeal, the imposition of a criminal penalty on the ground the sentencing court failed to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[2]

In Moen, the Washington Supreme Court held that a timeliness challenge to a restitution order could be raised for the first time on appeal. It looked at the authorizing statute, which set

[2] See also, State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); In re Personal Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

forth a mandatory 60-day limit, and the record, which showed the trial court did not comply with that statutory directive. Specifically rejecting a waiver argument, the Court explained:

> We will not construe an uncontested order entered after the mandatory 60-day period of former RCW 9.9A.142(1) had passed as a waiver of that timeliness requirement; it was invalid when entered.

Id. at 541(emphasis added). The Supreme Court concluded the restitution was not ordered in compliance with the authorizing statute and, therefore, the validity of the order could be challenged for the first time on appeal. Id. at 543-48.

Consequently, the salient question here is whether the record shows the trial court complied with the statutory requirements set forth in RCW 10.01.160(3) before it ordered LFOs as a condition of Childs's sentence. If not, Childs is entitled to challenge the trial court's LFO order for the first time on appeal.

Appellant is aware a panel of this Court concluded that a defendant may not challenge LFOs for the first time on appeal in State v. Duncan, 180 Wn. App. 245, 252–53, 327 P.3d 699 (2014). However, appellant respectfully disagrees with that holding.

There are two flaws in Duncan's reasoning. First, Duncan is wrongly premised on the notion that the State has no burden in

proving the defendant's ability or likely future ability to pay. Id. at 254. Duncan points to no statutory authority and provides no reasoning to support this premise. Indeed, Division II has found otherwise. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755, 760 (2013). Division II's conclusion makes sense.

It is the State that is asking for discretionary fees to be imposed and who is seeking to enforce the judgment. Those fees can only be imposed after the trial court makes an informed decision as to the defendant's ability to pay. RCW 10.01.160(3). Thus, it is entirely reasonable that the State be required to offer some prima facie basis upon which the trial court can satisfy the requirements set forth in RCW 10.01.160.

Second, Duncan is also flawed because it is premised on the notion that defendants are not raising LFO challenges at sentencing as some sort of way to game the system and gain a tactical advantage. Duncan's reasoning supporting this conclusion can be summed as follows:

> In the case of LFOs, there is clear potential for abuse, since a defendant might well defer rather than raise a claim of permanent indigency at the time of sentencing, if he or she thought it could be successfully raised for the first time on appeal.

Duncan, 180 Wn. App. at 255. This "potential for abuse" is not clear – it is speculative at best. Duncan provides no examples of such abuse taking place, and offers nothing specifically indicating such abuse actually takes place.

More significantly, Duncan provides no insight as to what a defendant might tangibly gain by deferring a challenge to the validity of the LFO order until appeal. It makes no strategic sense for a defendant to forgo an objection to LFOs based on a violation of RCW 10.01.160(3) when the remedy is merely to remand for an actual hearing on ability to pay – as was proposed by the State in Duncan. Given this remedy, this is not a situation where the defendant is somehow leveraging for a better result than he might have gotten had he raised the issue below.

Additionally, Duncan fails to address the systemic problem of trial courts signing off on pre-formatted sentencing forms[3] that include a finding indicating they considered the defendant's ability to pay when the trial court never actually did so. The judge should have some responsibility not to sign off on false findings.

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[3] The use of these pre-formatted sentencing forms is discussed in further detail below.

Duncan simply fails to take into account the trial court's responsibility in this matter. The Legislature has placed an affirmative duty on the trial court to undertake a specific inquiry before ordering LFOs. It fails in that duty when it relies on pre-printed forms and undertakes no meaningful inquiry. However, it likely will not fail in that duty nearly as often if it knows that whenever it fails to comply with RCW 10.01.163 at sentencing, it will see the same case on remand. For these reasons, appellant respectfully contends Duncan was wrongly decided and should not be followed here.

As shown above, the issue raised in this case is analogous to that raised in Moen. Thus, if the record shows the trial court did not comply with RCW 10.01.160(3)'s mandatory requirements, the issue is reviewable for the first time on appeal.

(ii) Because The Sentencing Court Did Not Comply With RCW 10.01.160(3), Childs May Challenge the LFO Order For The First Time on Appeal.

RCW 10.01.160(3) provides:

> [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.[4] 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 Childs'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 he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); Bertrand, 165 Wn. App. at 403-04. If the record does not show this occurred, the trial court's LFO order is not in compliance

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[4] Comparatively, RCW 9.94A.753 (a statute which addresses restitution) merely provides:

> The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(emphasis added).

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 Childs' financial resources and the nature of the payment burden, or that it made an individualized determination regarding his ability to pay. The State did not provide any evidence establishing Childs' ability to pay or ask the trial court to make a determination under RCW 10.01.160 when it asked that LFOs be imposed. At sentencing, there was no evidence or inquiry into Childs's financial resources, debts or employability. RP 466-67.

The only part of the record that even remotely suggests the trial court complied with RCW 10.01.160(3) is a boilerplate finding on the Judgment and Sentence. CP 157, 188. However, this finding does not establish compliance with RCW 10.01.160(3)'s requirements.

On the Judgment and Sentence, the trial court entered the following:

> a. LEGAL FINCINCIAL OBLIGATIONS / RESTITUTION: 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.

CP 157, 188. There was no checkbox for the trial court to mark on the pre-printed sentencing form, and the trial court made no contemporaneous statements at sentencing regarding Childs's ability to pay. CP 157, 185; RP 466-67.

A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding a boilerplate finding was insufficient to show the trial court gave independent consideration of the necessary facts); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir.2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

The Judgment and sentence form used in Childs' 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. Rather, every time one of these forms is used, there is a pre-formatted conclusion the trial court followed the requirements of RCW 10.01.160(3) – regardless of what actually transpired. For this reason, this type of finding,

without more, cannot reliably establish the trial court complied with RCW 10.01.160(3).

In sum, the record fails to establish the trial court actually took into account Childs' financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should permit Childs to challenge the legal validity of the LFO order for first time on appeal, and it should vacate the order.

(iii) Appellant's Challenge to the LFO Order Is Ripe for Review.

In response, the State may argue that the issue raised herein is not ripe for review because the State has not yet attempted to collect the costs. This argument should be rejected, however, because it fails to distinguish between a LFO challenge based on financial hardship grounds (arguably not ripe) and a challenge attacking the order based on statutory non-compliance (ripe).

Although there is a line of cases holding the relevant or meaningful time to challenge an LFO order is after the State seeks to enforce it, these cases address challenges based on an assertion of financial hardship or on procedural due process

principles that arise in regard to collection.[5] By contrast, this case involves a direct challenge to the legal validity of the order on the ground the trial court failed to comply with RCW 10.01.160(3). As shown below, this issue is ripe for review.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. Bahl, 164 Wn.2d at 751. Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, as discussed above, 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. As such, Childs meets the first

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[5] See, e.g., Lundy, 176 Wn. App. 96, 308 P.3d 755, 761-62 (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).

prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. As explained above, Childs 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.

Although the Supreme Court, in Valencia, 169 Wn.2d at 789, previously suggested LFO challenges require further factual development, Valencia does not apply here. Valencia involved a constitutional challenge to a sentencing condition regarding pornography. In assessing the second prong of the ripeness test, the Supreme Court compared Valencia's challenge to the court-ordered sentencing condition with a hypothetical challenge to a LFO order. It suggested the former did not require further factual development to support review, while the latter did.

It appears, however, that Valencia's hypothetical LFO challenge was predicated upon the notion that the order would be challenged on factual financial hardship grounds, rather than on statutory non-compliance grounds. For example, it stated:

> [LFO orders] are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement.

Id. at 789. This statement certainly may be true if the offender is challenging the validity of the LFO order asserting current financial hardship. However, this statement is not accurate if an offender is challenging the legal validity of the LFO order based on non-compliance with RCW 10.01.160.

Either the sentencing court complied with the statute prior to imposing the order, or it did not. If it did not, the order is not valid, regardless of the particular circumstances of attempted enforcement. This demonstrates Valencia likely never contemplated the issue raised herein and, therefore, is distinguishable. As explained above, no further factual development is needed here, and the second prong of the ripeness test is met.

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 pay off LFOs that have been ordered may be "conditional," the original sentencing order imposing LFOs is final.[6] As such, the third prong of the ripeness test is met.

Next, withholding consideration of an erroneously entered LFO places significant hardship on the defendant due to its immediate consequences and the burdens of the remission process.

An LFO order imposes an immediate debt upon a defendant that can make him subject to arrest if he does not pay. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at a 12% rate. RCW 10.82.090.

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[6] Division I 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, that analysis was focused on the defendant's conditional obligation to pay, rather than on the legal validity of the initial sentencing order. Id.

The hardship 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, concluded 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 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).[7]

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

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

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. Lundy, 176 Wn. App. 96, 308 P.3d at 760. 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 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 on the State.

Second, an offender who is left to fight his erroneously ordered LFOs though 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, Washington State Minority and Justice Commission, supra, at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they stop trying to modify the order and simply stop paying, subjecting themselves to further possible penalties. Id. 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 so overwhelming the person just gives up.

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 will otherwise be wasted by efforts to collect from individuals who likely will 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 requiring the defendant to 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 in the first place and not rely on the remission process to remedy errors.

For the reasons stated above, this Court should hold Childs's challenge to the legal validity of the LFO is ripe.

(iv) Because The Record Does Not Expressly Demonstrate The Sentencing Court Would Have Imposed The LFOs If It Had Undertaken The Required Considerations, The Remedy Is Remand for a Hearing on Ability to Pay.

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. Chanings, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997).

The record does not expressly demonstrate the trial court would have found the evidence sufficiently established Childs's ability to pay the LFOs. It was the State's burden to produce evidence establishing that appellant had the ability to pay. It did not do so. There is no evidence of Childs's employment prospects or any financial resources. In fact, the record as it exists now

suggests a dismal financial picture for Childs. As was discussed at sentencing, Childs has spent most of his working years in prison or addicted to methamphetamine. RP 455, 458-59.

Based on this record, it cannot be said the sentencing court would have imposed the same LFOs if it had actually taken into account Childs's individualized financial circumstances. As such, the remedy is remand for resentencing with a hearing on ability to pay.

III. THE COURT ERRED IN FAILING TO SET A DEFINITE NO-CONTACT TERM.

The trial court ordered Childs to have no contact with the victim Michael Provost as part of his sentence but did not specify when the no contact order would expire. CP 192. Remand is required to enable the court to set a definite term for the no-contact order.

In State v. Broadaway, the boilerplate language in the judgment and sentence contained a similar deficiency. State v. Broadaway, 133 Wn.2d 118, 135-36, 942 P.2d 363 (1997). The Court held when "a sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to expressly provide for

the correct period of community placement is the proper course." Broadaway, 133 Wn.2d at 136.

The same result is mandated here. A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). The Judgment and Sentence in Childs' case is insufficiently specific about the duration of the no-contact order toward Provost. There is no reference to an expiration date or a specific duration of years. CP 192. Instead, the space for this information is left blank. CP 192. Because the trial court provided no specific time limit for the no-contact provision, the intended duration of the provision is unclear.

The ambiguity poses problematic ramifications, as illustrated by City of Seattle v. Edwards, 87 Wn. App. 305, 307-10, 941 P.2d 697 (1997), overruled in part by State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005). In Edwards, this Court reversed a conviction for violation of a no-contact order on the grounds that the duration of the order was ambiguous on its face, resulting in lack of clear notice to the defendant that the order was still in effect at the time of its alleged violation. Edwards, 87 Wn. App. at 307-10.

The Supreme Court in Miller later agreed with Edwards that there must be clear notice regarding a no contact order's expiration date.[8] Miller, 156 Wn.2d at 29 ("In Edwards, the order was vague and was inadequate to give the defendant notice of what conduct was criminal and what conduct was innocent. The court was rightly loath to allow a person to be convicted under such circumstances.").

Edwards and Miller demonstrate why it is important to specify the expiration date of a no contact order in unambiguous terms. First, it protects the innocent from being wrongly prosecuted. Miller, 156 Wn.2d at 29. Second, it avoids the needless waste of limited prosecutorial resources resulting from reversal of a conviction due to lack of insufficient notice. Id.

Courts have the authority to clarify insufficiently specific sentences. Broadaway, 133 Wn.2d at 136. This Court should therefore remand the case to allow entry of a definite no-contact term as part of the disposition.

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[8] Miller disagreed with Edwards only on the issue of whether the validity of the underlying order is an element of the crime to be decided by a jury or a question of law to be resolved by a judge. Miller, 156 Wn.2d at 30-31.

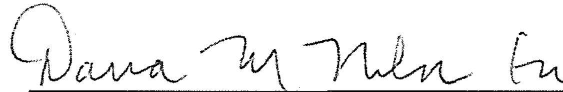
D. CONCLUSION

Childs' convictions should be reversed because he was denied effective assistance of counsel. Alternatively, Childs respectfully requests remand so that the trial court can address the LFO order, and so the sentence can be made definite and specific as to the duration of the no contact order.

DATED this 15th day of December, 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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State v. Benjamin Childs

No. 32587-3-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 15th day of December, 2014, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 15th day of December, 2014.

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