33021-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

CHRIS LITO, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

# BRIEF OF RESPONDENT

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## I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Lito's motion for a new trial based on the argument that Instruction 12 violated defendant's due process rights by impermissible burden-shifting.

2. The record does not support the finding that Mr. Lito had the current or future ability to pay the imposed legal financial obligations because the trial court did not engage in an individualized inquiry into defendant's ability to pay.

3. The trial court erred when it ordered Mr. Lito to pay a $100 DNA collection fee because such an order violates due process.

## II. ISSUES PRESENTED

1. Did the trial court's jury instruction on the defense to second degree rape of "reasonable belief of capacity to consent" violate due process or impermissibly shift the burden of proof to the defendant where that defense did not negate an element of the offense charged?

2. Did the defendant fail to preserve any legal financial obligation (LFO) or community custody condition issues for appeal; are the LFOs imposed in his case mandatory financial obligations exempt from the inquiry required for discretionary LFOs under RCW 10.01.160(3)?

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

## III. STATEMENT OF THE CASE

Defendant was charged in Spokane County Superior Court with one count of rape in the second degree in April 2014. CP 1. The state charged the defendant with rape in the second degree (RCW 9A.44.050(1)(b)) based on the victim's inability to consent due to mental or physical incapacity. CP 1.

On April 2, 2014, victim H.H. met some friends in Peaceful Valley in Spokane, Washington, to hang out, have some drinks, play some drums, and have fun. 1RP 49-50. She drank approximately six shots of rum. 1RP 51-52. Between eight and nine o'clock, she and her friends went to play pool at a local bar, where she had two cans of beer. 1RP 52-53. After three or four games of pool, H.H. and her friends headed to the "strip" in downtown Spokane, where they bar-hopped. 1RP 54. During the next few hours, H.H. consumed at least another five rum and cokes at various bars. 1RP 57-58. H.H. also testified that she smoked at least three bowls of marijuana that evening. 1RP 80, 84. Around eleven o'clock, H.H. called her sister for a ride and told her that she would wait for her at one of the local bars. 1RP 58-59. That is the last thing that H.H. remembered from that night. 1RP 59.

H.H. awoke the next morning in a stranger's apartment, without her pants on and with bruises on her neck.[1] 1RP 59-60. She knew that she had been raped because, due to a medical issue, sexual intercourse is extremely painful for her afterwards, and she felt that particular pain the morning of April 3, 2014. 1RP 61. She testified, "there was no way I should have had sex that night." 1RP 60. Further, she testified that on the evening in question, she neither gave consent to anyone to have sexual relations with her, nor allowed anyone to bruise or bite her neck or breast. 1RP 75-76.

After finding her way out of the unfamiliar apartment building, she called 911 and made her way to nearby Deaconness hospital. 1RP 60. Law enforcement investigated the incident and located a video recording taken outside the apartment building that showed the defendant and H.H. walk into the apartment at 11:41 p.m. 2RP 180-182. Defendant's DNA sample matched the DNA sample taken from the victim's rape kit. 1RP 123.

At trial, defendant argued (1) that H.H. was not actually physically helpless or mentally incapacitated and (2) that even if H.H. was physically helpless or mentally incapacitated, the defendant had a reasonable belief, "based on what he knew, what he could see" that she was not

[1] At least one bruise was described as a bite mark. H.H. also had a bite mark on one of her breasts. 2RP 215.

incapacitated. 2RP 252-253. The defense argued that Mr. Lito saw that H.H. was able to walk unaided, talk, climb stairs, sit on a table, talk to another individual in the apartment, dial a telephone,[2] participate in the act of sexual intercourse and that "doing all of these things … would indicate to him that she was able to consent." 2RP 252-253.

The jury found the defendant guilty as charged on September 19, 2013. CP 26. On November 17, 2014, defendant moved the court for a new trial based on the Supreme Court's decision in *State v. W.R.*,[3] filed on October 30, 2014. CP 27-31. The court denied the motion, finding that *W.R.* was distinguishable from the facts of Mr. Lito's case. CP 50.

The court sentenced the defendant to a standard range sentence of 96 months to life under the indeterminate sentencing provisions of RCW 9.94A.507. CP 59, 62. The court further imposed legal financial obligations totaling $1,352.86, including a $500 Victim Assessment, $200 filing fee, $100 DNA fee and $552.86 in restitution, CP 65, and indicated that "it doesn't appear in the future there will be the ability to pay"; and the start date for the payment of the LFOs was "somewhat illusory." 2RP 292-293. Defendant timely appealed.

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[2] Evidence was elicited at trial that could support defense arguments in closing that H.H. was able to walk, talk, and use her telephone.

[3] 181 Wn.2d 757, 336 P.3d 1134 (2014).

## IV. ARGUMENT

### A. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE THE DEFENSE OF "REASONABLE BELIEF OF THE VICTIM'S CONSENT" DOES NOT NEGATE THE STATE'S BURDEN OF PROOF AS TO ANY ELEMENT OF THE CHARGE OF RAPE BY INCAPACITY.

The defendant argues that the trial court erred in denying him a new trial after the Washington Supreme Court decided *State v. W.R.*, which held, in a rape by forcible compulsion case, the requirement for a defendant to prove consent by a preponderance of the evidence impermissibly shifted the burden of proof to the defendant and therefore, violated due process. The trial court correctly determined that *W.R.* is inapplicable to Mr. Lito's case.

The due process clause of the Fourteenth Amendment requires the state to prove every element of a charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The state cannot require the defendant to disprove any fact that constitutes the crime charged. *W.R.*, 181 Wn.2d at 762. Whether due process prevents the legislature from allocating the burden of proof of a defense to the defendant depends on the relationship between the elements of the crime and the elements of the defense. *Id*.

A defense that merely excuses conduct that *would otherwise be punishable* is a true affirmative defense, and the burden of proving that

defense is properly allocated to the defendant.[4] [5] *Id.* However, where a defense *necessarily* negates[6] an element of the crime charged, the legislature may not allocate the burden of proof to the defendant.[7] *Id.*

The question, therefore, is whether the completed crime and the defense can co-exist; Division II squarely addressed this issue in *State v. Lozano*, ___ Wn. App. ___, 356 P.3d 219 (2015).

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[4] An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so; it does not negate any element of the charged crime. *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010).

[5] The state has never been required to provide proof of the non-existence of all affirmative defenses in establishing the elements of a charge beyond a reasonable doubt. *Smith v. United States*, ___U.S. ___, 133 S.Ct. 714, 719, 184 L.Ed.2d 570 (2013).

[6] "The state is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense does negate an element of the crime. Where instead it excuse[s] conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt." *W.R.*, at 764 (quoting *Martin v. Ohio*, 480 U.S. 228, 237, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987)) (internal citations omitted).

[7] In such a case, of course, "the legislature can only require the defendant to present sufficient evidence to create a reasonable doubt as to his or her guilt." *State v. Riker*, 123 Wn.2d 351, 367-378, 869 P.2d 43 (1994) (stating alibi defense negates an element of the crime because it denies the defendant committed the crime and as such, a defendant must only prove the defense such that it creates reasonable doubt; however, duress defense admits that the defendant committed the unlawful act but pleads an excuse for doing so).

In *Lozano*, the defendant was charged with second degree rape with the allegation that the victim was incapable of consent by reason of being physically helpless or mentally incapacitated. *Id*. In that case, like the instant case, the victim had consumed a significant amount of alcohol. *Id*. A witness found the defendant having sexual intercourse with the victim while she appeared to be asleep. *Id*. At trial, the defense theory was that the victim had initiated sexual intercourse with the defendant, and that even if she was incapable of consent, he reasonably believed she could consent. *Id*.

Lozano argued on appeal that the decision in *W.R.* should also apply to rape cases charged under RCW 9A.44.050(1)(b). *Id*. at 222. In deciding that *W.R* only applies to rape by forcible compulsion cases, not rape by incapacity cases, the court stated,

> *W.R.* does not support Lozano's position. The instruction in *W.R.* violated due process because it allocated to the defendant the burden to prove consent, which negated the forcible compulsion element of the charged crime. Lozano's burden to prove his "reasonable belief" that the victim was not mentally incapacitated and physically helpless did not negate an element of the charged crime.

*Lozano*, 356 P.3d at 222.

Here, defendant was also charged with rape in the second degree with the allegation that the victim was incapable of consent by reason of

being physically helpless or mentally incapacitated. CP 1. The jury was instructed:

> Mental incapacity is that condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse, whether that condition is produced by some illness, defect, influence of a substance, or by some other cause.
>
> A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

CP 19; 2RP 238.[8]

> The jury was further instructed:
>
> It is a defense to the charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [H.H.] was not mentally incapacitated or physically helpless.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 20; 2RP 238.[9]

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[8] The jury was instructed by the use of Washington Pattern Jury Instruction (WPIC) 45.05. Neither party objected or took exception to the use of this instruction during the instruction conference. 2RP 203-208, 228-229.

[9] The jury was instructed by the use of WPIC 19.03. Neither party objected to the use of this instruction during the instruction conference. 2RP 203-208, 228-229.

In this case, just as in *Lozano*, the state retained its burden to prove beyond a reasonable doubt that the defendant had sexual intercourse with H.H. when she could not consent by reason of being physically helpless or mentally incapacitated. *See, Lozano*, *supra*. The challenged instruction did not negate this element, as it did not require the defendant to prove that H.H. *actually* consented. It merely placed the burden on him to prove that he *reasonably believed* that she *could* consent, which is a statutory defense to the crime.

One way to think about this distinction is that forcible compulsion and consent are conceptual opposites;[10] [11] thus, the two cannot co-exist and *necessarily* negate each other. The "opposite" of incapacity to consent, however, is actual capacity to consent. Defendant was not required to prove that H.H. had actual capacity to consent. His burden was merely to prove that he *reasonably believed* that she had capacity to consent. The focus of this defense is on the reasonableness of the

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[10] Forcible compulsion is defined as physical force which overcomes resistance and places a person in fear of death or injury. As defined, there can be no forcible compulsion when the victim consents as there is no resistance to overcome. *W.R.*, 181 Wn.2d at 765.

[11] In examining and overruling its prior precedent on this issue, the Washington Supreme Court criticized its own prior jurisprudence for not explaining how two legal concepts (forcible compulsion and consent) can be conceptual opposites without negating one another. *W.R.*, 181 Wn.2d at 768.

defendant's belief, not on the victim's actual ability to consent to sexual contact.

At trial, defendant argued the reasonableness of his belief that H.H. was not incapacitated, citing to her ability to walk unassisted, her ability to carry on a conversation, and her ability to dial her telephone. The jury was simply unpersuaded by these facts. No error occurred when the trial court found *W.R.* to be inapplicable to defendant's case and denied his motion for a new trial. The burden of proving the reasonableness of his belief that the victim was not incapacitated was properly allocated to the defendant, and he failed to meet his burden of proof. The trial court did not err.

B. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) OBJECTION; THE LFOS IMPOSED IN HIS CASE ARE MANDATORY FINANCIAL OBLIGATIONS, AND, THEREFORE, EXEMPT FROM INQUIRY UNDER RCW 10.01.160(3).

The defendant failed to object to the imposition of his LFOs, and concedes this on appeal. Appellant's Br. at 12. Therefore, he failed to preserve the matter for appeal. RAP 2.5. In its consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court determined that the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *Id.* at 830. No constitutional issue is

involved. *Id*. at 840 (Fairhurst, J. concurring in result). And, as set forth later, the statutory violation existing in *Blazina* applied to discretionary LFOs, not mandatory LFOs. However, the *Blazina* court exercised its discretion in favor of accepting review due to the nationwide importance of LFO issues and to provide guidance to our trial courts. *Id.* at 830. That guidance has been provided. *Blazina* was decided after the December 2014 sentencing in the instant case. There is no nationwide or statewide import to this present case, and review should not be granted where the defendant failed to object, and thereby give the trial court the ability to make further inquiry as to his ability to pay, if necessary. Statewide appellate procedural rules are of more import in the present case.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5. RAP 2.5 is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d

212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

> [I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from "riding the verdict" by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.
>
> BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

*Strine*, 176 Wn.2d at 749-50.

Therefore, policy and RAP 2.5 favor declining review of this statutory,[12] non-constitutional LFO issue.

Secondly, the LFOs ordered are mandatory LFOs. CP 73-74. The $500 crime victim assessment, $100 DNA (deoxyribonucleic acid) collection fee, $200 criminal filing fee and restitution due to the Crime

[12] Assuming the RCW 10.01.160(3) applied to mandatory fees.

Victim's Compensation Fund (in this case $552.86)[13] are mandatory legal financial obligations, and each is required irrespective of the defendant's ability to pay. *State v. Kuster*, 175 Wn. App. 420, 424-425, 306 P.3d 1022 (2013); *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Because the trial court imposed only mandatory LFOs in Mr. Lito's case, there is no error in the defendant's sentence.

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[13] The restitution was all owed to the CVC. CP 65, 72. The trial court had a statutory obligation to order restitution. *See State v. McCarthy*, 178 Wn. App. 290, 313 P.3d 1247 (2013):

> Subsection (7) demands that the trial court "order restitution in *all* cases where the victim is entitled to benefits under the crime victims' compensation act." RCW 9.94A.753(7) (emphasis [the court's]). The section does not expressly identify what losses the court may impose on the accused, but the language urges that any benefits paid by the compensation fund be imposed upon the defendant. "The very language of the restitution statutes indicates legislative intent to grant broad powers of restitution." *Davison*, 116 Wn.2d at 920, 809 P.2d 1374. The defendant's reimbursement of the crime victims' fund, under a loose rather than strict standard of causation, furthers the goal of the defendant facing the consequences of his conduct. *See Enstone*, 137 Wn.2d at 680, 974 P.2d 828. To a limited extent, restitution also promotes the worthy objective of protecting the public purse. *See Dick Enters., Inc. v. King County*, 83 Wn. App. 566, 569, 922 P.2d 184 (1996).

*McCarthy*, 178 Wn. App. at 300-01.

C. THE DNA FEE IMPOSITION STATUTE, RCW 43.43.7541, DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

The DNA fee imposition statute, RCW 43.43.7541, mandates the imposition of a fee of one hundred dollars in *every* felony sentence.[14] The defendant claims this statute violates the *substantive* due process clause. Appellant's Br. at 19-23.

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." Appellant's Br. at 20, citing *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). "To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id*." Appellant's Br. at 20.

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[14] RCW 43.43.7541 provides:

> ***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 9.94A 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. (Emphasis added).

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 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

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[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 (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.

held in *State v. Thornton*, 188 Wn. App. 371, 374-375, 353 P.3d 642 (2015):

> The language in RCW 43.43.7541 that "[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars" plainly and unambiguously provides that the $100 DNA database fee is mandatory for all such sentences. *See, State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813 (1947) (word "must" is generally regarded as making a provision mandatory); *see also, State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (DNA collection fee is mandated by RCW 43.43.7541). 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.

*Thornton*, 188 Wn. App. at 374-375.

Therefore, there is a rational basis for the legislation, and the imposition of the DNA fee does not offend substantive due process guarantees.

## V. CONCLUSION

The state respectfully requests the court affirm defendant's conviction and the imposition of legal financial obligations. The trial court properly denied defendant's motion for a new trial as *W.R.* is inapplicable to defendant's case; furthermore, the legal financial

obligations imposed were all mandatory obligations not subject to a *Blazina* analysis.

Dated this 28 day of October, 2015.

LAWRENCE H. HASKELL
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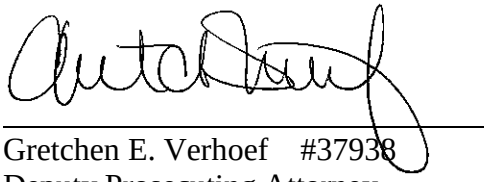

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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| STATE OF WASHINGTON,<br><br>Respondent,<br>v.<br><br>CHRIS LITO,<br><br>Appellant, | NO. 33021-4-III<br><br>CERTIFICATE OF MAILING |

I certify under penalty of perjury under the laws of the State of Washington, that on October 28, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

David N. Gasch
gaschlaw@msn.com

10/28/2015 (Date) Spokane, WA (Place) Kim Cornelius (Signature)