32708-6-III
(Consolidated with 32760-4-III)

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAYME L. RODGERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the convictions of drive-by shooting as set forth in Counts V, VI, and VII of the second amended information.

2. The trial court erred in imposing mandatory minimum terms on the first degree assault convictions as set forth in Counts I, III, and IV of the second amended information.

3. The trial court erred in using Count I (first degree assault) as the predicate serious violent offense for calculating the offender score.

4. The trial court miscalculated the offender score.

5. The trial court erred in imposing improper conditions of community custody.

6. The record does not support the finding Mr. Rodgers has the current or future ability to pay the imposed legal financial obligations.

7. The trial court erred when it ordered Mr. Rodgers to pay a $100 DNA – collection fee.

II. ISSUES PRESENTED

1. Admitting the truth of the State's evidence and drawing all reasonable inferences from that evidence, was there sufficient evidence presented from which a rational jury could find all of the

essential elements of drive-by shooting beyond a reasonable doubt as contained within counts six, seven, and eight of the amended information?

2. Should this court remand to superior court with an order to strike the five-year mandatory minimum sentence for counts I, III, and IV as contained within § 2.1 and § 4.1 of the judgment and sentence?

3. Should this court remand to the superior court for recalculation of the defendant's offender score using the anticipatory offense of conspiracy to commit first degree assault as the base offense for calculation of the offender score for the serious violent felony convictions?

4. Do the sentencing conditions imposed by the superior court have sufficient definiteness of the forbidden conduct that an ordinary person could understand what is prohibited, and, do they provide identifiable standards of guilt to protect against arbitrary enforcement?

5. Should this court consider the defendant's claim that the trial court failed to consider his ability to pay his legal financial obligations (LFOs) if he did not object in the trial court and preserve the issue for review?

6. Does a superior court have discretion to consider LFOs when the obligation is mandatory as directed by statute?

7. Does the $100 DNA fee imposition statute, RCW 43.43.7541, violate the due process clause?

8. Does RCW 43.43.7541 violate equal protection because a defendant may have to pay the fee each time he is sentenced?

III. STATEMENT OF THE CASE

Defendant, Jayme Rodgers, and co-defendant, Thomas Weatherwax, were joined for trial. Mr. Rodgers was charged by second amended information with first degree assault (Count 1); conspiracy to commit first degree assault (Count 2); first degree assault (Count 3); first degree assault (Count 4); drive-by shooting (Count 5); drive-by shooting (Count 6); drive by shooting (Count 7); and drive by shooting (Count 8). The State alleged firearm enhancements with regard to the charges of first degree assault and conspiracy to commit first degree assault, and a gang enhancement concerning counts 1 and 5 involving victim Leroy Bercier.

The defendant was convicted by a jury as charged including the weapon and gang enhancements. CP 580; CP 590.

At the time of trial, victim Leroy Bercier (victim named in Counts 1 and 5) was called to testify. He was reluctant to discuss the incident on

the stand as he feared retaliation. RP 156. Mr. Bercier explained that he was not associated with a criminal gang, but he had family members who were gang members. RP 156.

On the day of the incident, Mr. Bercier was confronted by an individual at the Hillyard Grocery in Spokane. RP 261-17. He was wearing blue shorts, a blue shirt, and a blue belt. RP 375; RP 385.[1] He tried to get away from the individual in the store. RP 222. While in the store, one of the assailants called him a "scrap."[2] RP 385. During this same time, his cousin, Joseph Berrier, entered the store. RP 222. The cousin intervened and the individual left the store. RP 223. Mr. Bercier

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[1] Officer Casey Jones had contact with Mr. Bercier shortly after the incident. Officer Jones said Mr. Bercier stood out with his blue attire. RP 375. He thought clothing color was odd in that it was well known to law enforcement that the area was populated by the gang "Red Boyz." RP 375; RP 535. In that regard, defendant Weatherwax admitted to a police officer on a prior occasion that he was a Norteno "Red Boyz" gang member. RP 493; RP 550. During the jail booking, defendant Rodgers also stated he was a Norteno "Red Boyz" gang member. RP 502; RP 550. Sureno gang members typically associate with the color blue and Norteno gang members connect with the color red. RP 541. Corporal Rose testified that Mr. Bercier was identified by law enforcement as a gang member. RP 552. If one gang member confronts a person he perceives to be a rival gang member, there would be, at a minimum, a verbal or physical challenge. RP 553. A violent act toward a different gang member would enhance the gang member's credibility and reputation. RP 553.

[2] A "scrap" is a derogatory term used to describe a rival gang member. RP 385; RP 544.

testified he was then shot at inside the store. RP 220. The gunshots were fired from outside the store. RP 225.

During the time of the incident, Louie Stromberg (victim named in Counts 3 and 7) went into the grocery store to buy some beer around 11:00 p.m. RP 228; RP 232. He was with Amanda Smith (victim named in Count 4). RP 228. He observed a young man enter the store, appearing very scared. RP 228-29. The young man advised him that two men were going to jump him outside. RP 229. He calmed the young man down, continued with his shopping, and he ultimately walked to his car. RP 232.

Mr. Bercier left the store. RP 233. When shots were fired, Mr. Bercier ran back toward the store, and he looked as if he was "running for his life." RP 233. Mr. Bercier ran by Mr. Stromberg's car as he ran back into the store. RP 234. Mr. Bercier appeared very scared. RP 233. Mr. Stromberg saw two men chasing the young man. RP 234. Mr. Stromberg exited his car; put his hands up to stop the two men; and within seconds, he saw muzzle flashes and his car window exploded.[3] RP 233. Mr. Stromberg and Ms. Smith were standing next to his car when shots were fired. RP 243. He believed a bullet would have struck him but

[3] Mr. Stromberg had familiarity with firearms and he believed the weapons were 9 mm hand guns based upon the noise and muzzle flash of the weapons fired at him. RP 244-45.

for his car. RP 243. He believed the suspects were trying to shoot him. RP 233. His car was struck three times.[4] RP 235. He heard between six and ten gunshots. RP 235. He also heard gunshots skipping off the ground. RP 234. The gunshots were coming from two different locations and from the area of the two males. RP 235.

At the time of the shooting, the defendants stopped right in front of several semi-trucks in the parking lot – in the direction Mr. Bercier walked when he left the store. RP 233; RP 235. Both defendants were shooting firearms near some semi-trucks in the parking lot. RP 231; RP 235. Mr. Stromberg and Ms. Smith ran into the store after the shots were fired. RP 233. Ms. Smith remained in the store after the shooting and Mr. Stromberg left the scene fearing he might be shot. RP 236; RP 245.

Surjit Singh, part-owner of the Hillyard Grocery Store, heard gunshots outside the store the day of the incident. RP 258. He identified defendant Rodgers. Shortly before the incident, defendant Rodgers parked an older Caprice automobile at the store's gas pump. RP 260-61; RP 270. He also observed co-defendant Weatherwax exit the vehicle before the incident. RP 261. Mr. Singh observed both defendants exit the vehicle and enter the store. RP 262. Defendant Rodgers paid for the gas. RP 271.

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[4] The bullets hit the left car window; the door, and they went through a tire which ultimately struck the car engine disabling it. RP 237.

Thereafter, an argument ensued inside the store with the defendants and he asked them to leave the store. RP 262-63. The argument was over the color of Mr. Bercier's belt. RP 264. Mr. Bercier was pushed by one of the defendants at the store counter. RP 265. The defendants and the victim exited the store. RP 265. Mr. Singh observed the defendants leave the gas pump area after they finished pumping gas. RP 266. They drove the vehicle to the center of the adjoining street. RP 267. Within a few minutes, Mr. Bercier again entered the store stating he was being shot at. RP 265.

Customer John Liberty entered the store at the time of the incident. RP 274. He heard and observed the argument inside the store. RP 275-276. He heard one of the defendants ask Mr. Bercier if he was "banging." RP 276. Mr. Bercier said he was a "banger," but, he was not "banging" at the present time. RP 276. At one point, Mr. Liberty observed both defendants outside posturing and exhibiting aggressive behavior. RP 278-79. When Mr. Liberty exited the store parking lot in his vehicle, he observed the defendants walk toward their car at the gas pump. RP 279.

Officer Eugene Baldwin responded to the store after the 911 call shortly before 11:00 p.m. on the date of the incident. RP 318. After speaking with several witnesses at the scene, Officer Baldwin located Mr. Stromberg's vehicle at 2508 East Nebraska, approximately four to

five blocks from the store. RP 331-32. Officer Baldwin observed various bullets holes on the vehicle. RP 333-34. There were three different bullet strikes to the car. They were likely fired from a vacant lot to the west of the store. RP 346; RP 348. Officer Baldwin recovered a bullet projectile underneath the floor mat the vehicle. RP 337-38. Officer Baldwin estimated Mr. Stromberg's car was ten to fifteen yards in front of the store when the suspects shot at Mr. Stromberg. RP 345-46.

On the night of the incident, Corporal Shane Oien observed the suspect vehicle parked on the street approximately one-half block from 5611 North Perry. RP 357. While surveilling the vehicle, he observed a larger individual wearing a red shirt with white lettering walk toward the suspect vehicle and return to the alleyway. RP 359. This larger individual returned to the vehicle within a short period of time, entered and exited it, and returned toward the alleyway. RP 360. Thereafter, a smaller male drove the vehicle into the alleyway adjacent to the street. RP 361-62.

Officer Art Dollard ran the license plates on the suspect vehicle and learned the vehicle had ties to a gang known as "Red Boyz." RP 369. At approximately 12:45 am, Officer Dollard and Officer Oien observed the suspect vehicle enter a gated back yard from the alleyway. RP 370. Officer Dollard detained defendant Rodgers near the suspect vehicle. RP 371. Defendant Rodgers was identified as the owner of the vehicle.

RP 518. From outside the suspect home, Officer Dollard observed a male, later identified as defendant Weatherwax, place a ladder to the attic in the suspect home and climb to the attic. RP 372.[5]

Natalie Lemery testified she knew both defendants. RP 177-78. On September 24, 2013, defendant Weatherwax asked her to retrieve a vehicle parked approximately a block from her house. RP 179-80. She lived on the 5600 block of North Perry in Spokane. RP 177. When she attempted to drive the vehicle, police surrounded her house. RP 180. Mr. Weatherwax was very reluctant to exit the home after repeated requests to do so by the police. RP 181. He was in the upstairs attic area for approximately six to eight hours. RP 181. During this encounter, Ms. Lemery had observed a handgun on the table of the house and she placed it into the dryer to hide it. RP 183-84; RP 193. She initially told the police the gun belonged to one of the defendants; however, she denied making that statement on the stand. RP 185-86.

Corporal Matthew Rose executed a search warrant on the suspect vehicle. RP 417. He collected a red sweatshirt with black skulls in the backseat of the vehicle, and a .380-caliber semi-automatic Browning

[5] SWAT police officers ultimately extracted defendant Weatherwax from the house after a prolonged standoff. RP 343-44.

pistol[6] and magazine in the trunk of the vehicle. RP 419; RP 422; RP 425; RP 446. Corporal Rose also executed a search warrant on the residence where the defendants were observed. He located an "Uncle Mikes" holster containing a Makarov semi-automatic 9 millimeter pistol inside the clothes dryer. RP 426-28; RP 451. The pistol had a magazine filled with six bullets. RP 429. Corporal Rose also collected DNA from both defendants pursuant to a search warrant. RP 434.

Glenn Davis, firearms examiner at the Washington State Patrol, determined the retrieved fired bullet from Mr. Stromberg's vehicle was fired from the Browning pistol collected from the defendants' car trunk. RP 449.

Kristi Barr, a DNA forensic scientist with the Washington State Patrol Crime Laboratory, tested several items collected during the investigation. She found the major DNA contributor to the sweatshirt found in the defendant's vehicle belonged to defendant Rodgers. RP 469. Defendant Weatherwax was a partial major contributor of the DNA located on the holster. RP 471. Defendant Rodgers was excluded as a DNA contributor to the Makarov pistol, and defendant Weatherwax could

[6] A .380 caliber pistol is close in diameter to a 9 millimeter pistol. RP 453

not be included or excluded. RP 472. No meaningful conclusions were drawn from the DNA evidence on the Browning pistol. RP 474.

IV. ARGUMENT

A. THERE WAS SUFFICENT EVIDENCE TO SUPPORT THE CONVICTIONS FOR DRIVE BY SHOOTING AS THERE WAS A SUFFICEINT NEXUS ESTABLISHED BETWEEN THE VEHICLE USED AND THE SHOOTING.

Standard of review.

When considering whether sufficient evidence supports a criminal conviction, this court must "view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the jury on questions of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In addition, appellate courts draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences from it. *Brown*, 162 Wn.2d at 428.

The defendant alleges in his assignment of error no. 1 that there was insufficient evidence to support the convictions for drive by shooting under Counts five, six, and seven of the amended information.

RCW 9A.36.045(1) defines the crime of drive-by shooting as a reckless discharge of a firearm:

> [i]n a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

In *State v. Rodgers*, 146 Wn.2d 55, 43 P.3d 1 (2002), the driver of a car drove the co-defendants to the victim's home. The two co-defendants exited the car and walked to the victim's home approximately two blocks away. They shot into the home and returned to the vehicle. They were convicted of drive-by shooting.

The Supreme Court recognized the statute does not define either "immediate" area or "scene" of discharge, but the court said the statute was "aimed ... at individuals who discharge firearms from or within close proximity of a vehicle" and has held that "[a] person discharging a firearm two blocks away from a vehicle cannot be said to be in close proximity to that vehicle." *State v. Rodgers*, 146 Wn.2d at 62.

The *Rodgers* court held:

> If [co-defendant] Locklear's culpability could be established merely by showing that he discharged a firearm from the "area" of Ishaq's motor vehicle or from the "area of town" that her vehicle was located in, then it might be said that the evidence supports Locklear's conviction. The drive-by shooting statute is, however, more narrowly drawn and requires the State to produce evidence that the firearm was discharged by the defendant from the "immediate area" of the vehicle which transported the shooter. It seems obvious that one is not in the immediate area of a vehicle that is parked two blocks away from the place where that person discharges a firearm.

Rodgers, 146 Wn.2d at 61–62.

The undisputed facts of this case establish the required nexus "between the use of a car and the use of a gun" required by *Rodgers*. The defendants' car was used to transport both defendants and their firearms to the convenience store. After purchasing gas at the store, the defendants parked their car in the median of the adjacent street next to the gas pumps. Within moments, the defendants ultimately fired several gunshots toward the victims. Thereafter, the defendants - with their guns - fled the area in the same automobile used to transport them and their guns to the scene.

It can be reasonably inferred that the defendants strategically parked their vehicle in the median of the street next to the gas pumps rather than in the parking lot of the store. Rather than possibly having the car blocked in the parking lot, parking it in the median provided easy and

immediate access to the vehicle after commission of the crimes and it also provided a means to flee the area or scene quickly to avoid apprehension. The vehicle was an integral part of the crime. The car was as important a tool as the firearms to facilitate the commission of the crimes of drive-by shooting.

Viewing the evidence in the light most favorable to the State and because circumstantial evidence is considered as reliable as direct evidence, a reasonable person could find the shots fired by the defendant were within the immediate area of the automobile used by the defendants after strategically placing it in the street.

B. THIS COURT SHOULD REMAND THE CASE TO THE TRIAL COURT WITH AN ORDER TO STRIKE THE FIVE-YEAR MANDATORY MINIMUM SENTENCE FOR COUNTS ONE, THREE, AND FOUR AS CONTAINED WITHIN § 2.1 AND § 4.1 OF THE JUDGMENT AND SENTENCE.

In the present case, the trial court, rather than a jury, found the facts necessary to impose a mandatory minimum sentence under RCW 9.94A.540(1)(b) to counts' one, three, and four as contained within § 2.1 and 4.1(a) the judgment and sentence.

A five-year mandatory minimum sentence applies to offenders convicted of first degree assault only under two conditions: where the offender "used force or means likely to result in death or intended to kill

the victim." RCW 9.94A.540(1)(b). This sentencing statute "indicates that the legislature intended to increase the punitive requirement for certain assaults that are characterized by unusually (within the world of assault) violent acts or a particularly sinister intent." *In re Pers. Restraint of Tran*, 154 Wn.2d 323, 329–30, 111 P.3d 1168 (2005).

In *State v. Dyson*, ---Wn. App. ---, 2015 WL 4653226, 7 (Div. 3, 2015), the trial court, rather than the jury, found the facts necessary to impose a mandatory five-year minimum sentence on the defendant for each of his two convictions for first degree assault.

This court found the jury's guilty verdict alone was not enough to apply the five-year mandatory minimum sentence to each of the defendant's first degree assault convictions. Applying the rationale of *Alleyne v. United States*, ––– U.S. ––––, 133 S.Ct2151, 186 L.Ed.2d 314 (2013), the court found the trial court should have submitted a separate instruction to the jury regarding the applicability of the five-year mandatory minimum to each of the defendant's first degree assault convictions.

This court should remand to the trial court to strike the mandatory five-year minimum term sentence under counts' one, three, and four, as contained within § 2.1 and § 4.1(a) of the judgment and sentence.

C. THE DEFENDANT'S OFFENDER SCORES SHOULD BE RECALCULATED BY THE TRIAL COURT.

The defendant correctly claims he is entitled to resentencing because of the trial court improperly calculated his offender score under RCW 9.94A.589(b). Under that statute, where a person is convicted of two or more serious violent offenses not part of the same criminal conduct, the defendant's offender score for the crime with the highest seriousness level shall be computed using other current convictions that are not serious violent offenses, and the sentence range for other serious violent offenses shall be determined by using an offender score of zero. The sentences are then imposed consecutively. RCW 9.94A.589(1)(b).

As stated earlier, the defendant was convicted of three "serious violent" counts of first degree assault; one "serious violent" count of conspiracy to commit first degree assault; and three counts of drive-by shooting. In the judgment and sentence, the trial court identified count one (first degree assault) as the predicate offense for scoring purposes with an offender score of "4." CP 91. Counts three and four (first degree assaults) were calculated using an offender score of "0" per RCW 9.94A.589(b). The conspiracy to commit first degree assault conviction and the drive by shooting convictions were not used in the offender score calculation because the court found those offenses were the

same criminal conduct. CP 91; RP 825. The court imposed the firearm enhancement only on counts one, three, and four. The court did not acknowledge the defendant's offender score would have been shorter if the conspiracy to commit first degree assault would have been chosen as the offense with highest seriousness level under RCW 9.94A.589(b).

In *State v. Breaux*, 167 Wn. App. 166, 273 P.3d 447 (2012), the trial court imposed a sentence under RCW 9.94A.589(1)(b) where the defendant was convicted of two serious violent offenses with the same seriousness level; first degree rape and attempted first degree rape. *Breaux*, 167 Wn. App. at 168. In *Breaux*, the trial court calculated the offender score using the completed crime of first degree rape and scored the attempted first degree rape as "0," yielding a longer term of incarceration. *Id*. Division one of this court held:

> Because RCW 9.94A.589(1)(b) is ambiguous, it must be construed in Breaux's favor. We conclude that (1) the offender score calculation applies to Breaux's attempted first degree rape and (2) the 0 scoring rule applies to his first degree rape conviction as this will yield a shorter sentence.

State v. Breaux, 167 Wn. App. at 168.

Here, with regard to the holding in *Breaux*, the defendant's offender score should be recalculated using the conspiracy to commit first degree assault conviction as the base offense with the highest offender

score and the "0" scoring rule applied to remainder of his first degree assault convictions. This court should remand to the trial court to correct the standard range calculation.

D. THE TRIAL COURT PROPERLY CALCULATED THE DEFENDANT'S OFFENDER SCORE BASED UPON CURRENT AND PAST CONVICTIONS.

With regard to the above analysis and in computing the defendant's offender score, a conspiracy to commit a serious violent offense is treated the same as a completed crime. *See, State v. Knight,* 134 Wn. App. 103, 108, 138 P.3d 1114 (2006) (a conspiracy to commit second degree robbery is scored as if it was a completed crime). In computing the offender score for serious violent offenses, each violent offense counts as two points. RCW 9.94A.525(9). First degree assault is classified as a serious violent felony. RCW 9.94A.030(46)(v). Drive by shooting is classified as a violent offense. RCW 9.94A.030(55)(xii).

Here, the trial court found counts' one, two, and five comprised the same criminal conduct; counts three and six represented the same criminal conduct; and counts four and seven included the same criminal conduct. Accordingly, counts one, two, and five would not count against each other; counts three and six would not count against each other; and counts four and seven would not count against each other.

If this court remands for resentencing, counts six and seven (drive by shooting convictions) would count toward the offender score under count two. The defendant would have an offender score of "4" under the conspiracy to commit first degree assault. The conspiracy to commit first assault under count two would run consecutive per RCW 9.94A.589(1)(b) to counts three and four.[7]

E. THE SENTENCING CONDITIONS PROVIDE ADEQUATE NOTICE OF THE PROSCRIBED CONDUCT AND THEY ARE NOT UNCONSTITUTIONALLY VAGUE.

Standard of review regarding sentencing conditions.

If the trial court has statutory authority to impose a sentencing condition, this court reviews the trial court's imposition of the condition for an abuse of discretion, even where the sentencing condition infringes on a fundamental right. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374–75, 229 P.3d 686 (2010);[8] *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). "A court abuses its discretion if, when imposing a crime-

[7] At the time of the original sentencing, the trial court only ran counts' three and four consecutive to each other.

[8] In *Rainey*, the trial court failed to give an express justification for the purpose or length of a lifetime no contact order between a child and her father. *Id.* at 381. The Supreme Court concluded that the trial court should have addressed the defendant's argument that a no contact order would be detrimental to his daughter's interest. *Id.* at 382. The court remanded the issue for the sentencing court to address the parameters of the no contact order under the "reasonably necessary" standard. *Id.*

related prohibition, it applies the wrong legal standard." *State v. Howard,* 182 Wn. App. 91, 100, 328 P.3d 969 (2014). The imposition of an unconstitutionally vague sentencing condition is manifestly unreasonable and void for vagueness. *State v. Valencia*, 169 Wn.2d 782, 791-93, 795, 239 P.3d 1059 (2010).

As a part of any sentence, the trial court may impose and enforce crime-related prohibitions and affirmative conditions. RCW 9.94A.505(9).[9] RCW 9.94A.703(3)(f)[10]. As a part of any sentence, the trial court may impose and enforce crime-related prohibitions and affirmative conditions as provided in RCW 9.94A.505(8). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "'[c]ircumstance' is defined

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[9] This statute states "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. "Crime-related prohibitions" may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense." RCW 9.94A.505(9)

[10] RCW 9.94A.703(3)(f), in part, states: "When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section. 3) Discretionary conditions. As part of any term of community custody, the court may order an offender to: (f) Comply with any crime-related prohibitions."

as [a]n accompanying or accessory fact." *State v. Williams*, 157 Wn. App. 689, 692, 239 P.3d 600 (2010).

No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *Williams*, 157 Wn. App. at 691–92. A sentencing court may impose sentencing conditions that are required or allowed by law. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

The defendant argues the trial court exceeded its authority when imposing certain community custody conditions during the pendency of his community custody.

1. § 4.2(B) of the judgment and sentence - Controlled substances prohibition.

The community custody condition prohibiting the appellant from possessing or consuming controlled substances is statutorily authorized. RCW 9.94A.703(2)(c).[11]

[11] RCW 9.94A.703(2)(c), in part, states "When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section. 2) Waivable conditions. Unless waived by the court, as part of any term of community custody, the court shall order an offender to: c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

However, in the present case, the trial court did not authorize the possession or consumption of controlled substances pursuant to a lawfully issued prescription per RCW 9.94A.703(2)(c).

When a sentencing court imposes an unauthorized condition of community custody, appellate courts remedy the error by remanding the case with instructions to strike the unauthorized condition. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). The State agrees this sentencing condition should be remanded to the trial court to modify the condition to allow the appellant to possess or consume a controlled substance with a lawfully issued prescription.

2. § 4.2(C) of the judgment and sentence - Gang prohibitions.

A sentencing condition must adequately inform a defendant what conduct it requires or prohibits; failure to provide sufficient certainty violates the due process protection against vagueness. *Valencia*, 169 Wn.2d at 791; *State v. Villano*, 166 Wn. App. 142, 143, 272 P.3d 255 (2012); *United States v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007) (a condition of supervised release violates due process "if it either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.")

This court considers the terms of a community custody condition in the context in which they are used. *State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008). When a term is not defined in a statute, the court resorts to using a standard dictionary. *Bahl*, 164 Wn.2d at 754. A condition is sufficiently definite if persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement. *Bahl*, 164 Wn.2d at 754.

a. Sentencing condition § 4.2(C)(2) of the judgment and sentence - that the defendant not "have any association or contact with known felons or gang members or associates."

The defendant complains the condition that he not associate or have contact with known gang members or their associates is unconstitutionally vague. This claim has no merit. When the challenged language is read in context, ordinary people can understand what is prohibited. Any imprecision is not likely to expose the defendant to arrest.

A "criminal street gang" has been identified by statute as:

> [a]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity. This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of

> labor and bona fide nonprofit organizations or their members or agents.

RCW 9.94A.030(12).

Likewise, a "criminal street gang associate or member" has been defined by statute as:

> [a]ny person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang.

RCW 9.94A.030(13).

This court dealt with an analogous claim in *State v. Llamas–Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992). In that case, the defendant was restricted from associating with persons who used, possessed, or distributed controlled substances. *Id*. at 454. He argued that the provision was vague because it did *not* limit his liability only to situations involving people he *knew* were engaging in the prohibited activities. *Id*. at 455. This court disagreed, stating that if the defendant "is arrested for violating the condition, he will have an opportunity to assert that he was not aware that the individuals with whom he had associated were using, possessing, or dealing drugs." *Id*. at 455–56. This court concluded the condition was not vague. *Id*. at 456.

The Ninth Circuit Court of Appeals has similarly held conditions prohibiting "association" with known gang members and presence in

known gang gathering locations are not vague or overbroad. *Soltero, supra*, 510 F.3d at 866-67. In *Soltero*, the court held the district court did not abuse its discretion when it imposed the following condition: "The defendant shall not associate with any known member of any criminal street gang ... as directed by the Probation Officer, specifically, any known member of the Delhi street gang." *Soltero*, 510 F.3d at 865. The court held the term "associate" was not impermissibly vague: "The Supreme Court has held that 'incidental contacts'-such as those [the defendant] fears he would be punished for inadvertently engaging in-do not constitute 'association,' ... and we hold that, with this limitation, 'men of common intelligence' need not guess at the meaning of 'association' in the context of" the sentencing condition. *Soltero*, 510 F.3d at 866-67.

Further, the *Soltero* court held the term "Delhi street gang" was "sufficiently clear": the district court was "entitled to presume that [the defendant]-who has admitted to being a member of this gang - is familiar with the Delhi gang's members...." *Id*. at 866.

Finally, in *Soltero*, the court held the meaning of the term "criminal street gang" was sufficiently clear: the term is "slightly more ambiguous [than "Delhi street gang"]-but not unconstitutionally so." *Id*. at 866.

In *United States v. Vega*, 545 F.3d 743 (9th Cir. 2008), building on the *Soltero* decision, the Ninth Circuit rejected a challenge to a supervised release condition that prohibited the defendant from "associating with any member of any criminal street gang." *Id*. at 746. The court found the term "associate" was not impermissibly vague because "'[persons] of common intelligence' could understand its meaning." *Id*. at 749–50. In order to uphold the condition, the court imputed a *mens rea* element so that the defendant was prohibited from *knowingly* associating with members of a criminal street gang. *Id*. at 749–50; *United States v. Bolinger*, 940 F.2d 478, 480-81 (9th Cir. 1991) (upholding condition prohibiting participation in activities or membership of motorcycle clubs); *Malone v. United States*, 502 F.2d 554, 555-57 (9th Cir. 1974) (upholding restrictions on participating in any American Irish Republican movement, from belonging to any Irish organization, and from visiting Irish pubs).[12]

[12] In *People v. Lopez*, 66 Cal.App.4th 615, 78 Cal.Rptr.2d 66 (1998), the court of appeals found that the condition "[t]he defendant is not to be involved in any gang activities or associate with any gang members" "suffers from constitutionally fatal overbreadth because it prohibited [the defendant] from associating with persons not known to him to be gang members." *Id*. at 628, 78 Cal.Rptr.2d at 66. The court ordered the language modified to provide that "Defendant is not to be involved in or associate with any person known to defendant to be a gang member."); *In re H.C.* (2009) 175 Cal.App.4th 1067, 1071, 96 Cal.Rptr.3d 793 (2009) (condition prohibiting association "with any known probationer, parolee, or gang member" modified to "'any person known to you to be on probation, on parole or a member of a criminal street gang"]; *People v.*

In *State v. Moultrie*, 143 Wn. App. 387, 396–97, 177 P.3d 776 (2008), the Division One of this court considered whether a condition prohibiting contact with "vulnerable, ill or disabled adults" was unconstitutionally vague despite the fact that "vulnerable adult" and "developmental disability" are defined by statute. The court observed that "vulnerable adult" and "developmental disability" are specific, legal terms that differ from the general terms "vulnerable" and "disabled." *Id*. at 397. Without a specific reference to the statutory definitions, the court could not conclude the trial court intended to incorporate them. *Id*. at 397–98. The court remanded for the trial court to clarify the condition, and ordered the term "ill," which has no statutory definition, stricken as vague. *Id*. at 398.

Unlike *Moultrie*, the statutorily defined terms here are not more specific than the terms imposed by the sentencing court. Rather, the terms used in the condition are identical to the terms defined by RCW 9.94A.030(12)(13), as referenced above. "Gangs" and "gang members or associates" are terms of art with a specific legal meaning. The defendant has not identified a contradictory or alternate ordinary

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Leon, 181 Cal.App.4th 943, 954, 104 Cal.Rptr.3d 410(2010) (condition modified to prohibit association "with any person you know to be or the probation officer informs you is a member of a criminal street gang.").

meaning. The Supreme Court has observed "[b]ecause of the inherent vagueness of language, citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute"—"[s]uch sources are considered 'presumptively available to all citizens.' " *Bahl*, 164 Wn.2d at 756-757.

This case is unlike *Valencia* and *Bahl*. The condition in *Valencia* relied on a community corrections officer to give meaning to the term "any paraphernalia," which could have included a number of everyday items. In *Bahl*, the corrections officer was responsible for defining "pornography" - a term without a legal definition. The Supreme Court explained that "pornography" does not have a precise legal definition, and insofar as it relates to adult pornography, it is protected speech. *Bahl*, 164 Wn.2d at 754.

Here, even without an express statutory citation in the judgment and sentence, the condition is not unconstitutionally vague because the only reasonable interpretation is that the sentencing court intended to tie the sentencing condition to the statutory definition.

Moreover, the sentencing condition is even more limited than the condition challenged in *Llamas–Villa*. First, the condition contains the restriction that it applies only to persons *known* to the defendant to be gang members or associates. Second, as in *Llamas–Villa*, the wording of

the condition permits the defendant to present evidence that she did not know an individual was a gang member or associate if he is accused of violating the condition. The condition places the burden on the Department of Corrections to prove the defendant's knowledge of a person's gang membership or associates status. The condition is not vague.

In addition, the trial court was entitled to presume the defendant was familiar with known gang members or their associates. At trial, there was ample undisputed evidence in the record that the assault against Mr. Berceir was gang related; the defendant admitted to being a Nortenos "Red Boyz" gang member and he was familiar with its customs and members; and it was undisputed the defendant was versed in the traditions and markings of rival gang members.

b. Sentencing condition § 4.2(C)(6) of the judgment and sentence that the "defendant shall not wear clothing, insignia, medallions, ect., which are indicative of gang lifestyle."

The Ninth Circuit, in *Soltero*, also upheld a supervised release condition prohibiting the defendant from wearing, displaying, using or possessing "any insignia, emblem, button, badge, cap, hat, scarf, bandana, jewelry, paraphernalia, or any article of clothing which may connote affiliation with, or membership in, the Delhi gang." *Soltero*, 510 F.3d at

865. The court held this condition was within the court's discretion because it specifically referenced the "Delhi" gang, and the district court was entitled to presume the defendant—who had admitted to being a member of the gang—was familiar with the gang's paraphernalia. *Id*. at 866.

However, in *Villano, supra*, this court found the condition that the defendant have "no possession of gang paraphernalia" unconstitutionally vague. In doing so, the court stated:

> There is no definition of what constitutes "gang paraphernalia." In the common experience of this court, popular clothing items or specific colored items are frequently described as gang attire. If the trial court intended to prohibit the wearing of bandanas or particular colored shoes, it needed to provide clear notice to [the defendant] about what he could not possess.

Villano, 166 Wn. App. at 144; *United States v. Green*, 618 F.3d 120, 124 (2d Cir. 2010) (The condition of supervised release that prohibits the defendant from the "wearing of colors, insignia, or obtaining tattoos or burn marks (including branding and scars) relative to [criminal street] gangs," is not statutorily defined and does not provide the defendant with sufficient notice of the prohibited conduct - eliminating such a broad array of clothing colors would make a defendant's daily choice of dress "fraught with potential illegality. People of ordinary intelligence would be unable to confidently comply with this condition."); *U.S. v. Robinson*, 428 Fed.

Appx. 103, 108 (2nd Cir. 2011) (defendant challenged, as unconstitutionally vague, a release condition prohibiting him from wearing colors or insignia, or obtaining tattoos or burn marks, of the "Jungle Junkies" street gang or any other criminal street gang. The court held although the portion of the condition relating to the Jungle Junkies gang was not vague, the part relating to "any other" gang was unconstitutionally vague because it contained no limits of the colors or insignia ... typically associated with any particular gangs to provide guidance to the defendant in his clothing choices.); *People v. Leon*, 181 Cal.App.4th 943, 949, 104 Cal.Rptr.3d 410, 415 (2010) (the appellate court found the probation condition the defendant have "no insignia, tattoos, emblem, button, badge, cap, hat, scarf, bandana, jacket, or other article of clothing which is evidence of affiliation with or membership in a gang" was unconstitutional because it lacked an explicit knowledge[13]

[13] As discussed above, a knowledge requirement has been ascribed by California courts to probation conditions restricting the display of gang signs and the possession of gang paraphernalia. *Lopez*, 66 Cal.App.4th at 638, 78 Cal.Rptr.2d at 66 (condition modified by appellate court to state: "He may not wear or possess any item of gang clothing known to be such by defendant including any gang insignia, moniker or pattern, jewelry with gang significance nor may he display any gang insignia, moniker or other markings of gang significance known to be such by defendant on his person or property as may be identified by law enforcement or the probation officer."); *In re Vincent G.*, *supra*, 162 Cal.App.4th 238, 247–248, 75 Cal.Rptr.3d at 526 (2008) (condition modified by the appellate court to "You are not to possess, wear or display any clothing or insignias,

requirement; absent that qualification the condition rendered defendant vulnerable to criminal punishment for possessing paraphernalia that he did not know was associated with gangs.)

Here, the condition limits wearing clothing or the like that "evidences affiliation" with a gang lifestyle, and it is comparable to the condition in *Soltero*. Knowledge would be imputed as a requirement to be met by the State at a probation violation hearing. The State would have to establish the defendant knew the complained of clothing or the like showed gang affiliation. The defendant could present evidence that he did not wear clothing, insignia, medallions, and the like, which are indicative of gang lifestyle. The trial court thus acted within its discretion by imposing it.

c. Sentencing condition § 4.2(C)(6) of the judgment and sentence that the "defendant not obtain any new or additional tattoo indicative of a gang lifestyle."

The defendant relies on *Bahl*, *supra*, in support of his argument that the trial court's restriction that the defendant not obtain any new or

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emblems, badges, or buttons that you know, or that the probation officer informs you, are evidence of affiliation with or membership in a gang; nor display any signs or gestures that you know, or that the probation officer informs you, are gang gestures."); *Leon*, 181 Cal.App.4th at 954, 104 Cal.Rptr.3d at 410 (condition modified by the appellate court to "You are not to possess, wear or display any clothing or insignia, tattoo, emblem, button, badge, cap, hat, scarf, bandanna, jacket, or other article of clothing that you know or the probation officer informs you is evidence of, affiliation with, or membership in a criminal street gang."

additional tattoo which indicative of a gang is unconstitutional. He asserts that such a prohibition violates his First Amendment right and should be struck from his judgment and sentence

As discussed earlier, and at issue in *Bahl*, was a community custody condition prohibiting the defendant from possessing or accessing pornographic materials as directed by his CCO. The court observed that the term "pornography" had never been given a precise legal definition and that many courts had rejected sentencing conditions prohibiting access to or possession of pornography as unconstitutionally vague. *Bahl*, 164 Wn.2d at 754–56. The *Bahl* court agreed that the restriction on accessing or possessing pornography was unconstitutional, adding that the fact that the CCO could direct what fell within the condition made the vagueness problem more apparent. *Bahl*, 164 Wn.2d at 758.

The due process vagueness doctrine under the state and federal constitutions requires that citizens have fair warning of proscribed conduct. *Bahl*, 164 Wn.2d at 752. A sentencing condition is unconstitutionally vague if it does not define the proscribed conduct with sufficient definiteness that ordinary people can understand what is prohibited. *Bahl*, 164 Wn.2d at 752–53. The requirement of sufficient definiteness does not demand impossible standards of specificity or absolute agreement concerning a term's meaning; some amount of

imprecision in the language is allowed. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

In *In re Antonio C.*, 83 Cal.App.4th 1029, 100 Cal.Rptr.2d 218 (2000), the California court of appeals upheld a probation condition barring a 15–year–old from obtaining *any* new tattoos. The court reasoned that since minors are prohibited from obtaining permanent tattoos with or without parental consent under their penal code, the challenged condition was analogous to the condition requiring him to obey all laws. *Antonio C.*, 83 Cal.App.4th at 1035. The court explained, "the condition is sufficiently related to his rehabilitation, and is a reasonable exercise of the juvenile court's supervisory function to provide for his safety and protection." *Antonio C.*, 83 Cal.App.4th at 1035. "Moreover," the court held, "the condition is sufficiently related to his rehabilitation, and is a reasonable exercise of the juvenile court's supervisory function to provide for his safety and protection." *Antonio C.*, 83 Cal.App.4th at 1035.

The court rejected the minor's argument that the condition infringed on his constitutional right to free speech. The court stated,

> "Assuming, without deciding, that tattoos and related skin markings constitute speech under the First Amendment, the probation condition does not unduly burden Antonio's free speech rights. The United States Supreme Court has long held that while nonverbal expressive activity cannot be banned because of the ideas it expresses, it can be banned because of the action it entails. For example, burning a flag

> in violation of an ordinance against outdoor fires may be punished, whereas burning a flag in violation of an ordinance against dishonoring a flag may not. [Citation.] Here, the probation condition, which is content neutral, temporarily prohibits Antonio from self-expression through permanent skin disfigurement. Its focus is the manner in which the message is conveyed, not the message itself. As such, it constitutes a reasonable manner restriction on Antonio's free speech rights."

Antonio C., 83 Cal.App.4th at 1035 (citations omitted).

In *In re Victor L.*, 182 Cal.App.4th 902, 106 Cal.Rptr.3d 584 (2010), another division of the California court of appeals agreed with the constitutional analysis of *Antonio C.*, and concluded that "the prohibition on acquiring tattoos while on juvenile probation is a proper condition for gang members or those at risk of becoming gang members, regardless of their age, so long as they remain under the juvenile court's jurisdiction." *Victor L.*, 182 Cal.App.4th at 928.

The *Victor L.* court recognized the same argument was presented in *Antonio C.*, where a minor objected to a "probation condition barring him from obtaining '*any* new tattoos, brands, burns, piercings, or voluntary scarring,'" as unreasonable and an infringement on "his constitutional right to free speech." The minor requested the court to limit the condition to one only "barring new *gang-related* " tattoos. The court concluded: "The tattoo and comparable body marking prohibition, as applied to *Antonio*, is a valid probation condition under [*People v. Lent*

(1975) 15 Cal.3d 481, 486] because it relates to criminal conduct. In addition, the state's compelling interest in the protection of children justifies the restriction on Antonio's freedom of expression through body marking. As such, the condition does not unduly burden his free speech rights and was properly imposed."

The *Victor L.* court observed, "[j]ust because it is lawful for an 18 year old to get a tattoo does not mean it is wise," the court refused to modify the condition by limiting its prohibition to the acquisition of new tattoos "with gang significance." *Victor L.*, *supra*, 182 Cal.App.4th at 929–930. The court of appeals did so for two reasons. First, "[t]attoos are ... commonly worn by gang members to show gang affiliation. Whether tattoos are gang related or not, a heavily tattooed appearance tends to give rise to prejudices or suspicions about the tattooed person—warranted or not—that could interfere with a ward's future aspirations, such as employment opportunities. Thus, the prohibition on tattoos tends to steer wards away from gang appearance, gang identity, and the social stigma sometimes attached to tattoos." (citations omitted) (*Ibid*).

Second, "gang tattoos may employ obscure symbols not readily recognized or catalogued as gang tattoos. Thus, a complete ban on new tattoos enhances the enforceability of the condition." *Victor L.*, 182 Cal.App.4th at 929–930 (citation omitted). Because these factors made

the tattoo ban part of a program of reform and rehabilitation, the total ban on new tattoos "for the remainder of Victor's probationary period [wa]s not overbroad." *Victor L*., 182 Cal.App.4th at 929–930.

Here, the prohibition on the use of gang attire or tattoos is not vague, as was the pornography prohibition at issue in *Bahl*. It restricts only tattoos which would convey a gang affiliation.

d. Sentencing condition § 2.1 reflecting the defendant used a motor vehicle during the commission of a felony and 4.2(C)(7) of the judgment and sentence that the "defendant shall notify the CCO of any vehicles owned or regularly driven by him."

The defendant next argues this court should vacate the motor vehicle suspension and restriction as contained within the judgment and sentence.

In Washington, a court may instruct the Department of Licensing to revoke a defendant's license upon a conviction of one of many crimes, including "[a]ny felony in the commission of which a motor vehicle is used." RCW 46.20.285(4).

RCW 46.20.285(4) does not define "use." In order for this statute to apply, the vehicle must contribute in some way to the accomplishment of the crime. *State v. Batten*, 140 Wn.2d 362, 365, 997 P.2d 350 (2000). There must be some relationship between the vehicle and the commission or accomplishment of the crime. *Batten*, 140 Wn.2d at 365. "Used" in the

statute means "employed in accomplishing something." *State v. Hearn*, 131 Wn. App. 601, 609–10, 128 P.3d 139 (2006). RCW 46.20.285(4) does not apply when the vehicle was incidental to the commission of the crime. *State v. Wayne*, 134 Wn. App. 873, 875–76, 142 P.3d 1125 (2006).

In *Batten*, the defendant was convicted of unlawful possession of a firearm and possession of a controlled substance. Because the defendant used his car to conceal the firearm and to transport the controlled substance, the Supreme Court held the defendant "used" his car in the commission of a felony. In *State v. Dupuis*, 168 Wn. App. 672, 278 P.3d 683 (2012), this court held the defendant "used" a car while committing the offense of second degree taking or riding in a motor vehicle without the owner's permission. In *State v. Dykstra*, 127 Wn. App. 1, 110 P.3d 758 (2005) (this court also found the use of a vehicle was supported when the defendant and others drove around looking for cars to steal, drove stolen cars, had a lookout car during a theft, and drove away stolen goods with a car); *State v. Griffin*, 126 Wn. App. 700, 708, 109 P.3d 870 (2005) (the court found a sufficient connection between the car and the crime when the defendant was given cocaine in exchange for a ride in his car).

In *Alacantar-Maldonado*, 184 Wn. App. 215, 340 P.3d 859 (2014), the defendant used his car to drive to the location where he committed the crime. It was not used for the commission of the crime nor was it used to

transport a weapon or other items to commit the crime. *Id*. at 230. This court found there needed to be a more direct connection between the use of the vehicle and the crime to allow the Superior Court to direct the Department of Licensing to revoke his license under RCW 46.20.285(4).

In the present case, and as discussed earlier, the defendants' use of the car was an integral part in the commission and successful completion of the crimes charged. The defendants transported themselves and their pistols to the crime scene in their car; parked it strategically, and left the crime scene with their weapons in tow in the same vehicle. There was sufficient evidence for the court to direct the Department of Licensing to suspend the defendant's driver's license and other related sentencing conditions.

F. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL AND THE LFOS IMPOSED IN HIS CASE ARE MANDATORY AND EXEMPT FROM INQUIRY UNDER RCW 10.01.160(3).

The defendant next argues the trial court failed to make an individualized determination on his ability to pay before imposing the LFOs. The defendant has waived consideration of this issue.

Under § 4.3 of the judgment and sentence, the trial court ordered the defendant pay a $500 victim assessment fee, $200 in court costs, and a $100 DNA fee. CP 91.

The defendant did not challenge the trial court's imposition of these mandatory LFOs at his sentencing. In general, an appellate court will refuse to review any issue not raised in the trial court: "[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review," and an "appellate court may refuse to review any claim of error which was not raised in the trial court." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

This court should exercise its discretion under RAP 2.5(a) and follow its decision in *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014), *petition for review filed*, No. 90188–1 (Apr. 30, 2014), decided before *State v. Blazina*. In *Duncan*, this court held that the defendant's failure to object was not because of the ability to pay LFOs was overlooked, rather the defendant reasonably waived the issue, considering "the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive." *Duncan*, 180 Wn. App at 250; *State v. Calvin*, 176 Wn. App. 1, 316 P.3d 496, (2013), *petition for review filed*, No. 89518–0 (Nov. 12, 2013) (pre- *Blazina*) (failure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal).

Consequently, the defendant in the present case failed to preserve the matter for appeal and this court should not consider it. *State v. Blazina*, 174 Wn. App. at 911, *remanded*, 182 Wn.2d 827 (2015).[14]

1. Mandatory LFOs.

The defendant does not distinguish between discretionary and mandatory LFOs in his brief. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account by the trial court. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The LFOs imposed in the present case are mandatory. The statutory violation existing in *Blazina* applied to discretionary LFOs, not mandatory LFOs. "For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account." *State v. Lundy*, 176 Wn. App. 102; *see also, State v. Kuster*, 175 Wn. App. 420, 306 P.3d 1022 (2013) (pre-*Blazina*); RCW 7.68.035 (l)(a); RCW 6.18.020 (2)(h); RCW 43.43.7541.

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[14] In its consideration of the issue in *Blazina*, *supra*, the Supreme Court rejected the State's ripeness argument. Accordingly, the fact that the LFO issue may not be ripe does not preclude this court's review of the issue. However, the Supreme Court noted, an appellate court may use its discretion in reaching unpreserved claims of error. *Blazina*, 182 Wn.2d at 830.

These costs are required to be paid by statute irrespective of the defendant's ability to pay.

There is no error in the defendant's sentence because the trial court imposed the mandatory LFOs.

2. Due process argument concerning the mandatory DNA fee. RCW 43.43.7541, the court DNA fee imposition statute, mandates the imposition of a fee of one hundred dollars in every sentence imposed for a felony.

RCW 43.43.7541 provides:

> **DNA identification system — Collection of biological samples — Fee.**
> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94.A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

The defendant claims this statute violates the *substantive* due process clause. Defendant then implicitly argues an *equal protection violation* regarding an indigent defendant's inability to pay.

Standard of review. "Where a fundamental right is not at issue, as is the case here, the rational basis standard applies." *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

As to the first argument, that RCW 43.43.7541 violates substantive due process, the defendant sets forth the correct standard of review: "Where a fundamental right is not at issue, as is the case here, the rational basis standard applies." Applying this deferential standard, this court assumes the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest. *Amunrud v. Bd. Of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006).[15]

The DNA fee imposition statute is rationally related to a legitimate state interest. These fees help support the costs of the legislatively enacted DNA identification system, supporting state, federal, and local criminal justice and law enforcement agencies by developing a multiuser databank

[15] *See also Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 597, 55 P.2d 1083 (1936) (statute must be unconstitutional "beyond question"), *aff'd*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Nebbia v. New York*, 291 U.S. 502, 537–38, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (every possible presumption is in favor of a statute's validity, and that although a court may hold views inconsistent with the wisdom of a law, it may not be annulled unless "palpably" in excess of legislative power); cited with approval, *Amunrud*, 158 Wn.2d at 215.

that assists these agencies in their identification of individuals involved in crimes and excluding individual who are subject to investigation and prosecution. *See*, RCW 43.43.753 (finding "that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are subject of investigations or prosecutions ..."). The legislation is supported by a legitimate financial justification. As this court recently held in *State v. Thornton*, No. 32478-8-III, 2015 WL 3751741 (Wash. Ct. App. June 16, 2015):

> The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton's felony drug conviction.

State v. Thornton, at 2.

Therefore, there is a rational basis for the legislation.

Equal protection claim. Next, the defendant impliedly argues that the imposition of the mandatory fee upon defendants who cannot pay violates equal protection. The defendant lacks standing to assert this mixed equal protection claim. The general rule is that "[o]ne who is not adversely affected by a statute may not question its validity." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). This basic rule of standing "prohibits a litigant ... from

asserting the legal rights of another." *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997). It also mandates that a party have a "real interest therein," *State ex rel. Gebhardt v. Superior Court*, 15 Wn.2d 673, 680, 131 P.2d 943 (1942).

Accordingly, the defendant lacks standing and his claim fails.

V. CONCLUSION

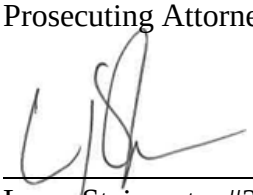
For the reasons stated above,

1. the defendant's convictions for drive by shooting under counts' six, seven, and eight should be affirmed;
2. this court should remand to the superior court with an order to strike the five-year mandatory minimum sentence for counts' one, three, and four as contained within § 2.1 and § 4.1 of the judgment and sentence;
3. this court should remand to the superior court for recalculation of the defendant's offender using the anticipatory offense of conspiracy to commit first degree assault as the base offense for calculation of the offender score for the serious violent felony convictions, and, otherwise affirm the trial court's calculation of the offender scores for the convictions;
4. affirm the gang and driving related sentencing conditions imposed by the superior court; and

5. affirm the LFOs sentence requirements imposed by the trial court.

Dated this 26th day of August, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON, Respondent, v. JAYME L. RODGERS, Appellant,	NO. 32708-6-III (Consolidated with 32760-4-III) CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 26, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Susan Gasch
gaschlaw@msn.com

8/26/2015	Spokane, WA	Crystal McNees
(Date)	**(Place)**	**(Signature)**