NO. 32454-1

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

LISA M. MUMM

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

A. ISSUES PERTAINING TO ASSIGMENT OF ERROR

1. Was the defendant denied effective assistance of counsel for not objecting to prior acts where defense opened the door to the inquiry; and for not objecting to criminal history that defense offered in direct testimony and that were not offered pursuant to ER 609?

2. Did the trial court err in by refusing to give proposed WPIC 5.05 when the defendant's criminal convictions were offered by defendant, and not offered for impeachment under ER 609?

3. Was the evidence sufficient for the jury to find the school bus route stop enhancement, where the definitional instruction of "school bus" did not create and additional element of the enhancement?

4. Did the trial court error in imposing legal financial obligations where defendant testified about income, and did not request any consideration at the time of sentencing?

B. STATEMENT OF THE CASE

The defendant was charged by information with three counts of delivery of a controlled substance, methamphetamine, on or about December 7, 2012, January 4, 2013, and February 1, 2013; and one count of possession of a controlled substance, methamphetamine on February 21, 2013. *CP 110-115.* The information also alleged the delivery violations were committed within 1000 feet of a school bus route stop. *Id.*

The State provided notice in its omnibus application and it its motions in limine of intent to offer the defendant's prior delivery and escape convictions if the defendant testified. *CP 53-54.* The State's motions in limine also cited to ER 609 and State v. Latham, 30 Wash. App. 776, 638 P.2d 592 (1981) aff'd, 100 Wash. 2d 59, 667 P.2d 56 (1983). Latham, 30 Wash. App. 776

The defense did not object at the time motions in limine were argued. *RP 3/13/14* (hereinafter "*RP*"), pg. 5. At that time, the State indicated if the defendant testified, and the convictions were offered as impeachment under ER 609, the State would ask the court to conduct a balancing test at that time. The State differentiated this from the situation where the defendant testifies and opens the door. *RP* 5 and 16.

In Appellant's brief, she claims to have submitted a motion requesting all "improper" evidence be excluded under ER 402, 403, 404(b). *Brief of Appellant* pg. 5, FN 1; *CP 52*. Defendant made a generalized motion in #6 citing ER 403 and 404(b), and claiming the State had not provided notice of 404(b) evidence. *RP 14*. The State pointed out to the court and defense that it had provided notice and evidence intended to be introduced. *RP 14-15*. Defense could not indicate any specific evidence pertinent to the motion. *RP 15*.

In motion #7 defendant moved:

> "That any testimony concerning contacts with the defendant by law enforcement officers on any prior matters other than in relation to the present charges be excluded. This motion is made because such evidence is not relevant and not admissible under ER 402. 403 and 404(a) or (b)."

CP 52. The State noted that the defense motion tied back to prior convictions and would not be offered unless the defendant testified, *or* presented evidence that opened the door. Defense agreed. *RP 16*.

The case proceeded to trial. The charges were the result of an investigation by the North Central Washington Narcotics Task Force (hereinafter "Task Force"). The Task Force utilized a confidential informant named Lyle Long. *RP 130*. The Task Force utilized Mr. Long to begin purchasing controlled substances from Lisa Mumm. *RP 133*.

The first transaction on Dec. 7, 2012, occurred at a house at 95 Old Riverside Highway. RP 134, 186, 242. The defendant lived there with Robert Watts and roommate Melissa Starzyk. *RP 245, 265.* The Task Force was advised the defendant had to call her supplier to obtain the drugs for the arranged delivery. RP 135, 138. Ms. Mumm obtained the drugs from "Chino" who was identified as Christian Aquino Gonzales. *RP 136, 145-148, 182, 187-188, 196, 204-205, 247-248, 364-367.*

During the transaction, the defendant expressed her concern to Mr. Long that he might be "setting her up" because she knew he had recently been arrested. *RP 138-139. See also RP 250-252.* Mr. Long also identified the defendant from a photo montage. *RP 208-209, 218.*

On January 4, 2013, the defendant met with Mr. Gonzales to obtain drugs that were delivered to Mr. Long. RP 148-153. The transaction began at the defendant's house at 95 Old Riverside and was ultimately completed in the parking area of Gene's Harvest Foods. *RP 149-153*, 154-155, 190-192, 210-213, 214-217, 242-243, 298-299, 300-301, 370-374.

During the transaction Mr. Long discussed with the defendant about getting larger quantities of drugs. The defendant indicated she was nervous because she had been to prison before. RP 156.

On February 1, 2013, another transaction was arranged, in which the defendant and the defendant's roommate, Ms. Starzyk, utilized a vehicle to complete the delivery to Mr. Long. *RP 159, 163-164, 228, 249-250, 254-256, 379-382.* The defendant drove to Mr. Gonzales' trailer before the transaction with Mr. Long. *RP 160-163, 225-226, 228-*

229, 243, 304. Following the transaction, Mr. Long, was found in possession of $20 of Task Force funds, and was arrested for theft. *RP 165-166, 230, 306, 359-360.*

On February 4, 2013, Task Force Commander Steve Brown met directly with the defendant at the defendant's house and informed the defendant of the evidence they had about her deliveries. RP 167-169. The defendant admitted she was procuring the drugs from "Chino". RP 169, 182. The defendant agreed to sign a contract to act as an informant for the Task Force in lieu of being charged with the delivery. *RP 169-*.171. The defendant revealed that she knew that Mr. Long was the informant who had purchased drugs from them. *RP 170-171.*

Task Force Detectives Thomas and Bowling met with the defendant and co-defendant Watts on February 6, 2013. *RP 232.* During that meeting the defendant identified Mr. Gonzales and provided additional information about Mr. Gonzales, and information about other individuals the defendant believed she could buy drugs from. *RP 233, 235. 313-317, 318-320.*

The defendant attempted to purchase drugs from Mr. Gonzales on behalf of the Task force, but was unable to do so because Mr. Gonzales knew the police had been to the defendant's house. *RP 172*, 317-318.

After a few initial text messages between the defendant and Task Force, the defendant failed to maintain contact with the Task Force and was subsequently arrested. *RP 173, 235-238,320-321.* At the time of her arrest, the defendant was in possession of the blue Ford Explorer used in the drug transactions. *RP 173*, 195, 237-238. Methamphetamine was later found inside the Explorer. *RP 324.*

The defendant and co-defendant had no reportable income at or around the time of the drug transactions. *RP 350-353.* During that time, drug dealing was routinely occurring at, or originating from, the defendant's house. The defendant would obtain the drugs from Mr. Gonzales; at times she would obtain drugs from him multiple times in a day. RP 246-248, 315-317.

Agent Thomas testified that he measured the distances between designated Omak School District bus route stops and the location of the three transactions. *RP* 270-273. Dan Wood, the supervisor in charge of Omak School District transportation, testified that the school bus stops near the transactions were active and on the district's school bus routes. *RP* 284-287.

During cross examination of Mr. Long, defense counsel began to inquire about when the defendant had previously dated Mr. Long's father; where his mother was at the time, etc. *RP* 388. The State objected, and the court allowed defense counsel to continue. *RP* 388. The defendant then inquired whether Mr. Long would characterize Ms. Mumm living with Mr. Long's father and Mr. Long when he was a child as a "family type environment" and whether he thought of Ms. Mumm as his "stepmother". RP 389. The State again objected. Pursuant to the motions in limine regarding opening the door, the State asked that if defense was permitted to continue the area of questioning, that the State be permitted to inquire into the activities occurring at that time. *RP* 389-390.

The court warned defense counsel that they may be opening the door, and that the court may find the door was opened and allow the State to inquire into the background. *RP* 391. Defense responded:

> The reason for this questioning are two. This goes to the witness' motive and bias. Secondly, -- we understand the state intends -- We understand that this would open the door. Defense has already -- thought this through. And if the state wishes to pursue that we have no objection – if we open the door.

RP 391-392. The court indicated defense was a "question or two" from the door being opened and that defense was put on notice. *RP* 392.

Defense immediately resumed the line of questioning with Mr. Long. Defense first summarized the prior testimony and then inquired what specifically caused him to leave:

> **Blount**: So, Mr. Long, what you had just stated was -- testified was that you and Ms. Mumm and your father lived in the same household for 13 years, correct?
> **Long**: Yes
> **Blount**: And -- when did you leave the household?
> **Long**: Off and on (**over**) 13 years.
> **Blount**: So during those 13 years -- when you're saying you lived off and on, can you be a little more specific what that means?
> **Long**: (**I couldn't' stand to**) live there so I moved out. I lived on the streets.
> **Blount**: Thank you.

RP 393; Agreed Stipulation to Corrections to Verbatim Report of Proceedings, pg. 1.

The court did find the door was opened by defense. RP 540. On re-direct, the State followed up on the defense questions of Mr. Long about leaving his home when the defendant lived there:

> **PA**: I want to ask you, you were asked some questions about background, about your -- your knowledge of Ms. Mumm. And you were asked -- basically about the living situation, and that you had moved out 'cause you didn't want to live there.
> **PA**: Why was that?
> **Long**: (**Cause of the frequent**) drug sales in and out and (**traffic**) all the time.
> **PA**: That -- regarding Ms. Mumm?
> **Long**: Yah. My dad's house getting raided.
> **PA**: When you say getting raided--
> **Long**: (**She went to jail before**) for the same thing.

R*P 404, Agreed Stipulation to Corrections to Verbatim Report of Proceedings, pg. 2.*

No objection was raised by defense. Latham, 30 Wash. App. 776 Mr. Long was asked

if that was the end of their (the defendant and his father) relationship, and he responded:

> **Long**: That's what started it. And after she got out she came back **(I t think maybe for six months)** and then that was – my dad kicked her out. (**She wanted**) to go right back to the same routine.

R*P 405, Agreed Stipulation to Corrections to Verbatim Report of Proceedings, pg. 2.* No objection was raised by defense. *Id.*

The defendant was called to testify and testified she lived with Mr. Long's father for 13 years. *RP 473.* The defendant then testified about her criminal history and stated she was "charged" with three counts of delivery. RP 474. Defense counsel then asked if that was the only felony she was "charged" with. RP 474. The defendant responded no, she got an escape charge, and that she was convicted of that escape charge. RP 474. The defendant was then allowed to go into the details surrounding the charges and sentences over the State's objection. *RP* 474-475. *See also Agreed Stipulation to Corrections to Verbatim Report of Proceedings, pg. 2.*

On cross examination, the State again asked if the defendant's testimony was that she was charged with just three counts, to which the defendant testified yes. RP 497. The State then asked the defendant about the number of counts she was actually charged with, and about other open cases she had with the Task force. RP 497-499. No objection was raised by defense. *Id.*

The defendant proposed a late instruction, WPIC 5.05.[1] *RP 450, 452, 535.* The court indicated that the defendant's prior acts were first raised with Mr. Long, and were

[1] 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 5.05 (3d Ed) Prior Conviction—Impeachment—Defendant, states: You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose.

not offered as convictions for the purpose of impeachment. *RP* 536. Additionally the court noted that the defendant testified about her convictions, and that the convictions were not offered for impeachment under ER 609. *RP* 536. The court read from the comments to the instruction, stating:

> "Use this instruction only when a defendant is a witness and a prior conviction has been admitted solely for impeachment purposes. It should not be given if a prior conviction was admitted for a substantive purposes."

RP 536. Based on the defense opening the door, and the defendant testifying about her convictions on direct, the court ruled the instruction should not be given. *RP* 540-541.

After the presentation of evidence and closing argument, the defendant was convicted of delivery of three counts of delivery of a controlled substance, and found not guilty of possession of a controlled substance. *CP 22.* The jury also answered the special interrogatories in the affirmative that the deliveries occurred within 1000 feet of a school bus route stop designated by a school district. *CP 23-24.*

At trial, the defendant also testified she earned unreported income doing various jobs and had minimal financial obligations. *RP* 481-482. At sentencing the defendant requested no relief from, or reduction of, financial obligations; nor did she raise any objection to their imposition. RP 608-609, 611.

At sentencing the State requested standard legal financial obligations of $1,110.50, a VUCSA assessment of $3,000, and restitution of $460. *RP 603-604.* The court order the imposition of those legal financial obligations, totaling $4,570.50. *RP 606, 611.* The judgement and sentence listed the $500 victim assessment, $200 filing fee, $20.50 Sheriff's service fee, $3000 VUCSA assessment, $100 DNA collection fee, $40 booking fee, and $460 in restitution. *CP 7.* The judgment and sentence

inadvertently did not list the $250.00 attorney reimbursement that was part of the $1,110 standard costs ordered by the court, which resulted in total financial obligations of $4,570.50. *CP 7, RP 606, 611.*

The court waived the accrual of interest while the defendant was incarcerated and order DOC to issue a notice of payroll deduction. *CP 8.*

C. ARGUMENT

1. Counsel was not ineffective for failing to object to evidence that defense initially raised at trial.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Thomas, 109 Wash. 2d 222, 225, 743 P.2d 816 (1987)(applying the 2–prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wash. 2d 223, 225, 500 P.2d 1242 (1972)(citing State v. Gilmore, 76 Wash. 2d 293, 456 P.2d 344 (1969)).

The first prong requires a showing of errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. The second prong requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. Strickland, 466 U.S. at 694; State v. Jeffries, 105 Wash.

2d 398, 417-18, 717 P.2d 722 (1986), Jeffries v. Washington, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

Courts engage in a strong presumption counsel's representation was effective. State v. Brett, 126 Wash. 2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wash. 2d at 226. The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below. State v. McFarland, 127 Wash. 2d 322, 336, 899 P.2d 1251, 1257 (1995), as amended (Sept. 13, 1995), as amended (Sept. 13, 1995).

A defendant is not denied effective assistance of counsel where the record as a whole shows that he or she received effective representation and a fair trial. State v. Smith, 104 Wash. 2d 497, 511, 707 P.2d 1306 (1985). Rather, the defendant must make "an affirmative showing of actual prejudice" demonstrating a manifest constitutional error. McFarland, 127 Wash. 2d 322, citing, RAP 2.5(a)(3)).

Appellate courts are hesitant to find the assistance of counsel ineffective based solely on questionable trial tactics and strategies that fail to gain an acquittal. Matter of Richardson, 100 Wash. 2d 669, 675, 675 P.2d 209 (1983); State v. Adams, 91 Wash. 2d 86, 91–93, 586 P.2d 1168 (1978). Ineffective assistance may be found, however, if the tactics used would be considered incompetent by lawyers of ordinary training and skill in the criminal law. *See* Adams, 91 Wash. 2d at 91. In Adams, 91 Wash. 2d 86, the Washington State Supreme Court found that defendant's conviction would not be reversed where the trial tactics at issue constituted an exercise of judgment. In Adams, 91 Wash. 2d 86, the court declined to adopt a "more objective" standard for a Sixth

Amendment ineffective assistance challenge because trial counsel was effective under either standard. Adams, 91 Wash. 2d at 89.

Appellant argues the counsel was ineffective for failing to object to the State's presentation of Ms. Mumm "unproven prior criminal charges" and thereby exceeded the scope of ER 609(a).[2] Appellant fails to recognize that the testimony was not offered or admitted to impeach pursuant to ER 609(a).

The defendant testified falsely during the direct examination conducted by her attorney; claiming that she had only been charged with three counts of delivery in the past. This was apparently offered to assert her minimal prior involvement in drug dealing.

The State was properly allowed to cross examine the defendant related to this subject. Cross examination should be limited to the subject matter of the direct examination *and* matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. ER 611(b). Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness. State v. Gefeller, 76 Wash. 2d 449, 455, 458 P.2d 17 (1969). When a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within

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[2] ER 609(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

the scope of the examination in which the subject matter was first introduced. Gefeller, 76 Wash. 2d 449

The opposing party is entitled to introduce evidence in order to explain, modify or rebut the evidence already introduced by the proponent, insofar as it relates to the same subject matter and is relevant to the issue involved. This is true though the evidence might have been inadmissible in the first place. State v. Robideau, 70 Wash. 2d 994, 999, 425 P.2d 880, 883 (1967)

Washington case law also allows cross-examination pursuant to ER 608(b) into specific instances that are relevant to veracity. *See* State v. Cummings, 44 Wash. App. 146, 152, 721 P.2d 545 (1986), State, Respondent, v. Cummings, Petitioner,, 106 Wash. 2d 1017 (1986). "Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue." State v. York, 28 Wash. App. 33, 36, 621 P.2d 784 (1980). *See also* State v. Wilson, 60 Wash. App. 887, 893, 808 P.2d 754, 758 (1991) (evidence of false statement under oath was relevant to veracity and credibility). Lewis Const. Co. v. King Cty., 60 Wash. 694, 893, 111 P. 892 (1910).[3]

The scope of cross-examination is within the discretion of the trial court, and will not be reversed unless the trial court's decision was unreasonable or based on untenable grounds. State v. Israel, 113 Wash. App. 243, 289, 54 P.3d 1218 (2002), review denied, 149 Wn.2d 1013 (2003).

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[3] ER 608(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Evidence of bias is also admissible to weigh in on a witness's credibility. State v. Whyde, 30 Wash. App. 162, 166, 632 P.2d 913 (1981). A party may show bias through cross-examination or the admission of extrinsic evidence. State v. Jones, 25 Wash. App. 746, 751, 610 P.2d 934 (1980). Generally, such evidence offered to impeach is relevant if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action. The second of these elements is the question of who can be impeached. If a person's credibility is a fact of consequence to the action, the jury needs to assess it, and impeaching evidence may be helpful. State v. Allen S., 98 Wash. App. 452, 459-60, 989 P.2d 1222, 1226 (1999).

The cross examination in the present case was limited to the subject matter of the direct examination opened by defense. The matters discussed on cross examination directly addressed, the credibility of the defendant, as well as her knowledge, bias, and motive.

Defense counsel was not ineffective for not objecting to the subject matter that he opened when conducting direct examination of the defendant. Arguably, if an objection had been made to the cross examination, and was sustained by the trial court, it would have been an abuse of discretion.

Similarly, there was no error in admitting testimony pursuant to ER 401, which defines relevant evidence broadly as "evidence having *any tendency* to make the existence of any fact ... more probable or less probable ..." (emphasis added). Minimal logical relevance is all that is required. In his treatise, Karl Tegland dispels any misunderstandings to the contrary–

> Rule 401 rejects any notion of "legal relevance"; i.e. that the evidence must have a greater degree of probative value than people would expect in the conduct of ordinary, everyday affairs. The admissibility of evidence having only marginal relevance is governed by Rule 403, not Rule 401.
>
> The test for probative value under Rule 401 *should not be confused with the sufficiency of the evidence to take the case to the jury, nor should it be confused with the sufficiency of the evidence to satisfy the overall burden of proof. The latter two concepts relate to weight, not admissibility*, and the tests under the latter two concepts are more rigorous than the nominal "any tendency" test for relevance under Rule 401. 5 Wash. Prac., Evidence Law and Practice § 401.4 (5th ed.)(emphasis added). [4]

With reference to materiality, ER 401 defines relevant evidence as evidence that tends to prove or disprove "any fact that is *of consequence* to the determination of the action..." (emphasis added).

> Facts that are "of consequence" include facts that offer direct evidence of an element of a claim or defense; also included are facts that imply an element of a claim or defense (circumstantial evidence), as well as facts bearing on the credibility or probative value of other evidence (background information and evidence offered to impeach or to rehabilitate a witness).
>
> Or to state the same point negatively, evidence that makes no difference to the outcome of the case—evidence that cannot affect the validity of a claim or defense, even if true—is immaterial and does not meet the test of relevance under Rule 401. 5 Wash. Prac., Evidence Law and Practice § 401.4 (5th ed.)(emphasis added).

Even if an objection had been raised at trial, the evidence was not subject to exclusion under ER 403. Rule 403 authorizes the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It should be emphasized that Rule

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[4] *See also* State v. Bebb, 44 Wash. App. 803, 814, 723 P.2d 512 (1986) aff'd, 108 Wash. 2d 515, 740 P.2d 829 (1987) State v. Bebb, 108 Wash. 2d 515, 740 P.2d 829 (1987)(defendant's statement on a California prison form that he was involved in a possible unknown offense in Washington was admissible in murder trial where the statement had some tendency, when viewed in conjunction with other evidence, to make defendant's guilt more probable).

403 is not concerned with irrelevant evidence. The rule is concerned with evidence that admittedly tends to prove or disprove a fact of consequence, but that also possesses one or more of the undesirable characteristics listed in the rule. 5 Wash. Prac., Evidence Law and Practice § 403.1 (5th ed.).

Nearly all evidence is prejudicial in the sense that it is offered for the purpose of inducing the trier of fact to reach one conclusion and not another. This is not the sense in which the term "prejudice" is used in Rule 403. Nothing in Rule 403 authorizes the exclusion of evidence merely because it is "too probative." Rule 403 is instead concerned with what is rather loosely termed "unfair prejudice," usually meaning prejudice caused by evidence that is more likely to arouse an emotional response than a rational decision among the jurors. 5 Wash. Prac., Evidence Law and Practice § 403.3 (5th ed.).

Even if objection had been made there was no unfair prejudice in admitting the evidence. Moreover, under Rule 403, the burden is on the party seeking to exclude the evidence. The rule permits exclusion only when the probative value of the evidence is substantially outweighed by one of the factors mentioned in the rule. When the balance is even, the evidence should be admitted. 5 Wash. Prac., Evidence Law and Practice § 403.2 (5th ed.).The same analysis discussed above applies to the Appellant's argument that counsel was ineffective for failing to object to Mr. Long's testimony on re-direct. The re-direct examination followed the defense opening the door. The defense resumed questioning of Mr. Long on the subject of his reasons for leaving home when the defendant resided with Mr. Long's father. This questioning occurred after objection by the State, and a warning by the court that they were about to open the door. In

response, the defense stated they understood they were opening the door and had no objection to the State asking questions related to the subject matter.

The re-direct of Mr. Long was directly related to the questions asked by defense in an effort to establish their theory of the case. Contrary to Appellant's argument, it was not offered as prohibited "conformity" evidence under ER 404(b). The questions asked on re-direct went directly to explain, modify or rebut the questions and subject matter that had already been introduced by defense in their questioning of Mr. Long.

In the present case, there was no objection to the admission of the evidence that was initially raised by defense. The complained of evidence was admissible, and the evidentiary decisions at trial were clearly within the trial court's discretion.

2. The trial court properly denied proposed WPIC 5.05.

The current comments to 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 5.05 (3d Ed) state in part:

> When evidence of prior crimes is admitted under ER 609(a) for the purpose of impeaching a defendant, an instruction should be given that the conviction is admissible only on the issue of the defendant's credibility and may not be considered on the issue of guilt.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 5.05 (3d Ed). The admission of evidence complained of by defense was not offered for the purpose of impeachment of a criminal conviction under ER 609(a). The evidence of prior criminal convictions was initially offered by defense to establish a theory of the case and *not* for impeachment under ER 609. Defense, however, went further in direct examination and opened the door with questions about the charges and underlying facts surrounding the defendant's

activities. The defense knowingly and purposefully opened the door on the defendant's prior drug dealing during their cross examination of Mr. Long. The State's follow up questioning on the subject matter was not for the purpose of eliciting criminal convictions under ER 609.

The evidence was properly admitted to address the defendant and the witness' knowledge, bias, and motive. It was also admissible to rebut material assertions made by the defendant in her testimony.

The trial court properly denied proposed instruction WPIC 5.05.

3. The jury finding of the school zone enhancement was supported by substantial evidence.

The defendant was found to have committed each delivery within 1000 feet of a school bus route stop designated by a school district, in violation of Wash. Rev. Code Ann. § 69.50.435(1)(c) (West).[5] The enhancement was not based on a violation

[5] Wash. Rev. Code Ann. § 69.50.435 states in part: Violations committed in or on certain public places or facilities—Additional penalty—Defenses—Construction—Definitions.
(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:
(a) In a school;
(b) On a school bus;
(c) **Within one thousand feet of a school bus route stop designated by the school district**;
(d) Within one thousand feet of the perimeter of the school grounds;
(e) In a public park;
(f) In a public housing project designated by a local governing authority as a drug-free zone;
(g) On a public transit vehicle;
(h) In a public transit stop shelter;
(i) At a civic center designated as a drug-free zone by the local governing authority; or
(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

occurring on a school bus (i.e., not section (1)(b)). The State proved beyond a reasonable doubt that the distance of each transaction was within 1000 feet of a school district designated school bus route stop.

The defendant's argument that the definition of school bus was the "law of the case" implies that the definitional instruction created a new essential element. This is incorrect. The cases cited by Appellant do not support that proposition.[6]

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have

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(2) It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, in a public housing project designated by a local governing authority as a drug-free zone, on a public transit vehicle, in a public transit stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter....
(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(a) "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;
(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system;
(c) **"School bus route stop" means a school bus stop as designated by a school district;... (emphasis added).**

[6] The claim that Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton, 158 Wash. 2d 506, 145 P.3d 371 (2006) stands for the proposition that the law of the case applies to definitional instruction at best based on dicta contained in a separate concurring opinion of one justice.

The State found a single case that had relevant language. In State v. Calvin, 176 Wash. App. 1, 316 P.3d 496, 506 (2013), as amended on reconsideration (Oct. 22, 2013), review granted in part, cause remanded, 183 Wash. 2d 1013, 353 P.3d 640 (2015), the court stated "Although the State argues that the law of the case doctrine applies only when an element is added to a to-convict instruction, the doctrine is not limited to that application. It is a broad doctrine that has been applied to to-convict instructions and definitional instructions. *See, e.g.,* City of Spokane v. White, 102 Wash. App. 955, 964–65, 10 P.3d 1095 (2000); State v. Price, 33 Wash. App. 472, 474–75, 655 P.2d 1191 (1982); Englehart v. Gen. Elec. Co., 11 Wash. App. 922, 923, 527 P.2d 685 (1974). It has been applied in both criminal and civil cases. *See, e.g.,* State v. Hickman, 135 Wash. 2d 97, 102, 954 P.2d 900 (1998); Crippen v. Pulliam, 61 Wash. 2d 725, 732, 380 P.2d 475 (1963)." However those cases cited by the court in Calvin, 176 Wash. App. 1 do not support the assertion; moreover, the few Division 1 cases citing back to *Calvin* have pulled back from assertion.

found guilt beyond a reasonable doubt. *E.g.,* State v. Salinas, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992).

In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. Roberson v. Perez, 156 Wash. 2d 33, 41, 123 P.3d 844, 848-49 (2005). In addition, law of the case also refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal. Roberson, 156 Wash. 2d 33

In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction. State v. Lee, 128 Wash. 2d 151, 159, 904 P.2d 1143 (1995). The courts have never required the words defining an element be included in the "to convict" instruction in place of the actual element itself. *See* State v. Laico, 97 Wash. App. 759, 764, 987 P.2d 638 (1999) (definition of "great bodily harm" does not add an element to the assault statute, rather it is intended to provide understanding); State v. Strohm, 75 Wash. App. 301, 308–09, 879 P.2d 962 (1994) (definitional term does not add elements to the criminal statute). *See also* State v. Marko, 107 Wash. App. 215, 219–20, 27 P.3d 228 (2001) (definition of threat does not create additional elements rather it merely defines an element); State v. Saunders, 177 Wash. App. 259, 268, 311 P.3d 601, 605 (2013) review denied, 180 Wash. 2d 1015, 327 P.3d 55 (2014) State v. Saunders, 180 Wash. 2d 1015, 327 P.3d 55 (2014) ("sexual gratification" was not an essential element of first degree child molestation).

There were no additional element added to the special verdict form in the present case and the definitional instruction did not create an additional element for the school bus route stop enhancement. Moreover, the finding of the enhancement in this case is based solely on the school district's designation of a school bus route stop and the distance to the crime; not a finding of, or about, actual bus or busses that may serve that designated stop.

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wash. 2d at 201. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. Salinas, 119 Wash. 2d at 201.

Contrary to the apparent argument of Appellant, the role of the Court of Appeals is not to determine whether the evidence at trial established guilt beyond a reasonable doubt. E.g., State v. Green, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980). Whether there is evidence legally sufficient to go to the jury is a question of law for the courts; but, when there is substantial evidence, and when that evidence is conflicting or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact. State v. Hagler, 74 Wash. App. 232, 235, 872 P.2d 85 (1994), (citing State v. Theroff, 25 Wash. App. 590, 593, 608 P.2d 1254 aff'd and remanded, 95 Wash. 2d 385, 622 P.2d 1240 (1980) State v. Theroff, 95 Wash. 2d 385, 622 P.2d 1240 (1980).

The reviewing court considers circumstantial evidence to be as equally reliable as direct evidence. *Id.*

4. The trial court did not err in imposing financial obligations at the time of sentencing.

The defendant made no objection to the imposition of discretionary LFOs at sentencing, and she is not automatically entitled to review. State v. Blazina, 182 Wash. 2d 827, 832-33, 344 P.3d 680, 682 (2015). It is well settled that an appellate court may refuse to review any claim of error which was not raised in the trial court. Blazina, 182 Wash. 2d 827 (citing RAP 2.5(a)); State v. Clark, No. 32928-3-III, 2015 WL 7354717, at *3 (Wash. Ct. App. Nov. 19, 2015)

This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond. Blazina, 182 Wash. 2d 827 (citing State v. Davis, 175 Wash. 2d 287, 344, 290 P.3d 43 (2012), cert. denied, —— U.S. ——, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013).

Blazina held that RCW 10.01.160(3) requires the record to reflect an individualized inquiry into the defendant's current and future ability to pay before the court imposes legal financial obligations. Blazina, 182 Wash. 2d 827. RCW 10.01.160(3) states:

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

Appellant argues the court's imposition of legal financial obligations was unsupported by the record. In her argument, Appellant does not clearly distinguish between mandatory and discretionary costs.

Mandatory costs are not subject to the "ability to pay" analysis addressed in *Blazina*.Blazina, 182 Wash. 2d at 38 *Blazina* concerned the discretionary portions of LFOs, not mandatory fees. 182 Wn.2d 837-38. Nothing in *Blazina* changed the principle that mandatory LFOs may be constitutionally imposed at sentencing without a determination of the defendant's ability to pay so long as there are sufficient safeguards to prevent imprisonment of indigent defendants for a noncontumacious failure to pay.[7]

A number of fees and costs are mandatory by statute and are therefore not subject to the *Blazina* analysis. Under RCW 9.94A.753(5), restitution is a mandatory assessment. State v. Lundy, 176 Wash. App. 96, 102-03, 308 P.3d 755 (2013). This is supported by The Supreme Court specifically noting that a trial court should consider restitution in determining the ability to pay discretionary costs. Blazina, 182 Wash. 2d at 839. The Crime Victim's Assessment is mandatory under RCW 7.68.035. State v. Kuster, 175 Wash. App. 420, 424, 306 P.3d 1022 (2013); Lundy, 176 Wash. App. at 102-03. The DNA collection fee is also mandatory under RCW 43.43.7541. Kuster, 175 Wash. App. at 424; Lundy, 176 Wash. App. at 102-03. Finally, the criminal filing fee is mandatory under RCW 36.18.020(h). Lundy, 176 Wash. App. at 102-03.

Blazina did not hold that an offender who is indigent under GR 34 must have his legal financial obligations waived. It stated that trial courts should look to the comments in GR 34 for guidance and that if someone meets the standards for indigency, the court

[7] Wash. Rev. Code Ann. § 9.94B.040 (West) provides such safeguards.

"should seriously question that person's ability to pay LFO's." Blazina, 182 Wash. 2d at 838.

Indigency is a relative term that must be considered and measured in each case by reference to the need or service to be met. Kuster, 175 Wash. App. at 555; State v. Rutherford, 63 Wash. 2d 949, 953-54, 389 P.2d 895 (1964).

The defendant testified to earning non-reported income before her arrest; and that she incurred no housing expense. The defendant's testimony also indicated that the income was earned from physical work. The court could find that she was not disabled nor prevented from working in the future. The court had a sufficient factual basis to order payment of non-mandatory legal financial obligations.

Even while incarcerated there is no basis to show the defendant is unable to make payments toward her legal financial obligations. The defendant's LFOs are not bearing interest while she is incarcerated, and her meals, housing, clothing and health care needs are all provided by the Department of Corrections, leaving her with potential resources from which legal financial obligations can be paid. *Cf.* Braden v. Estelle, 428 F. Supp. 595 (S.D. Tex. 1977) (because inmates are provided the necessities of life even small bank accounts may be able to afford the costs of litigation); Temple v. Ellerthorpe, 586 F. Supp. 848, 851 (D.R.I. 1984) (surveying cases in which in forma pauperis status was denied for prisoners who had access to funds ranging from $45.00 to $500.00).

Furthermore, under RCW 72.09.111, no more than 20 percent of the defendant's prison wages may be deducted to pay legal financial obligations. Additionally, no deductions for legal financial obligations will be made from the defendant's earnings if

she is determined an indigent inmate. RCW 72.09.111. There is no showing that she is unable to make payments toward her financial obligations.

The court should not grant review of the legal financial issues raised for the first time on appeal. If the court does grant review, the Appellant has failed to show that the mandatory or the discretionary financial obligations were ordered without consideration of RCW 10.01.160(3). The record sufficiently established the defendant's ability to pay.

D. CONCLUSION

Appellant cannot show that trial counsel was ineffective for not objecting to subject matters that defense purposefully introduced at trial. Similarly, the purpose and admission of that evidence did not support a limiting instruction under ER 609.

The definition of school bus did not create a new element for the enhancement of delivery within 1000 feet of a designated school bus route stop.

Finally, the defendant is not entitled to review of her claims regarding LFO's that were raised for the first time on appeal. Additionally the record supported the court's order imposing discretionary LFO's.

For all the foregoing reasons, the State respectfully asks this Court to affirm the defendant's convictions, sentence, and order for legal financial obligations.

Dated 10th day of December 2015

Respectfully Submitted by:

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I, Karl F. Sloan, do hereby certify under penalty of perjury that on December 10, 2015, I provided by email service a true and correct copy of the Brief of Respondent to:

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