No. 32826-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER M. TASKER II,

Appellant.

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

The Honorable Judge Blaine Gibson

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Gloria Campos-White was in a school parking lot when a man approached her vehicle and demanded her purse. Ms. Campos-White testified he pointed a gun at her. After she gave the man her purse and told him she "didn't have any money," he climbed into the backseat of her car and told her to drive. After driving for a distance, Ms. Campos-White jumped from her vehicle. The car rolled over and the man left the scene. Ms. Campos-White later identified the man as the defendant, Christopher M. Tasker II.

The State charged Mr. Tasker with first-degree kidnapping with a firearm enhancement, first-degree attempted robbery with a firearm enhancement, and first-degree unlawful possession of a firearm. The firearm enhancements should now be reversed, because the State did not prove the firearm was operable.

In addition, the matter should be remanded for resentencing based on Mr. Tasker's erroneous offender score. Specifically, the trial court abused its discretion or misapplied the law when it failed to find that the first-degree kidnapping and attempted first-degree robbery constituted the same criminal conduct.

Finally, the trial court found that Mr. Tasker had the ability to pay present and future legal financial obligations. But this finding is unsupported by the record and should be stricken with resentencing.

B. ASSIGNMENTS OF ERROR

1. There is insufficient evidence to support the firearm enhancements, because there was no proof of an operable firearm.

2. The court erred in failing to count the first-degree kidnapping and attempted first-degree robbery offenses as "same criminal conduct" in calculating the offender score.

3. The court erred by finding that Mr. Tasker has the ability or likely future ability to pay legal financial obligations.

4. The court erred by imposing present discretionary legal financial obligations and by authorizing the imposition of future discretionary legal financial obligations, including a $600 court-appointed attorney recoupment, $1,000 for the costs of incarceration, any costs of medical care incurred by Yakima County on behalf of the defendant, and the potential award of appellate costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether there is insufficient evidence to support the firearm enhancements, because there was no proof of an operable firearm.

Issue 2: Whether the trial court erred in failing to count the first-degree kidnapping and attempted first-degree robbery offenses as "same criminal conduct" in calculating the offender score.

Issue 3: Whether the trial court's finding of ability to pay present or future discretionary legal financial obligations was unsupported by the record and requires resentencing.

D. STATEMENT OF THE CASE

On June 13, 2013, Gloria Campos-White sat in the driver's seat of her parked car outside the Selah Intermediate School, reading a book. (RP 420–421). A man approached her vehicle. (RP 424, 428). Ms. Campos-White said the man pointed a gun at her and demanded she give him her purse. (RP 428–429). Ms. Campos-White handed the man her purse and said "I don't have any money." (RP 429). In response, the man appeared fidgety, opened the car door behind Ms. Campos-White, and climbed inside her car with the purse. (RP 430). He told Ms. Campos-White to drive and directed her away from the school. (RP 430–433). Ms. Campos-White said she thought she heard a "clicking" sound behind her and presumed it was the sound of the gun. (RP 431, 453–454).

After driving a distance with the man in the car directing her where to go, Ms. Campos-White decided to jump from the moving vehicle. (RP 431–435). Without its driver, the car flipped over and the man fled the scene. (RP 342, 440). At trial, Ms. Campos-White identified the man as Christopher Michael Tasker II. (RP 435–436).

The State charged Mr. Tasker with first-degree kidnapping with a firearm enhancement, attempted first-degree robbery with a firearm enhancement, and first-degree unlawful possession of a firearm. (CP 6-7).

The case proceeded to a jury trial. (RP 328–765). The gun allegedly used by Mr. Tasker was not produced at trial. (RP 328–765).

Ms. Campos-White testified consistent with the facts stated above. (RP 418–460). In addition, she testified the gun Mr. Tasker had was dark grey or black and that he was able to hold it in one hand. (RP 436, 451). Ms. Campos-White acknowledged she did not know much about guns, did not know the difference between a revolver and a semi-automatic or other types of guns, and had never seen a gun in real life. (RP 436, 451–452). She could not give any other descriptive details about the gun and testified she did not see the gun again after it was initially pointed at her. (RP 430–431, 452–54).

After the State rested, Mr. Tasker moved to dismiss the firearm enhancements. (RP 709–711; CP 17–18). Mr. Tasker argued there was insufficient evidence that he possessed an operable firearm. (RP 709–711). The trial court reserved ruling until after the jury's verdict. (RP 719–720).

The trial court instructed the jury that in order to convict Mr. Tasker of first-degree kidnapping, it had to find the following elements beyond a reasonable doubt:

> (1) That on or about the June 13, 2013, [Mr. Takser] intentionally abducted another person;
> (2) That [Mr. Tasker] abducted that person with intent to facilitate the commission of Attempted First Degree Robbery or flight thereafter, and
> (3) That the acts occurred in The State of Washington.

(CP 30).

For the firearm enhancements, the trial court instructed the jury:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Counts 1 and 2.

(CP 36; RP 746).

The following definitional instruction was given to the jury:

> A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

(CP 34; RP 745).

The jury found Mr. Tasker guilty as charged. (RP 774–75; CP 40–44).

After the jury's verdict, Mr. Tasker moved to set aside the verdict based upon insufficient evidence of an operable firearm. (RP 787–807; CP 17–18, 51–54). Although the trial court doubted the sufficiency of the State's evidence to prove a firearm existed, the trial court denied Mr. Tasker's motion. (RP 713–715, 789, 791, 793, 806–807).

At sentencing, Mr. Tasker argued that the court should count the offenses of first-degree kidnapping and attempted first-degree robbery as

"same criminal conduct" for purposes of calculating his offender score. (RP 817–820). The court refused to do so, reasoning that the attempted robbery was completed when Ms. Campos-White gave Mr. Tasker her purse, and, therefore, the kidnapping had a separate criminal intent. (RP 821–822).

Also at sentencing, Mr. Tasker requested the trial court consider his ability to pay legal financial obligations. (RP 839). The trial court inquired and discovered Mr. Tasker had a minimum-wage earning capacity and history, acknowledged he would likely never be able to pay the restitution in the case, and would be incarcerated and thus unable to earn income for a very long time. (RP 840, 846–847). The trial court then imposed discretionary costs of $600 (court appointed attorney recoupment) and mandatory costs of $143,665.95[1], for total legal financial obligations of $144,265.95. (CP 64; RP 846).

[1] $500 Victim Assessment, $200 criminal filing, $100 DNA fee, and $142,865.95 in restitution. (CP 64).

The Judgment and Sentence contains the following language:

> ¶ 2.7 Financial Ability: The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

(CP 61).

The trial court also found Mr. Tasker had the means to pay the costs of incarceration of up to $1,000 and ordered him to pay those costs. (CP 64; RP 847). In addition, the trial court found Mr. Tasker had the means to pay the costs of any medical care incurred by Yakima County on his behalf, and ordered him to pay those costs. (CP 64). The court ordered Mr. Tasker to begin paying the costs and assessments within 180 days after his release at a monthly amount to be determined by the Yakima County Clerk. (CP 64). The court also ordered that "[a]n award of costs on appeal against the defendant may be added to the total financial obligations. RCW 10.73.160." (CP 64).

The trial court found Mr. Tasker indigent for purposes of appeal. (RP 848–850). Mr. Tasker timely appealed. (CP 69).

E. ARGUMENT

Issue 1: Whether there is insufficient evidence to support the firearm enhancements, because there was no proof of an operable firearm.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). "[I]n order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a 'firearm'. . . ." *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276, 1281 (2008).

Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn

therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

To prove the firearm enhancements, the State was required to prove Mr. Tasker was armed with a firearm at the time of the underlying crimes. RCW 9.94A.533(3) (firearm enhancement statute); RCW 9.41.010(9) (firearm definition); *see also* CP 41, 43. A firearm is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9); *see also* CP 34. In addition, in order to prove the firearm enhancements, the State must present the jury with sufficient evidence to find that a firearm is operable under this definition. *State v. Pierce*, 155 Wn. App. 701, 714, 230 P.3d 237 (2010) (citing *Recuenco*, 163 Wn.2d at 437). "A gun-like object incapable of being fired is not a 'firearm' under this definition." *State v. Pam*, 98 Wn.2d 748, 754, 659 P.2d 454, 457 (1983) *overruled on other grounds by State v. Brown*, 113 Wn. 2d 520, 782 P.2d 1013 (1989).

In *Pierce*, the court found there was insufficient evidence to establish the defendant was armed with an operable firearm. *Pierce*, 155 Wn. App. at 714. The witnesses in that case were awakened in their home and saw an intruder holding what appeared to be a handgun. *Id*. at 705. However, because no other evidence of operability was introduced, such

as bullets found, gunshots heard, or muzzle flashes, the evidence was insufficient to support a firearm sentencing enhancement. *Id*. at 714 n.11.

Here, the State did not prove the firearm enhancements because it did not prove the gun allegedly used by Mr. Tasker was operable. *See* RCW 9.41.010(9); *see also Pierce*, 155 Wn. App. at 714 (citing *Recuenco*, 163 Wn.2d at 437); *Pam*, 98 Wn.2d at 754. No firearm was recovered in this case, and the State did not prove the gun seen by Ms. Campos-White was capable of firing a projectile. (RP 429–430); *see also* RCW 9.41.010(9) (firearm definition). Ms. Campos-White did testify she saw Mr. Tasker holding a gun. (RP 429–430). However, she also testified she has never seen a real gun before, could not tell the difference between a revolver and other types of guns, and had no personal experience with guns. (RP 436, 451–52). She could only describe the object Mr. Tasker was holding as dark-colored and that he was able to hold it in one hand. (RP 436). She believed she heard a "clicking" sound behind her, but no foundation was laid to prove she knew the "clicking" sound to be that of a gun. (RP 431). She expressly indicated she had "never seen a gun in real life." (RP 451). No other evidence was presented by the State to prove the gun was operable. *See* RCW 9.41.010(9); *see also Pierce*, 155 Wn. App. at 714 (citing *Recuenco*, 163 Wn.2d at 437); *Pam*, 98 Wn.2d at 754. At most, if Ms. Campos-White's testimony is believed, the State proved

Mr. Tasker had a gun; however, there was no evidence that it was operable or capable of being fired. (RP 418–460).

There was insufficient evidence that Mr. Tasker was armed with an operable firearm. *See* RCW 9.94A.533(3) (firearm enhancement statute); RCW 9.41.010(9) (firearm definition); *Pierce*, 155 Wn. App. at 714 (citing *Recuenco*, 163 Wn.2d at 437); *Pam*, 98 Wn.2d at 754. Therefore, a rational trier of fact could not have found the existence of the firearm enhancements. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22); *see also Recuenco*, 163 Wn.2d at 437. The two firearm enhancements should be dismissed and the matter remanded for resentencing without the firearm enhancements. *See Pierce*, 155 Wn. App. at 715 (setting forth this remedy).

Issue 2: Whether the trial court erred in failing to count the first degree kidnapping and attempted first degree robbery offenses as "same criminal conduct" in calculating the offender score.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). "A defendant's current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses

'encompass the same criminal conduct.'" *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998); *see also* RCW 9.94A.589(1)(a).

"Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The absence of any of these elements precludes a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). "Under this standard, when the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." *Id*. at 537-38. The defendant bears the burden of proving the crimes constitute the same criminal conduct. *Id*. at 539.

Here, the first-degree kidnapping and attempted first-degree robbery counts were the "same criminal conduct." *See* RCW 9.94A.589(1)(a) (defining same criminal conduct). First, these two counts were committed at the same time and place. Mr. Tasker attempted to take Ms. Campos-White's purse and then got into her car and demanded she drive in a continuous, uninterrupted sequence of events during a short

period of time. (RP 428–430); *see State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997) ("same time" element of "same criminal conduct" statute was proven where sequential drug sales occurred as closely in time as they could without being simultaneous because the sales were part of a continuous, uninterrupted sequence of conduct over a short period of time). The offenses involved the same place, as Ms. Campos-White was in the parking lot of the school when the attempted robbery and kidnapping occurred. (RP 420, 428–430).

Second, the offenses involved the same victim, Ms. Campos-White. (RP 428–430).

Third, the crimes involved the same criminal intent. "Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Phuong*, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (citing *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)). "In determining whether multiple crimes constitute the same criminal conduct, courts consider 'how intimately related the crimes are,' 'whether, between the crimes charged, there was any substantial change in the nature of the criminal objective,' and 'whether one crime furthered the other.'" *Id*. at 546–47 (quoting *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990)). The standard is the extent to which the criminal intent,

objectively viewed, changed from one crime to the next. *Vike*, 125 Wn.2d at 411 (citing *State v. Dunaway,* 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987)). When one crime furthers another, same criminal conduct applies. *State v. Garza-Villarreal,* 123 Wn.2d 42, 47, 864 P.2d 1378 (1993); *see also Dunaway,* 109 Wn.2d at 217. And, "if one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

In *Dunaway*, the Court found the offenses of robbery and kidnapping encompassed the same criminal conduct. *Dunaway,* 109 Wn.2d at 217. The defendant pleaded guilty to the charge of abducting his victim with the intent to commit robbery. *Id*. The Court noted it was the defendant's "very intent to commit robbery that enabled the prosecutor to raise the charge from second degree to first degree kidnapping" because the kidnapping charge necessarily included robbery as an element of the offense and the kidnapping furthered the robbery. *Id*. Thus, the objective intent behind both crimes was the robbery. *Id.*

Here, the first-degree kidnapping furthered the attempted first-degree robbery. *See Garza-Villarreal,* 123 Wn.2d at 47. Mr. Tasker was found guilty of first-degree kidnapping on the basis that he abducted Ms.

Campos-White "with intent to facilitate the commission of Attempted First Degree Robbery or flight thereafter. . . ." (CP 30, 40). The attempted robbery was an element of the first degree kidnapping charge. (CP 30, 40). The jury found the kidnapping furthered the attempted robbery because the abduction facilitated the crime or flight from it. (CP 40). From an objective standpoint, the attempted first degree robbery and first degree kidnapping had the same criminal intent. That intent did not change; the same intent is what the jury found. (CP 30, 40).

In addition, the trial court reasoned same criminal conduct did not apply because the attempted robbery was completed before Mr. Tasker kidnapped Ms. Campos-White. (RP 821-822). The court noted Mr. Tasker did not ask for anything else once he had the purse and that there was no evidence he was still attempting to rob her. (RP 821). However, Ms. Campos-White testified that when she handed Mr. Tasker her purse, she also told him she did not have any money. (RP 429-430). He then forced his way into her car. (RP 430). The evidence shows Mr. Tasker's intent behind the kidnapping was the robbery because Mr. Tasker was still trying to obtain money from Ms. Campos-White. (RP 430).

In sum, the crimes of first-degree kidnapping and attempted first-degree robbery constituted the same criminal conduct in this case. The first-degree kidnapping and attempted first-degree robbery involved the

same time and place, the same victim, and the same intent. *See* RCW 9.94A.589(1)(a) (defining same criminal conduct); *see also Phuong*, 174 Wn. App. at 546 (defining intent in this context) (citing *Adame*, 56 Wash. App. at 811). The two crimes were part of a continuous transaction, and the jury found that the kidnapping charge encompassed the crime of attempted first degree robbery. (CP 30, 40). The trial court misapplied the law or abused its discretion in failing to find first-degree kidnapping and attempted first-degree robbery were the same criminal conduct. *See Graciano*, 176 Wn.2d at 535-36. The matter sentence should be reversed and remanded for resentencing, with the first degree kidnapping and attempted first degree robbery counted as one crime. *See* RCW 9.94A.589(1)(a).

Issue 3: Whether the trial court's finding of ability to pay present or future discretionary legal financial obligations was unsupported by the record and requires resentencing.

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). "Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant's present or likely future ability to pay." *State v.*

Lundy, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). The applicable statute states:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant's current or future ability to pay based on the particular facts of the defendant's case. *State v. Blazina*, __ Wn.2d __, 344 P.3d 680, 683 (2015). The record must reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id*. at 683, 685. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including any restitution. *Id*. at 685. The court "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Id*. (quoting RCW 10.01.160(3)). The court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." *Id*. If a defendant is found indigent, such as if his income falls below 125 percent of the federal

poverty guideline and thereby meets "the GR 34 standard of indigency, courts should seriously question that person's ability to pay LFOs." *Id.*

The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants' inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants' lives that may have negative consequences on employment, housing and finances. *Blazina*, __ Wn.2d __, 344 P.3d at 683-84. "Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs." *Id.* at 684.

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant's ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). However, where the trial court does make the unnecessary finding that the defendant has the ability to pay, "perhaps through inclusion of boilerplate language in the judgment and sentence,"

its finding is reviewed under the clearly erroneous standard. *Id*. (citing *State v. Bertrand*, 165 Wn. App. 393, 404 n.13, 267 P.3d 511 (2011)). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Id*. (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Here, the court considered Mr. Tasker's financial position and entered the boilerplate finding that it had considered Mr. Tasker's total amount owing and his ability to pay LFOs. (RP 840, 846–50; CP 61). The court also entered the boilerplate finding that the defendant had the ability or likely future ability to pay the legal financial obligations imposed herein. (CP 61). However, the court's finding that the defendant had the ability to pay both those present and later-imposed LFOs was not supported by the record.

Mr. Tasker was 23-years-old when he went to prison for the underlying crimes, and he faces a long term of incarceration. (CP 60, 62). The trial court inquired into Mr. Tasker's work history and noted he made minimum-wage, he would not be able to earn income during his sentence,

and he would likely never be able to pay the restitution. (RP 840, 846–847). Mr. Tasker was also deemed indigent at trial and for purposes of this appeal. (CP 64; RP 848–850). Because the record shows that Mr. Tasker would likely not be able to pay costs, the court erred in imposing discretionary costs. *See Lundy*, 176 Wn. App. at 103; RCW 10.01.160(3); *Blazina*, 344 P.3d at 683; *see also* CP 64; RP 840, 846–847.

The erroneous discretionary LFOs included the $600 in court-appointed attorney recoupment, $1,000 for the costs of incarceration, any costs of medical care incurred by Yakima County on behalf of the defendant, and the potential "award of costs on appeal against the defendant . . . ." (CP 64). The boilerplate finding that Mr. Tasker has the present or future ability to pay discretionary LFOs, including the costs of incarceration, any medical care incurred by Yakima County on his behalf, and potential appellate costs, is not supported by the record. Accordingly, Mr. Tasker requests that this Court strike the erroneous discretionary LFOs and unsupported finding regarding Mr. Tasker's ability to pay and remand for resentencing. *See Blazina*, __ Wn.2d __, 344 P.3d at 685 (setting forth this remedy).

F. CONCLUSION

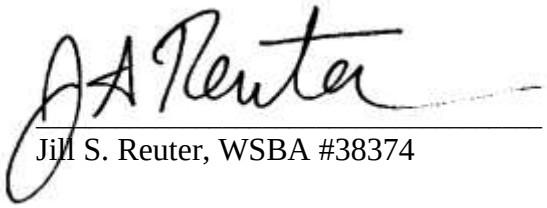
The evidence presented at trial was insufficient to support the firearm enhancements. The firearm enhancements should be dismissed and the matter remanded for resentencing without the firearm enhancements.

In addition, because the first-degree kidnapping and attempted first-degree robbery offenses should be treated as "same criminal conduct" the case should be remanded for resentencing where these offenses are counted as one crime.

Finally, Mr. Tasker requests this Court remand for resentencing to strike the discretionary present and future LFOs that were imposed, including the $600 court-appointed attorney recoupment, $1,000 for the costs of incarceration, any costs of medical care incurred by Yakima County on behalf of the defendant, and the potential award of appellate costs. Upon resentencing, the court's unsupported finding regarding Mr. Tasker's present or future ability to pay LFOs should be stricken as well.

Respectfully submitted this 20th day of May, 2015.

Laura M. Chuang, WSBA #36707



Jill S. Reuter, WSBA #38374

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

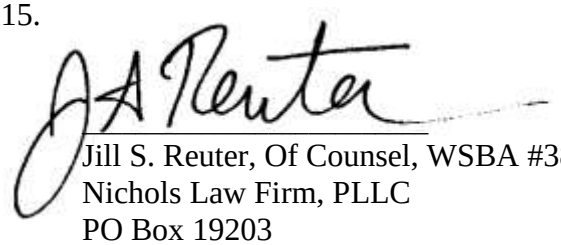
STATE OF WASHINGTON Plaintiff/Respondent vs. CHRISTOPHER M. TASKER II Defendant/Appellant	)	COA No. 32826-1-III PROOF OF SERVICE

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 20, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Christopher M. Tasker II, DOC #334035
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

Having obtained prior permission from Yakima County Prosecutor's Office, I also served the Respondent State of Washington at appeals@co.yakima.wa.us using Division III's e-service feature.

Dated this 20th day of May, 2015.



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