No. 33109-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MARIA HERNANDEZ-MARTINEZ,

Appellant.

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

The Honorable John D. Knodell

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

An arson fire occurred at Maria Hernandez-Martinez's residence while she and her family were away. Ms. Hernandez-Martinez was charged with first degree arson despite the lack of evidence linking her to the fire. At trial, the State was allowed to admit a photograph of an unrelated gasoline can found outside Ms. Hernandez-Martinez's residence three weeks after the fire, despite the State's failure to link the can to the fire. Ms. Hernandez-Martinez is entitled to reversal of her arson conviction for the State's failure to prove Ms. Hernandez-Martinez set the fire, and because of the prejudice she suffered due to the admission of the irrelevant evidence.

In addition, the trial court imposed discretionary Legal Financial Obligations (LFO) without inquiring into Ms. Hernandez-Martinez's financial status or making a finding that she had an ability to pay. Accordingly, Ms. Hernandez-Martinez is entitled to remand for a new sentencing hearing.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented to support the jury's verdict that Ms. Hernandez-Martinez was guilty of first degree arson.

2. Ms. Hernandez-Martinez's right to a unanimous jury verdict regarding the arson count was violated.

3. The trial court erred in admitting a photograph of an unrelated and irrelevant gas can found three weeks after the fire and not linked to the fire.

4. The trial court erred in imposing LFOs without inquiring into Ms. Hernandez-Martinez's financial status or making a finding of her ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State to prove every element of the charged offense. Ms. Hernandez-Martinez was charged with first degree arson which required the State to prove she started the fire. The State failed to provide any evidence linking Ms. Hernandez-Martinez to the fire. Is Ms Hernandez-Martinez entitled to reversal of her arson conviction with instructions to dismiss?

2. The Washington Constitution requires that a jury be unanimous regarding the alternative means of committing an offense. Arson has several alternative means of which two were charged. The trial court failed to instruct the jury it had to be unanimous regarding the alternative means of committing arson. Is Ms. Hernandez-Martinez

entitled to reversal of the arson conviction for a failure of jury unanimity?

3. Evidence that is not relevant is not admissible. Even otherwise admissible evidence is inadmissible if its prejudicial impact outweighs its probative value. Here, over repeated defense objections, the State was allowed to admit a photograph of a gas can discovered three weeks after the fire near Ms. Hernandez-Martinez's residence. The State failed to link this can to the fire or otherwise show why the photograph was relevant except to suggest to the jury without a foundation that it was used in starting the fire. Did the trial court err in admitting this irrelevant evidence whose sole purpose was to allow the jury to improperly speculate that the can was used in starting the fire?

4. A court may impose discretionary LFOs only after making an individualized assessment of the defendant's financial situation and determining her ability to pay. This finding must be made on the record. The court here imposed $200 in discretionary LFOs but failed to make a finding regarding Ms. Hernandez-Martinez's financial situation and her ability to pay. Is Ms. Hernandez-Martinez entitled to reversal of her sentence and remand for a new sentencing hearing?

D. STATEMENT OF THE CASE

In the morning of August 29, 2012, a fire occurred at Maria Hernandez-Martinez's residence in Moses Lake. RP 288. At the time of the fire, Ms. Hernandez-Martinez and her children had left the residence at 6:30 in the morning and were on their way to Spokane for a doctor's appointment. RP 353.

Grant County Fire Marshall Bruce Gribble went to Ms. Hernandez-Martinez's residence shortly after the fire was extinguished. RP 290. When he entered the residence, Gribble did not smell any odor of gasoline or other accelerants. RP 303. Gribble also did not observe any televisions in the residence. RP 302. His initial evaluation was that the fire appeared to have started in the south side of the trailer near a window and air conditioner. RP 293. Gribble also noted that records showed a fire had occurred at Ms. Hernandez-Martinez's residence in the same location in May 2009. RP 306.

Ms. Hernandez-Martinez made a claim with her insurance company, Foremost Insurance, which was owned by Farmer's Insurance. RP 251. In the claim she included two televisions and $3,800 in cash. RP 253-54. The insurance claims adjuster assigned to investigate the claim, Jonathon Hull, met with Ms. Hernandez-Martinez

at her residence in September 2012. RP 251. Hull noted the effective date of Ms. Hernandez-Martinez's policy was August 9, 2012. RP 252. Ms. Hernandez-Martinez told Hull the money was on a sofa. RP 253-54.

Farmer's Investigator Craig Harris spoke to Ms. Hernandez-Martinez on August 29, 2012. RP 265. Ms. Hernandez-Martinez told Harris that she lived at the residence with her three children. RP 277. She said she received $660 per month in income and her monthly mortgage payment on the trailer was $500 per month. Ms. Hernandez-Martinez again related that two televisions were damaged in the fire and that she had lost $3800 in cash as well. RP 279. According to Ms. Hernandez-Martinez, the money was in a leather purse that was on a sofa. RP 279.

Barry Kerth, a private fire investigator retained by Farmer's Insurance inspected the trailer on September 3, 2012. RP 153. He returned for a second time on September 8, 2012, for further investigation. RP 158. During his first inspection, Kerth did not observe any televisions in the trailer. RP 158. The televisions were present during his second inspection of September 8. RP 158. Kerth did not recall seeing a gas can at the scene. RP 160. Kerth inspected the

sofas in the trailer and did not find any evidence of cash. RP 167. Kerth traced the origin of the fire to a point behind one of the sofas near a window. RP 171. Kerth stated that when he first moved this sofa to investigate further, he did not smell anything. RP 174. As he began to dig around in the fire debris, he began to smell a strong odor of an accelerant. RP 174-75.

Following Kerth's discovery of the smell of an accelerant, Eileen Porter, the handler of an accelerant detection dog, was sent by Farmer's Insurance to Ms. Hernandez-Martinez's residence. RP 208. During her sweep of the residence, the dog alerted four times to the presence of an accelerant; three alerts outside the window near the sofa and air conditioner, and once inside the same window. RP 210. Ms. Porter took samples from this area and sent it to a private laboratory for testing. RP 211. This testing revealed the presence of automobile gasoline. RP 240-44. Ms. Porter also saw a gas can about 50 feet from the trailer. RP 229. Ms. Porter did not collect the gas can, but she took a photograph of it. RP 229.

On September 25, 2012, Ms. Hernandez-Martinez was interviewed by Grant County Sheriff's Deputy Jon Melvin along with Fire Marshall Gribble. RP 345-47. During this interview, Ms.

Hernandez-Martinez reiterated that two televisions were damaged and $3800 in cash was lost in the fire. RP 355.

Ms. Hernandez-Martinez was subsequently charged with first degree arson, based upon the alternative means of damaging a dwelling and intent to collect insurance proceeds on a property valued at $10,000 or more; second degree perjury, and filing a false insurance claim in excess of $1,500. CP 52-55. At trial, over repeated defense objections on relevancy and prejudice grounds, the trial court admitted the photograph of the unrelated gas can:

> THE COURT: I believe that there is very, very minimal, minimal probative value here. However, I don't see the danger of the jury being prejudiced here for the reasons -- I have a hard time believing that any jury is going to look at this and give it much weight. And I really don't think the jury is going to speculate on whether this is the gas can or not. You're going to point out there's no -- we don't know if there's anything in it, we don't know if it matches, if there is gasoline, would it match the gasoline in the accelerant that was used, nobody fingerprinted it, apparently, we don't why it got here.
>
> MR. GONZALES: Then why is it here?
>
> THE COURT: I'm confident that you're going to raise all of those questions with the jury.

RP 225.

At the completion of the jury trial, Ms. Hernandez-Martinez was convicted of first degree arson, filing a false insurance claim, and the

lesser included offense of making a false or misleading statement to a public servant. CP 105-07.

During sentencing, the trial court imposed $800 in legal financial obligations (excluding restitution): $500 victim penalty assessment, $100 DNA collection fee, and $200 criminal filing fee. CP 120. The court made no inquiry of Ms. Hernandez-Martinez regarding her financial situation and made no finding regarding her ability to pay. CP 117.

E. ARGUMENT

1. **The State failed to present any evidence that Ms. Hernandez-Martinez was responsible for the fire.**

a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. *The State failed to prove Ms. Hernandez-Martinez had anything to do with the arson.*

While the State arguably proved the fire in Ms. Hernandez-Martinez's residence was intentionally set, the State failed to prove she had anything to do with the fire, either as a principal or accomplice. Accordingly, Ms. Hernandez-Martinez is entitled to reversal of her conviction for arson.[1]

To prove first degree arson, the State was required to prove Ms. Hernandez-Martinez knowingly and maliciously caused a fire or explosion which damaged a dwelling, or knowingly and maliciously

[1] The Court also failed to instruct the jury on jury unanimity of the alternative means of committing arson. The first degree arson statute has long been recognized to specify alternative means by which a person may commit the crime. *State v. Flowers,* 30 Wn.App. 718, 722-23, 637 P.2d 1009 (1981), *review denied,* 97 Wn.2d 1024 (1982). In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the crime charged. Unanimity is not required, however, as to the means by which the crime was committed *so long as* substantial evidence supports each alternative means. *State v. Whitney,* 108 Wn.2d 506, 739 P.2d 1150 (1987).

In light of Ms. Hernandez-Martinez's argument regarding the sufficiency of the evidence, the failure to instruct on unanimity provides an additional argument for reversal of the arson count.

causing a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance. RCW 9A.48.020(1)(b), (d).

The State produced no physical evidence that Ms. Hernandez-Martinez started the fire, thus the entire case was based on what the State correctly characterized as circumstantial evidence. At the time of the fire, Ms. Hernandez-Martinez and her children were in their car on the way to Spokane.

The State relied upon several facts which it claimed showed Ms. Hernandez-Martinez was responsible for the fire but which do not support the State's claim. The State relied upon the fact that Ms. Hernandez-Martinez had just purchased the insurance which proved nothing. The State also relied upon the fact Ms. Hernandez-Martinez had a fire in her residence a few years prior. But the State had candidly admitted that it knew nothing about this fire, how it started or how much damage was caused, but still wanted the jury to speculate that this fire was also arson despite a complete lack of evidence of this fact.

Finally, the State relied upon Ms. Hernandez-Martinez's insurance claims in this matter to support its theory that she started the fire. Once again, all this evidence proves is that Ms. Hernandez-

Martinez took advantage of the fire, it did nothing to prove she had any involvement in starting it.

The only thing the State proved at trial was that the fire was arson, period. The State completely failed to prove who was responsible for its ignition. Accordingly, the State failed in its burden of proving Ms. Hernandez-Martinez responsible for the fire and she is entitled to reversal of her conviction for arson.

c. *Ms. Hernandez-Martinez's conviction for arson must be reversed with instructions to dismiss.*

Since there was insufficient evidence to support the conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford,* 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States,* 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. **The trial court erred in admitting a photograph of an unrelated and irrelevant gas can which the prosecutor subsequently took advantage of thereby prejudicing Ms. Hernandez-Martinez and requiring reversal of her conviction for arson.**

a. *The admission of irrelevant evidence violates the due process right to a fair trial.*

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). But, mere compliance with state evidentiary and procedural rules does not *guarantee* compliance with the requirements of due process. *Id., citing Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). Due process *is* violated where the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

b. *Only relevant evidence is admissible at trial.*

"Relevancy and the admissibility of relevant evidence are governed by ER 401 and ER 402." *State v. Rice*, 48 Wn.App. 7, 11, 737 P.2d 726 (1987). Irrelevant evidence is inadmissible, even if offered by a criminal defendant in his defense. ER 402; *State v. Maupin,* 128 Wn.2d 918, 925, 913 P.2d 808 (1996); *State v. Otis,* 151 Wn.App. 572, 578, 213 P.3d 613 (2009).

To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). ER 401; *Davidson v. Metropolitan Seattle,* 43 Wn.App. 569, 573, 719 P.2d 569 (1986), *review denied,* 106 Wn.2d 1009 (1986). Irrelevant evidence is not admissible. ER 402. Facts that are 'of consequence' have some tendency to prove, qualify, or disprove an issue in the case. *State v. Peterson,* 35 Wn.App. 481, 484, 667 P.2d 645 (1983). The relevance of evidence depends on the circumstances of each individual case and the relationship between the facts and the ultimate issue. *Davidson,* 43 Wn.App. at 573.

The determination of relevance is reviewed for an abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). A court abuses its discretion when its discretionary decision is manifestly unreasonable or based on untenable grounds. *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 926, 792 P.2d 520 (1990).

c. *Even if relevant, unfair prejudice may result from evidence whose probative value is substantially outweighed by its prejudicial impact.*

Relevant evidence may still be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. A danger of unfair prejudice exists "'[w]hen evidence is likely to stimulate an emotional response rather than a rational decision.'" *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011), *quoting State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *Powell*, 126 Wn.2d at 264.

d. *The gas can was not relevant as there was no attempt to connect it to the fire at Ms. Hernandez-Martinez's residence*.

The gas can had no relation to the fire in question and the State conceded as much. The can was found over three weeks after the fire

by the dog handler who took the photograph. The State did not seize the can, nor did it do any analysis of the can to determine whether DNA or fingerprints were present to tie it to the arson. Nevertheless, the court allowed the State to admit the photograph of the gas can despite noting that it had "very little probative value" and later "very, very minimal, minimal probative value." RP 224-25.

Given the fact the can was found so late in time after the fire, the State did no analysis on the can and, thus, could not link it to the arson, the can was not relevant. More importantly, the photo allowed the jury to speculate that the can was the source of the gasoline used to start the fire, a fact that the State used to its advantage. The can was simply not relevant and its admission was substantially more prejudicial than probative.

e. *There was a reasonable probability the irrelevant photograph of the gas can materially affected the outcome of Ms. Hernandez-Martinez's trial.*

An erroneous evidentiary ruling is grounds for reversal where, within reasonable probabilities, it materially affected the trial's outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997); *State v. Nelson*, 131 Wn.App. 108, 117, 125 P.3d 1008 (2006).

Given the paucity of evidence linking Ms. Hernandez-Martinez to the fire, the photo of the gas can allowed the jury to speculate that the can was the source of the accelerant used to cause the fire and that Ms. Hernandez-Martinez was responsible. This was an improper use of the evidence in light of the State's failure to seize the can and/or test in order to tie it into this particular crime. The jury's improper use of this evidence created a reasonable probability that the admission of the photo materially affected the trial. As a result, Ms. Martinez-Hernandez is entitled to a new trial.

3. **The trial court erred in imposing court costs without making a finding regarding Ms. Hernandez-Martinez's inability to pay.**

    a. *The court may impose court costs and fees only after an individualized inquiry and a finding of an ability to pay.*

The allowance and recovery of costs is entirely statutory. *State v. Nolan,* 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160 (3) states that the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." *See also State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (citing RCW 10.01.160 and requiring court to make individualized inquiry into defendant's ability to pay). In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs:

> 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. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id. at 839.

In making this individualized inquiry, the Supreme Court urged courts to look to the comment to GR 34[2] in assessing the defendant's ability to pay:

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[2] GR 34(a) states in relevant part:

> Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court.

> For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Id. at 838-39.

The court here failed to make this individualized inquiry and under *Blazina*, Ms. Hernandez-Martinez is entitled to a new sentencing hearing.

b. *The trial court failed to make an individualized inquiry into Ms. Hernandez-Martinez's ability to pay the LFOs.*

Blazina requires that prior to imposing discretionary LFOs, the trial court *must* make an individualized inquiry into the defendant's financial circumstances and his current and future ability to pay. *Blazina*, 182 Wn.2d at 839. In addition, the record must reflect this individualized inquiry:

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized

> inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id, at 838.

Here, the trial court failed to make the individualized inquiry required under RCW 10.01.160, and even failed to make a boilerplate finding in the Judgment and Sentence. CP 117.

In addition, only the victim assessment and DNA collection fee were mandatory fees that could not be waived. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson*, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory). The additional $200 filing fee imposed by the court was discretionary and could have been waived. Yet, the court failed to consider waiving this discretionary cost or even consider the impact that imposition of this fee would have on Ms. Hernandez-Martinez as required by *Blazina*. This was error.

c. *Ms. Hernandez-Martinez may raise the issue for the first time on appeal.*

Despite the fact Ms. Hernandez-Martinez did not object to the imposition of costs when they were ordered, she may raise it for the first time on appeal. *Blazina,* 182 Wn.2d at 839.

Neither of the name defendants in *Blazina* objected at the time of imposition of the costs. 182 Wn.2d 830. Nevertheless, the Court reviewed both sentences and reversed the imposition of costs because of a failure of the sentencing judge to make the inquiry into the defendant's ability to pay:

> At sentencing, judges ordered Blazina and Paige-Colter to pay LFOs under RCW 10.01.160 (3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, *we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.*

Id. at 839 (emphasis added).

Here, although Ms. Hernandez-Martinez did not object at sentencing, the sentencing court did not undertake the necessary inquiry and made no finding regarding her ability to pay. In light of the decision in *Blazina* and the important policy considerations regarding

debt and its effect on indigent people, Ms. Hernandez-Martinez may raise the court's failure to properly or accurately inquire into her ability to pay, she may raise this issue for the first time on appeal. *Id.* To deny her that opportunity would be to ignore the important and troubling findings of the Supreme Court engage in the very behavior that led to the decision in *Blazina*.

d. *The remedy for the court's failure to inquire into Ms. Hernandez-Martinez's financial circumstances and make a finding regarding her ability to pay the LFOs is remand for a new sentencing hearing*.

Where the trial court fails to make an individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand the matter to the trial court for a "new sentence hearing[]." *Blazina*, 182 Wn.2d at 839. This Court should remand Ms. Hernandez-Martinez's matter to the trial court for a new sentencing hearing.[3]

[3] This Court should refuse to follow Division Two's decision in *State v. Lyle*, __ Wn.App. __, 2015 WL 4156773 (July 10, 2015), where the Court found that a failure to object at sentencing waived the issue on appeal. This decision ignored the underlying rationale of *Blazina* and also ignored the important policy considerations the Supreme Court cited in deciding to review the issue in *Blazina* despite the lack of an objection. As the dissenting Judge in *Lyle* so artfully stated:

> The doctrinal tectonics, however, have shifted since our decision in *Blazina*. In that decision we followed the well trampled path of declining to reach issues for the first time on appeal if they did not fall within the exceptions of RAP 2.5. Now, the Supreme Court has concluded that the hazards of our LFO system demand consideration of this same issue, even if not raised below. As an

F. CONCLUSION

For the reasons stated, Ms. Hernandez-Martinez asks this Court to reverse her arson conviction and either dismiss the count for a failure of proof, or remand for a new trial.

DATED this 10th day of August 2015.

Respectfully submitted,

s/Thomas M. Kummerow
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> indigent, Lyle confronts those same hazards. Although our declining of review in 2013 was a sound exercise of discretion then, it is on much shakier grounds now, after the Supreme Court has spoken.

Lyle, Slip op. at 6-7 (Bjorgen, J. dissenting).

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DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 33109-1-III
	)	
MARIA MARTINEZ,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF AUGUST, 2015.

X_____

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