Supreme Court No. 93401-1

(Court of Appeals No. 47277-5-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHASE McCRACKEN,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

Chase McCracken was homeless, freezing, high, and hungry, when he entered an empty home through the dog door, ate some food, drank some juice, and spent the night. When authorities later connected him to the crime, he immediately expressed a desire to plead guilty to residential burglary and malicious mischief. He was embarrassed and wanted to take responsibility for his actions.

A week later, however, the State amended the charges to add allegations that Mr. McCracken committed the crimes with sexual motivation. The State did so because Mr. McCracken had masturbated while in bed. Mr. McCracken moved to dismiss the allegations because he did not commit any crime with sexual motivation and did not think it fair that he would have to register as a sex offender if convicted. A specially qualified psychologist also concluded this crime was not sexually motivated. The court nevertheless denied the motion, and found Mr. McCracken guilty as charged following a stipulated facts bench trial.

Mr. McCracken committed residential burglary, but he did not act with malice or with sexual motivation. This Court should grant review, reverse the malicious mischief conviction and remand with instructions to strike the sexual motivation finding from the burglary conviction. LFOs should also be stricken, because Mr. McCracken is impoverished.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Chase McCracken, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. McCracken*, No. 47277-5-II (Slip Op. filed July 6, 2016). A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. To convict a person of malicious mischief, the State must prove beyond a reasonable doubt that the accused person acted with malice, which is "an evil intent, wish, or design to vex, annoy, or injure another person." Here, the stipulated facts show that Chase McCracken was homeless, high, freezing, and hungry when he entered an empty home, ate some food, got into bed, masturbated, and slept. The State charged him with malicious mischief for masturbating in the bed.

    a. Did the Court of Appeals improperly construe the statute when it held that the adjective "evil" applies only to the noun "intent," and not to the other similar nouns in the series ("wish or design")?

    b. Did the trial court improperly treat a statutory permissive inference as a mandatory presumption?

    c. Did the State present insufficient evidence of malice, requiring reversal and dismissal of the charge?

2. Did the State fail to prove the burglary was sexually motivated because there was no evidence that Mr. McCracken had a purpose of sexual gratification when he entered the home, stole juice and candy, and spent the night?

3. RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and this Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay

before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Does this requirement extend to the victim penalty assessment, DNA fee, and filing fee?

D. STATEMENT OF THE CASE

Chase McCracken started using both methamphetamines and marijuana when he was just eleven years old. CP 50. As a young adult, he had difficulty recovering from his drug addiction, and was unemployed and homeless by the fall of 2013. CP 50; RP (12/23/13) 4.

In November of that year, Mr. McCracken was cold and hungry, so he entered an empty house through a large animal door. CP 32, 51; Slip Op. at 1-2. He had heard that the owner was frequently out of town, and he thought (correctly) that she would be gone that night. CP 32, 51; Slip Op. at 2. Mr. McCracken drank some juice, ate some candy, and went to bed. CP 32; Slip Op. at 2. While he was in bed, he masturbated. *Id.*

Mr. McCracken was gone by the time the homeowner returned, and the house was apparently in order with the exception of a stain on the bedding. The homeowner contacted the authorities, who took a sample from the sheets and discovered a DNA profile that matched Mr. McCracken. CP 30-31, 35.

The State charged Mr. McCracken with one count of residential burglary and one count of malicious mischief. CP 1-2. Mr. McCracken felt terrible about the crime and wanted to accept responsibility and plead

guilty right away. RP (12/23/13) 4; RP (2/26/15) 15, 24. He was not permitted to do so at first appearance, however. RP (12/23/13) 4; Slip Op. at 2.

At arraignment a week later, the State filed an amended information adding sexual motivation allegations to both counts. RP 8-9; RP (1/2/14) 2. Although Mr. McCracken had wanted to plead guilty to the original charges a week earlier, he entered "not guilty" pleas to the new charges because he did not believe he was a sex offender. RP (1/2/14) 2-3.

Mr. McCracken filed a motion to dismiss the sexual motivation allegations pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). CP 11-20; Slip Op. at 2. The court found sufficient evidence to support a prima facie case of sexual motivation, and denied the motion. RP (2/27/14) 12; Slip Op. at 2.

The case proceeded to a stipulated-facts bench trial, at which Mr. McCracken again acknowledged committing residential burglary, but argued the State failed to prove malicious mischief or sexual motivation. RP (8/27/14) 1-25; CP 22-36, 48-54. The stipulated evidence included the police reports setting forth the facts described above, as well as the report of a psychologist and certified sex offender treatment provider who determined that the crime was not sexually motivated, that Mr.

McCracken did not need sex offender treatment, and that he did not need to be labeled as a sexual offender. CP 22-36, 48-54; Slip Op. at 3.

The court nevertheless found Mr. McCracken guilty on both counts with sexual motivation as charged. CP 66-67; Slip Op. at 3. At sentencing, the Department of Corrections submitted a report agreeing with the psychosexual evaluator's conclusion that Mr. McCracken does not need sex offender treatment. CP 55-65.

Mr. McCracken moved to arrest judgment on the sexual motivation findings, but the court denied the motion. CP 38-43; RP (2/26/15) 1-12. The court did grant Mr. McCracken's motion for an exceptional sentence below the standard range. CP 69; Slip Op. at 3. In so doing, the court recognized that Mr. McCracken's conduct was caused by drug addiction and homelessness, and that Mr. McCracken wanted to take responsibility at the outset. RP (2/26/15) 24-25.

Despite recognizing that Mr. McCracken was impoverished, the court imposed $800 in legal financial obligations, with no discussion of Mr. McCracken's ability to pay. RP (2/26/15) 14-30; CP 73-74. The court also advised Mr. McCracken that he would be required to register as a sex offender. CP 77-79.

On appeal, Mr. McCracken argued, inter alia, that both the malicious mischief conviction and the sexual motivation finding should be

reversed for insufficient evidence. He also argued that LFO's should be stricken because he cannot pay.

The Court of Appeals affirmed. It rejected Mr. McCracken's argument that the State failed to prove the malice element of malicious mischief, and disagreed that the judge improperly treated a permissive inference as a mandatory presumption. The court recognized that malice means "an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12); Slip Op. at 5. But it implicitly held that the word "evil" applies only to "intent" and not to the other similar nouns in the series:

> Surely, even if there was no evil intent, the act of entering someone's home without permission, eating and drinking her property, using her bathroom, and then soiling her bedding could be reasonably construed as a design to vex, annoy or injure. Therefore, the record supports the trial court's finding that the element of malice had been proven.

Slip Op. at 5.

The court also rejected Mr. McCracken's claim that he did not commit burglary with sexual motivation. Mr. McCracken happened to masturbate inside the house, but his purpose for entering and remaining in the house was to obtain shelter because he was homeless. The Court of Appeals disagreed, holding that because Mr. McCracken was sexually motivated to masturbate, and the masturbation damaged the sheets,

sufficient evidence supported the finding that the burglary was committed with sexual motivation. Slip Op. at 7-8.

Because it was raised for the first time on appeal, the court declined to reach Mr. McCracken's argument that LFO's should not have been imposed upon him. Mr. McCracken had argued that the court should reach the issue because sentencing occurred before this Court decided *Blazina.*, and that is why trial counsel did not object. Slip Op. at 10. The Court of Appeals was unmoved, even though the record showed Mr. McCracken was homeless and had repeatedly served time in jail for non-willful failure to pay LFO's. RP (2/26/15) 18-19, 25.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The State presented insufficient evidence to prove malicious mischief beyond a reasonable doubt; both the trial court and the Court of Appeals incorrectly construed the statute defining "malice".

The State charged Mr. McCracken with third-degree malicious mischief, alleging that he "did knowingly and maliciously cause physical damage in an amount not exceeding $750.00 to the property of another; contrary to [RCW] 9A.48.090(1)(a)." CP 9. The definitional statute describes the mens rea for the crime as follows: " 'Malice' and 'maliciously' shall import an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12). The statute also provides a

permissive inference: "Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." *Id.*; *State v. Ratliff*, 46 Wn. App. 325, 330, 730 P.2d 718 (1986).

a. The trial court improperly treated a permissive inference as a mandatory presumption.

For statutes containing permissive inferences, it is important to ensure that the inference is not treated as a mandatory presumption. A mandatory presumption instructs the factfinder that it must infer the element has been proved if it finds the predicate fact has been proved. *Ratliff*, 46 Wn. App. at 330. Mandatory presumptions violate due process because they relieve the State of its burden to prove every element beyond a reasonable doubt. *See State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Thus, "when a permissive inference is the sole and sufficient proof of an element, the presumed fact must flow beyond a reasonable doubt from the proven fact, so that the prosecution does not circumvent its burden of proof." *State v. Drum*, 168 Wn.2d 23, 35-36, 225 P.3d 237 (2010) (internal quotations omitted).[1]

[1] In contrast, where the inference is only part of the state's proof, the presumed fact must flow more likely than not from a proven fact. *Id.* at 36.

Here, the trial court improperly treated the permissive inference as a mandatory presumption, and assumed that proof of the predicate fact equated to proof of the element. The court found the following regarding the mens rea for malicious mischief:

> As to the Malicious Mischief, that's slightly more complex [than the burglary], but I do find Mr. McCracken guilty beyond a reasonable doubt of malicious mischief as well. The facts stipulated to are that *for reasons of his own at the time*, he took off his clothes and got into bed *with what intent we don't know*, that he proceeded to masturbate which led to ejaculation and that that got onto some bedding.
>
> [discussion of actus reus and damage]
>
> So, he masturbated with the effect of ejaculation and that was a willful disregard of the rights of another, privacy rights among other things. Definitively would be vexing and annoying and injurious. He knowingly and willfully did it and it was wrongfully done without lawful excuse, so beyond a reasonable doubt he's guilty of Malicious Mischief, under $750.00.

RP (8/27/14) 28-29 (emphases added).

In other words, the trial judge found that Mr. McCracken acted in willful disregard of the rights of another by masturbating in the bed (and that he acted wrongfully without just cause or excuse), and from that finding the judge concluded Mr. McCracken was guilty of the crime. *See id.* But "willful disregard" and "wrongfully without just cause or excuse" are merely predicate findings from which the mens rea *may* be inferred;

they are not themselves the mens rea of the crime. Malice is the mens rea, and malice means evil intent, wish or design. RCW 9A.48.090(1)(a); RCW 9A.04.110(12). Thus, the findings of fact do not support the conclusions of law, and the conviction should be reversed. *See Stevenson*, 128 Wn. App. at 193.

b. The Court of Appeals improperly construed the statute and read out the requirement that the State prove "evil".

Furthermore, the State did not present sufficient evidence from which the judge could have made the requisite finding of malice. To be sure, the stipulated facts support the predicate finding that Mr. McCracken acted with willful disregard of the rights of another. *See* CP 22-36, 48-53. However, a factfinder is permitted to infer evil intent, wish or design from willful disregard of the rights of another only if either: (1) a finding of evil intent, wish, or design necessarily flows, beyond a reasonable doubt, from a finding of willful disregard; or (2) a finding of evil intent, wish or design more likely than not flows from a finding of willful disregard, *and* the State has presented additional evidence of evil intent beyond acting in willful disregard of another's rights. *See Drum*, 168 Wn.2d at 35-36. On the facts of this case, proof of the element does not flow from proof of the predicate fact under either standard. Although the State presented sufficient evidence that Mr. McCracken engaged in a volitional act of

masturbation, there was no evidence that he had the intent, wish or design – evil or otherwise – to damage somebody's property through that act.

The evidence to which the parties stipulated was that Mr. McCracken was addicted to methamphetamines and had been using drugs intravenously for a year and a half. CP 31. He was high and freezing and hungry, so he entered the empty home through the dog door, ate some candy, drank some juice, and used the bathroom and bed. CP 23, 32. While he was in bed, he masturbated. CP 23-24. The State presented no other evidence of mental state at all. CP 22-36. Thus, the State failed to prove beyond a reasonable doubt that Mr. McCracken acted with malice.

In affirming the conviction, the Court of Appeals not only disagreed with the above analysis, but it construed the statute such that the word "evil" applied only to "intent" and not to the rest of the noun phrase:

> Surely, even if there was no evil intent, the act of entering someone's home without permission, eating and drinking her property, using her bathroom, and then soiling her bedding could be reasonably construed as a design to vex, annoy or injure. Therefore, the record supports the trial court's finding that the element of malice had been proven.

Slip Op. at 5. This reading is contrary to the plain language of the statute under ordinary rules of grammar. *See, e.g.*, *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 554, 7 Cal. Rptr. 3d 844, 849 (2003) ("Most readers expect the first adjective in a series of

nouns or phrases to modify each noun or phrase in the following series unless another adjective appears."). This Court should grant review. RAP 13.4(b)(4).

2. The State presented insufficient evidence that Mr. McCracken acted with sexual motivation, and improperly labeling a person a sex offender causes severe collateral consequences.

The State also presented insufficient evidence to prove that the residential burglary was committed with sexual motivation. Accordingly, that finding should be stricken from the judgment. It is a matter of substantial public interest that individuals not be mislabeled sex offenders, as the stigma can result in severe collateral consequences. *See, e.g.*, Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. Rev. L. & Soc. Change 727, 760-67 (2013) (noting collateral consequences of vigilante violence, reduced employment and housing opportunities, and increased likelihood of recidivism, among others).

A person commits the crime of residential burglary if he enters or remains in a home with the intent to commit a crime therein. RCW 9A.52.025(1). "Sexual motivation" means "that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.030(48).

In the trial court, the parties argued about whether the act of masturbation was sexually motivated, but this is beside the point. It is not enough for the prosecutor to show that a defendant masturbated for the purpose of sexual gratification. Rather, "the State must prove beyond a reasonable doubt that the defendant *committed the crime* for the purposes of sexual gratification." *State v. Vars*, 157 Wn. App. 482, 494, 237 P.3d 378 (2010) (emphasis added); *cf. State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (accomplice liability must be based on *the* crime charged, not any crime or noncriminal act). The trial court found that because Mr. McCracken committed malicious mischief with sexual motivation, he necessarily committed burglary with sexual motivation. RP (8/27/14) 31. But as explained above, insufficient evidence supports the malicious mischief conviction.

There is still sufficient evidence of burglary because the stipulated facts show that Mr. McCracken entered and remained unlawfully with intent to commit theft of food and drink, but there is no evidence that this crime was sexually motivated. *See* CP 22-36, 48-53 (entirety of stipulated facts); *contrast State v. Halstien*, 122 Wn. 2d 109, 129, 857 P.2d 270 (1993) (sufficient evidence that burglary was committed with sexual motivation where defendant broke into victim's home and stole only a vibrator and condoms). Accordingly, Mr. McCracken asks this Court to

grant review and remand with instructions to strike the sexual motivation finding. RAP 13.4(b)(4).

3. This Court should hold that an inquiry into ability to pay is required before imposing the victim penalty assessment, DNA fee, and filing fee.

a. The trial court recognized that Mr. McCracken was homeless and indigent, but imposed legal financial obligations with no analysis of ability to pay.

The sentencing court recognized that Mr. McCracken's crime was the result of drug addiction and homelessness. RP (2/26/15) 25. Mr. McCracken stated that he wanted drug treatment and that he wanted to change his life. RP (2/26/15) 18. He asked the court not to impose sex-offender treatment both because he does not need it and because it's "way expensive and you're gonna see me in front of this court all the time because you already do for my fines that I can't even barely keep, you know what I mean." RP (2/26/15) 18. Mr. McCracken had been unemployed for some time, and his criminal history made it difficult to obtain work. RP (12/23/13) 4; CP 49. He lamented that he is "stuck in this cycle," whereby he's "struggling trying to keep those [LFO's] paid and every time I get picked up I do 30 days [in jail] …." RP (2/26/15) 18-19.

The court nevertheless imposed $800 in legal financial obligations, including a $500 "Victim Assessment," $200 "Criminal Filing Fee," and $200 "DNA collection fee." CP 73-74. The judgment and sentence

includes a boilerplate finding that "the defendant has the ability or likely future ability to pay the legal financial obligation imposed herein." CP 70. The parties and the court did not discuss this finding at all.

b. This Court should hold that the VPA, DNA fee, and filing fee are mandatory only for those who have the ability to pay.

The legislature has mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). This Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." *Id.* at 837; *see also* CP 49 (Mr. McCracken explains his

criminal history has hampered his employment prospects). All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State argued that the trial court properly imposed these costs without regard to Mr. McCracken's poverty, because the statutes in question use the word "shall" or "must." *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(h) (convicted criminal defendants "shall be liable" for a $200 fee); RCW 43.43.7541 (every felony sentence "must include" a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013); Br. of Respondent at 15. But these statutes must be read in tandem with RCW 10.01.160, which, as explained above, requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

To be sure, this Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's

inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

This Court should grant review to resolve the inconsistency between *Blazina* and *Curry*. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). Indeed, when listing the LFOs imposed on the two defendants at issue, the court cited the same LFOs Mr. McCracken challenges here: the Victim Penalty Assessment, DNA fee, and criminal filing fee. *Id.* at 831

(discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition cots). *See id.* If the Court were limiting its holding to a minority of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

Indeed, it does not appear that this Court has ever held that the DNA fee and "criminal filing fee" are exempt from the ability-to-pay inquiry. It would be particularly problematic to require Mr. McCracken to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants.[2] This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015) ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but

[2] This Court can take judicial notice of the fact that King County courts never impose this cost on indigent defendants. In the alternative, Mr. McCracken would be happy to provide the Court with representative judgments from King County.

would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because "the error, if permitted to stand, would create inconsistent sentences for the same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties); *and see* RCW 9.94A.010 (3) (stating that a sentence should "[b]e commensurate with the punishment imposed on others committing similar offenses").

The Court of Appeals declined to reach the question because it was not raised below. But the sentencing hearing occurred before *Blazina*, and in any event, only this Court can address the tension between that case and *Curry*. In sum, this Court should grant review to address the question of whether a sentencing court must inquire into a defendant's ability to pay before imposing the VPA, DNA fee, and filing fee. RAP 13.4(b)(4).

F. CONCLUSION

Chase McCracken respectfully requests that this Court grant review.

Respectfully submitted this 21st day of July, 2016.

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 6, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHASE BRENDON McCRACKEN, Appellant.	No. 47277-5-II UNPUBLISHED OPINION

LEE, J. — Chase Brendon McCracken was convicted, after a bench trial on stipulated facts, of malicious mischief and residential burglary, both with sexual motivation. On appeal, McCracken argues that (1) there was insufficient evidence to support (a) the element of malice in his malicious mischief conviction and (b) that he acted with sexual motivation when he committed residential burglary; (2) the State erred in believing it could not withdraw the sexual motivation allegations; and (3) the legal financial obligations (LFOs) imposed at his sentencing should be stricken because he lacks the ability to pay. We affirm.

FACTS

In early November 2013, McCracken entered a woman's house, without her knowledge or permission, through the "doggie door." Clerk's Papers (CP) at 23. McCracken entered the house

because he was cold and hungry. McCracken had heard that the woman was frequently out of town and chose to enter her house hoping she would not be there.

Inside, McCracken ate some candy, drank some juice, used the bathroom, undressed, and got into the bed in the master bedroom. While he was in bed, he masturbated. McCracken left before the woman returned home.

When the woman returned home, she discovered stains on her bedding, she contacted the authorities, who took a sample from stain on the bedding. Testing by the Washington State Patrol Crime lab showed that the stains were semen with a DNA (deoxyribonucleic acid) profile that matched McCracken.

McCracken was charged with one count of residential burglary and one count of third degree malicious mischief. He attempted to plead guilty at his first appearance, but he was not allowed to do so. Before his arraignment, the State filed an amended information that added a special allegation of sexual motivation to both charges.

McCracken moved to dismiss the sexual motivation allegations. The State opposed the motion, arguing that the State was not allowed to dismiss the sexual motivation allegations without the superior court making specific findings. The State also argued that while there may have been other reasons for McCracken's entry and remainder in the home, one of his purposes for remaining in the home was to "gratify himself sexually" through masturbation. Transcript (Tr.) (Feb. 27, 2104) at 9. The superior court denied McCracken's motion to dismiss the sexual motivation allegations.

The case proceeded to a bench trial on stipulated facts. The stipulated facts included a written statement by McCracken to the court and the police reports setting out the above facts.

Also included was a report of a psychologist and certified sex offender treatment provider who determined that McCracken's behavior was not consistent with a crime that was sexually motivated and McCracken did not meet the description of someone who should register as a sex offender.

The trial court found McCracken guilty of both counts with sexual motivation for each. With respect to the malicious mischief with sexual motivation conviction, the trial court found McCracken "masturbated with the affect [sic] of ejaculation and that was a willful disregard of the rights of another, privacy rights among other things. Definitely would be vexing and annoying and injurious. He knowingly and willfully did it and it was wrongfully done without lawful excuse." Tr. (Aug. 27, 2014) at 29. The trial court further found, with respect to the residential burglary with sexual motivation conviction, that McCracken "was damaging sheets while committing the residential burglary," and he was sexually motivated when he damaged the sheets. Tr. (Aug. 27, 2014) at 31.

McCracken was sentenced to an exceptional sentence below the standard range. The sentencing court also imposed the following LFOs on McCracken: $500 Victim Assessment fee, a $200 Criminal Filing Fee, and a $100 DNA Collection Fee.

McCracken appeals.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

McCracken argues that there was insufficient evidence to support the element of malice in his conviction for malicious mischief. He also argues that there was insufficient evidence that he acted with sexual motivation when he committed the residential burglary. We hold that there is

sufficient evidence to support the malice element in McCracken's conviction for malicious mischief, and that there is sufficient evidence to support a finding of sexual motivation on McCracken's residential burglary conviction.

a. Legal Principles

To determine whether sufficient evidence supports an adjudication, we view the evidence, along with all reasonable inferences that may be drawn from the evidence, in the light most favorable to the State and determine whether any rational fact finder could have found the crime's elements beyond a reasonable doubt. *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). Following a bench trial, our review is limited to determining whether substantial evidence supports the challenged findings and, if so, whether the findings support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Unchallenged findings of fact are verities on appeal, and a trial court's conclusions of law are reviewed de novo. *Id.*; *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

b. Malice—Malicious Mischief

RCW 9A.48.090 codifies Washington's proscription of third degree malicious mischief. In pertinent part, the statute states, "A person is guilty of malicious mischief in the third degree if he or she . . . [k]nowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree." RCW 9A.48.090(1)(a). "Malice" and "maliciously" are defined as "an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12). The definition also includes a permissive inference that says, "Malice may be inferred from an act done in willful disregard of

the rights of another, or an act wrongfully done without just cause or excuse." RCW 9A.04.110(12).

McCracken argues the trial court erred by relying on the permissive inference as a mandatory presumption. But, the record shows that sufficient evidence supports the trial court's finding that McCracken's actions met the definition for malice without relying on any inference.

The trial court found that McCracken's staining the woman's sheets was "vexing and annoying and injurious." Tr. (Aug. 27, 2014) at 29. The definition of malice includes actions done with "evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12). We hold that, when viewed in the light most favorable to the State along with the reasonable inferences that follow, the evidence that McCracken entered the woman's home without permission, ate her food, drank her juice, used her bathroom, and then masturbated and ejaculated on her bed is sufficient to support the trial court's finding that these actions were done with an evil intent, wish, or design to vex, annoy or injure. Surely, even if there was no evil intent, the act of entering someone's home without permission, eating and drinking her property, using her bathroom, and then soiling her bedding could be reasonably construed as a design to vex, annoy or injure. Therefore, the record supports the trial court's finding that the element of malice had been proven.

However, even if the trial court improperly relied on an inference and treated the permissive inference as a mandatory presumption, we hold that an inference of malice was appropriate. "A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *State v. Ratliff*, 46 Wn. App. 325, 330, 730 P.2d 716 (1986), *review denied*, 108 Wn.2d 1002 (1987). "A

permissive inference is valid when there is a 'rational connection' between the proven fact and the inferred fact, and the inferred fact flows 'more likely than not' from the proven fact." *Id.* at 330-31 (quoting *County Court of Ulster County v. Allen*, 442 U.S. 140, 165, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

In *Ratliff*, Division One considered "whether the trial court erred in instructing the jury that it could infer malice 'from an act done in willful disregard of the rights of another.'" 46 Wn. App. at 329-30 (quoting jury instructions). There, police officers left Ratliff in the back of a police van for approximately 15 minutes unattended and when they returned, they found Ratliff had broken the window between the holding area and the cab of the van. *Id.* at 326. They saw that the radio was damaged and an officer's jacket was pulled through the window. *Id.* at 326. Ratliff was convicted of second degree malicious mischief. *Id.* at 327.

The court explained that the jury instruction was proper because there was a "rational connection" between the proven facts of that case and an inference of malice:

> Ratliff admitted on cross examination that he continued to pull radio wires loose after he did not succeed in bringing the radio towards him. He stated that he continued to pull at the wires because he "was frustrated." Furthermore, the officers testified that one of their jackets had been pulled through the window into the prisoner holding area, a situation more consistent with malicious intent than with Ratliff's claims that he wanted to use the radio to call help.

Id. at 330-31. In conclusion, the court held that "the inference of malice flows more likely than not from the conduct of the defendant." *Id.* at 331.

Here, the same conclusion is appropriate. The evidence shows that McCracken entered the house without permission when the woman was not there because he was cold and hungry. McCracken then proceeded to eat candy and drink juice belonging to the woman without her

permission. Finally, after using her bathroom, he crawled into the woman's bed, and then masturbated and ejaculated on the woman's bedding. Based on this evidence, an inference of malice flows more likely than not from McCracken's actions.

Sufficient evidence supports the trial court's finding of malice. McCracken's challenge fails.

c. Sexual Motivation—Residential Burglary

McCracken next argues there was insufficient evidence to prove he committed the residential burglary with sexual motivation because the State could not prove beyond a reasonable doubt that he committed the crime of residential burglary for the purpose of sexual gratification. We disagree.

"A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1). "'Sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.030(47). "[T]he State must prove beyond a reasonable doubt that the defendant committed the crime for the purposes of sexual gratification," and "[i]t must do so with evidence of identifiable conduct by the defendant while committing the offense." *State v. Vars*, 157 Wn. App. 482, 494, 237 P.3d 378 (2010).[1]

[1] In analyzing the former juvenile counterpart to RCW 9.94A.030(47), our Supreme Court agreed that "'the statute makes sexual motivation *manifested by the defendant's conduct* in the *course of committing a felony* an aggravating factor in sentencing.'" *State v. Halstien*, 122 Wn.2d 109, 120, 857 P.2d 270 (1993) (quoting *State v. Halstien*, 65 Wn. App. 845, 853, 829 P.2d 1145 (1992)).

As McCracken acknowledges, "There is . . . sufficient evidence of burglary because the stipulated facts show that [he] entered and remained unlawfully with intent to commit theft of food and drink." Br. of Appellant at 13. But there is also evidence that McCracken *remained* unlawfully in the woman's dwelling to masturbate in her bed. And the stipulated fact that McCracken masturbated and ejaculated in the woman's bed while remaining unlawfully in her house is "evidence of identifiable conduct . . . while committing the offense." *Vars*, 157 Wn. App. at 494. The trial court found sexual motivation based on McCracken "damaging sheets while committing the residential burglary" and being sexually motivated when he damaged the sheets. Tr. (Aug. 27, 2014) at 31. Thus, the stipulated facts support the trial court's finding that one purpose McCracken remained unlawfully in the house was for his sexual gratification. Therefore, there is substantial evidence to allow a rational fact finder to find that McCracken committed residential burglary with sexual motivation beyond a reasonable doubt. *See Drum*, 168 Wn.2d at 34-35. McCracken's challenge fails.

B. STATE'S AUTHORITY TO WITHDRAW SEXUAL MOTIVATION ALLEGATIONS

McCracken argues that because the prosecutor erroneously believed that the State could not withdraw the sexual motivation allegations, we should remand the case for further proceedings so that the prosecution has an opportunity to withdraw the sexual motivation allegations. We disagree.

The charging statute on the sexual motivation allegation is as follows:

> (1) The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense

> that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.
>
> (2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.
>
> (3) The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

RCW 9.94A.835.

Our Supreme Court held in *State v. Rice*, 174 Wn.2d 884, 897, 279 P.3d 849 (2012), that the legislature, despite its use of the word "shall," intended the charging of a sexual motivation aggravator to be a discretionary function of the prosecutor. The Court explained that a prosecutor's decision to charge a special allegation, when one is available, depends on "the facts and circumstances of each case and the prosecutor's own policies and priorities," and is, therefore, necessarily a discretionary function of his office. *Id.* at 902.

Here, even if the prosecutor mistakenly believed that the State had no authority to withdraw the sexual motivation allegations, there is no evidence that the State would have otherwise withdrawn the allegations. Instead, the record shows that the State amended the information to add the sexual motivation allegations and then opposed the motion to dismiss the sexual motivation allegations. The State argued that McCracken committed the residential burglary when he unlawfully remained in the house to "gratify himself sexually" through masturbation. Tr. (Feb.

27, 2104) at 9. Thus, regardless of the understanding of the State's authority to do so, the record fails to support the argument or inference that the prosecutor intended to withdraw the sexual motivation allegations. Therefore, we decline McCracken's request to remand this case to give the prosecutor a second chance to remove the sexual motivation allegations.

C. LEGAL FINANCIAL OBLIGATIONS

McCracken argues that his LFOs should be stricken because he lacks the ability to pay. We decline to review the issue because McCracken raises it for the first time on appeal, and even if we were to grant review, only mandatory LFOs were imposed, and the sentencing court is not required to make an ability-to-pay inquiry before imposing mandatory LFOs. *See* RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (holding that a defendant who fails to object to the imposition of LFOs at sentencing is not automatically entitled to review.); *State v. Duncan*, No. 90188-1, 2016 WL 1696698 (Wash. April 28, 2016), at *2-3 (affirming the appellate court's decision to decline review of the imposition of LFOs that were not objected to at the sentencing court); *see also State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (holding that the legislature expressly directed that an ability to pay analysis not be considered when imposing victim restitution, victim assessment fees, DNA fees, and criminal filing fees); *State v. Mathers*, No. 47523-5-II, 2016 WL 2865576 (Wash. Ct. App. May 10, 2016) *4 (holding that sentencing courts do not need to conduct an ability to pay analysis before imposing victim assessment fees or DNA fees).

In summary, we hold that (1) sufficient evidence supports the trial court's finding of malice and sexual motivation; (2) regardless of any understanding regarding the State's authority, there is no evidence the State intended to withdraw the sexual motivation allegations; and (3) McCracken's

argument against the imposition of LFOs is without merit. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, J.

Sutton, J.

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Skamania County Prosecutor's Office

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