No. 48095-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KENNETH TURNER,

Appellant.

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

The Honorable Eric Price, Judge
Cause No. 14-1-00857-4

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Decisions Of The Court Of Appeals

U.S. Supreme Court Decisions

Statutes and Rules

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the prosecutor committed misconduct in closing argument.

2. Whether Turner was denied effective assistance of counsel because his attorney did not object to the claimed instances of prosecutorial misconduct.

3. Whether a court violates due process when it imposes certain legal financial obligations on defendants who have not been shown to have the likely ability to pay.

4. Whether the court cost imposed by the trial court was mandatory, and if not, whether it was ineffective assistance of counsel for his attorney to agree to it.

5. Whether this court should decide upon the imposition of appellate costs before they are requested.

B. STATEMENT OF THE CASE.

Turner was charged by a first amended information with one count of second degree theft, alleging theft of an access device, and one count of third degree malicious mischief. CP 3. He was tried jointly with his co-defendant, Tanya Lynn Satack, who was charged with fourth degree assault. CP 35.

On the evening of May 31, 2014, four couples were out for an evening of socializing in downtown Olympia.[1] Lisa Zepeda[2] and her husband, Oskar, Shana Flores and her husband, Michael,

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1 Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the five-volume trial transcript dated April 14-17 and 20, 2015.
2 Zepeda's name is spelled "Zapeda" in some parts of the transcript, *e.g.*, RP 3.

Lauren Sweatte and her husband, John, and Kylie Thorson and her husband, Alex, who was also called A. J, Sousy. RP 63-64, 121, 183, 270, 304. The four couples were having a going-away party for Kylie and Alex,[3] who were moving to California. RP 62. The husbands were all in the military and worked together. RP 63. The evening began at Jake's Bar, but after a couple of hours the group moved to the Twelve-Thirty Club. RP 139-40.

Kylie was carrying a wristlette, a wallet which was clipped to a strap that hung from her wrist. RP 269. It contained her identification, Lisa Zepeda's identification, a credit card, a debit card, a cell phone, powder and a makeup brush, and some cash. RP 63, 269-70, 304. Around 1:30 a.m. on June 1, 2014, Lauren Sweatte had been dancing with a man unknown to any of the group. RP 270. When Lauren returned to the group, the man followed, trying to speak to her. Alex Sousy told the man that Lauren was married and to leave her alone. RP 64, 123, 183, 270. Oskar tried to defuse the situation. Turner, who Lisa Zepeda understood to be a friend of the man who was dancing with Lauren, punched Oskar. RP 64-65, 270-71. Lisa was standing next to

3 Because some of the people involved share the same last name, the State will largely refer to them by their first names. No disrespect is intended.

Oskar, and the follow-through from the punch hit her. Both Lisa and Oskar fell to the floor. RP 65, 183, 271.

The men involved went outside at the request of security. RP 65, 125, 186, 205. Lisa, Shana, and Kylie also went outside, but did not see the men until a bouncer directed them around the corner to a parking lot. RP 66, 125, 187, 272. There they saw Alex Sousy fighting with Turner. RP 66, 126, 188, 273. Lisa, Kylie, and Shana stayed away from the fight, watching. RP 67, 127, 273. While they were standing there, a car backed out of a parking stall and bumped Kylie. RP 67, 128, 190, 274. Kylie was angry, and hit the trunk of the car with her hand to draw the driver's attention to the fact there was someone behind the car. RP 67-68, 128, 146, 190, 274-75. There was no damage to the car. RP 146.

The driver of the car, later identified as Satack, got out of the car and rapidly approached Kylie, who had moved behind a barricade where she would not be in danger from moving vehicles. Satack was obviously angry, and screamed, "Who hit my car?" RP 69, 130, 190, 275, 316, 328. Kylie thought Satack was going to hit her. RP 276. Because Satack was charging her, Kylie swung but did not know if she hit Satack or not. Simultaneously she heard a taser charge and felt it strike her. It hurt and left a burn mark, but

did not incapacitate her. RP 278-79, 305-06. Lisa and Shana believed Kylie threw a punch at Satack at the same moment Satack tased Kylie. They did not know if Kylie actually hit Satack. RP 71, 132-33.

When Kylie swung at Satack, the wristlett she wore came off of the strap holding it onto her wrist. RP 71, 135, 279-80. She felt the weight drop from her wrist and saw the wallet on the ground by the front passenger side door of the car Satack was driving. RP 279-80. Lisa saw it fall to the ground but did not see what happened to it after that. RP 74. Satack ran back to the driver's side of the car and got in, Turner got into the passenger seat, and Kylie believed someone else got into the back seat. RP 279-81. Kylie testified at trial that when Turner got into the front passenger seat, while the door was still open, he reached down and grabbed her wallet from the ground. RP 282, 325. Michael Flores also testified that as Turner got into the car, he put one foot out on the pavement and had both hands on the door, as if he was going to get back out of the vehicle. Then he got right back in. RP 195. The vehicle left and Kylie immediately said that they took her wristlette. RP 74, 195. She borrowed another phone and used the flashlight function to look on the ground in the hope that she had

been mistaken and her wallet was still on the ground. She acknowledged it was not a realistic hope. RP 330, 335.

Kylie's phone had a tracking function, so she borrowed her husband's phone and accessed that function. RP 284. When the police arrived she showed them on her husband's phone where her phone was. RP 284. With this information, police went to the 1600 block of Quasar Drive. RP 340, 360, 424. From 1620 Quasar Drive they could hear voices and a pounding noise coming from the closed garage. RP 327, 341, 425. The front door opened and a man, later identified as Robert Simerly, emerged carrying a white trash bag. RP 427. Inside the bag was a broken cell phone. RP 352.

Robert Simerly testified for the State. He said that he was a friend and former co-worker of Turner. He went with Turner and Satack, whom he met through Turner, to the Twelve-Thirty Club in the early morning of June 1, 2014, to socialize. RP 225. He was vague about how the fight began inside the club, but it involved a man being disrespectful to Turner. Simerly said the other man swung first and Turner defended himself. RP 227-28. He later found Turner in the parking lot fighting with two other men. RP 230-31. Simerly heard sirens and got into the rear passenger side

seat of the car they arrived in. RP 231-33, 236. He said that when he heard the noise of the taser he stuck his head out but Satack was getting into the driver's seat. RP 236. At some point Satack, Turner, and Simerly were all in the car and they left. RP 237. Everyone was in a hurry to leave so as not to get stopped by the police. They took back roads. RP 233-38, 240. He saw a small black bag, a makeup brush, and an iPhone, all of which he believed belonged to Satack. RP 240.

Simerly, who was very reluctant to testify, RP 238, heard Satack ask, "What happened to the rest of it?" Turner said, "Don't worry about it, I got rid of it." RP 241. Turner's window was rolled down. RP 242. When they arrived at Simerly's house, Satack and Turner asked Simerly to move his car out of his garage, which he did, and Satack parked their car inside. RP 243. Turner said they needed to get rid of the phone because it could be located. RP 244. Turner smashed the phone with a hammer after Simerly refused to do so. RP 245. Simerly swept up the broken pieces, put them into a bag, and was taking the bag outside to throw it away in someone else's trash can when he met the waiting police officers outside the garage. RP 247-48.

Satack and Turner both testified. They lived together in Tacoma at the time and had a child in common; they came to Olympia to pick up Simerly and go to a club. RP 521, 550, 606-07. They both described the altercation inside the Twelve-Thirty Club as an unknown man making an unprovoked attack on Turner, who defended himself. RP 523-26, 613-15. Satack had a taser in her purse, which she retrieved for a possible defense of Turner after the fight resumed in the parking lot. RP 528-30. Satack began to back the car out of the parking stall when she heard a thump from the back of her car and got out to investigate. RP 531-32. She said Kylie swung a fist at her and missed, then held the wristlett in her hand and swung, connecting with Satack's face. After a third swing, Satack tased Kylie. RP 533-34. The sound of the taser interrupted the fight; Turner and Simerly got into the car and left. RP 534. Satack and Turner saw nothing in the car that did not belong to them and there was no conversation about stolen property. RP 535, 621.

After they reached Simerly's residence, Simerly for some unknown reason directed Satack to park in the garage. RP 536. Once in the house, Simerly pulled a cell phone out of his pocket and said, "Look, we came up with an iPhone." RP 536, 623.

Simerly and Turner went back into the garage and Simerly smashed the phone with a hammer. RP 538-39, 624. Satack got in the driver's seat of the car so they could leave, but when the garage door opened, the police were outside and both she and Turner were arrested. RP 539-40. Both Turner and Satack testified that Simerly was high on meth the entire evening, even though Olympia Police Sgt. Anderson did not detect any signs of impairment. RP 551-52, 557, 609, 656.

Turner was found guilty of the second degree theft but not guilty of malicious mischief in the third degree. CO 11-12.

C. ARGUMENT.

1. Turner claims multiple instances of prosecutorial misconduct. He has not shown either error or prejudice.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578; State v. Russell, 125 Wn.2d 24, 85-86,

882 P.2d 747 (1994). Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. Russell, 125 Wn.2d at 86. "Reversal is not required if the error could have

been obviated by a curative instruction which the defense did not request." Id., at 85.

> As a general rule, remarks of the prosecutor, including such as would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where [the comments] are in reply to or retaliation for [defense counsel's] acts and statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.

State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Russell, 125 Wn.2d at 87. *See also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990). "When the State's evidence contradicts a defendant's testimony, a prosecutor may infer that the defendant is lying or unreliable." State v. Miles, 139 Wn. App. 879, 890, 62 P.3d 1169 (2007).

a. The prosecutor's rebuttal argument did not misstate the law. Even if there was an error in her recall of the facts, she had previously told the jury to rely on its own memories.

During closing argument, Turner's counsel argued that the State had not proved every element of the crime of second degree theft.

> [T]he defense submits the State has not proven that fact that an access device had been stolen.
>
> I anticipate under rebuttal [the prosecutor] will say this is a red herring, this is unnecessary for us to prove this, it's unreasonable for the defense to assist (sic) insist that we bring this before the jury. One, this is not a red herring. The instruction requires the State prove every element, including that an access device was stolen. This is not unnecessary.

RP 752.

> Defense submits that the State has not presented not only a posit (sic) of evidence that in fact, this—that any access device or any card or whatever could be used when it was last in possession of it's (sic) lawful owner, the defense submits there is a complete lack of evidence. What do we have from the State? We essentially have an assumption, well, she has a credit card and a debit card in her possession, it must be good. It must be something that can be used at that time. The instruction requires evidence that it can be used, not some vague assumption that merely because something may be in there that it can be used.
>
> Now, apparently somebody said she had it in the bar, the credit card. However, we don't have any proof of whether or not that credit card was able to be used in

the bar. We don't have any receipts. We don't have any bank statements.

RP 753.

So let's go over some of the things that we might expect to have had the State been completely serious about proving that this was an access device.

One, do we have any idea about the expiration date of these? Without at least some knowledge of this, you do not have sufficient information that this was an access device, and is it unreasonable to ask for either a bank statement or a facsimile of the card that wasn't recovered?

Maybe another thing you might be interested in, was the account in default? Was there enough money to be used in that? . . . How can that be determined? Again, a bank statement.

RP 754.

Another thing that you might want to know or would assist the State in showing that that was an item that could be used at the time, proof of what transactions had occurred up until that point and once the card had been cancelled, clearly not. Again, a bank statement as easily obtained often (sic) clicking the print function on a computer.

But instead what we have are none of these. . . . The State hasn't provided any proof of expiration dates either by bank statement of facsimile. The State hasn't provided any evidence that funds were available and, therefore, those cards could be used. We are just we—finally, we have no evidence of what transactions were used that night which indicate the card could be used that night or any transactions that they had been used recently at all.

RP 755.

On rebuttal the prosecutor first directed the jury's attention to the instructions, arguing that the "requirements" named by Turner's counsel to prove the credit cards were access devices were not in the instructions. RP 776. Sometime later, she reached the portion which Turner challenges:

> I want to touch on the access device, and I think this is important. First of all, I have never used the phrase "red herring" in my life. That is not how I talk. But more importantly, that's white noise, and it's a ridiculous argument, and it isn't a burden that I have to prove to you, but to be very clear, you do have evidence. Kylie specifically told you not only did she have those items but she used those items to pay for drinks at the club, very specifically. There is no requirement, as you will see in your jury instructions, for bank statements, for credit card statements. That is insulting and it's offensive.

RP 783.

A short time later, the prosecutor argued:

> You also know [Kylie] was concerned enough about them that she canceled them, a credit card and a debit card, because she doesn't want someone to access those, because she is afraid someone is going to use them to (a) take her money or (b) make her responsible for charges.

RP 784.

From the context of the rebuttal argument, it seems obvious that the prosecutor was not saying that the State had no burden to prove that the credit cards were usable, but that the State had no burden to produce bank statements or copies of the credit cards. She did not misstate the law; rather, Turner misunderstands what she was referring to when she made the challenged portion of the argument.

The prosecutor did have a faulty memory about Kylie testifying that she used the credit card to pay for drinks at the club. RP 783-84. However, at the beginning of her closing argument, the prosecutor said to the jury:

> Everything I'm going to say to you is my interpretation of the evidence it's my recollection of what you have heard over the last several days, but you are the trier of the facts. Anything I say, anything counsel says is simply our recollection. If that differs in any way from what you recall and what your notes are, your notes and your recollection is correct. So please disregard and rely on what you remember evidence to be. Any inaccuracies are not intentional on the part of the parties, or any differences.

RP 703-04.

"Access device" was defined for the jury in Instruction No. 14. CP 29. RCW 9A.56.010 requires that the device has the capacity to be used to access funds. Turner does not claim that the

evidence was insufficient to prove that the stolen cards were usable at the time they were taken. Kylie Thorsen testified that she carried the credit card and debit card in her wristlett and cancelled them after they were stolen. RP 269, 291. Circumstantial evidence which permits an inference that the cards were capable of transferring funds beyond a reasonable doubt is sufficient. State v. Askham, 120 Wn. App. 872, 880, 86 P.3d 1224, *review denied*, 152 Wn.2d 1032, 103 P.3d 201 (2004). Testimony in context can justify the conclusion that the cards were active, particularly when there is no evidence to the contrary. State v. Schloredt, 97 Wn. App. 789, 794, 987 P.2d 647 (1999). A rational jury could infer that the cards were active because Kylie carried them with her that evening and she cancelled them after they were stolen. There was no evidence to suggest that they could not be used to access money.

Turner relies on State v. Rose, 175 Wn.2d 10, 282 P.3d 1087 (2012), to support his argument. Rose was a case addressing sufficiency of the evidence. In that case, there was evidence that the stolen credit card had not been activated and could not be used. Id. at 15. While the State bears the burden of proving that the card "'can be used' to obtain something of value," Id. at 18, the court found that the State had failed to meet that

burden because the evidence specifically showed that it could not. Id. at 17, 18.

Turner's case is different. Kylie Thorsen's testimony was sufficient to lead to a reasonable inference that the cards were usable, and there was no evidence that they weren't. As noted above, he does not argue that the evidence was not sufficient. While the prosecutor was incorrect that Kylie had testified she used the cards that night, she did not misstate the law. Turner did not object to her argument, which indicates that he did not find it objectionable at the time. Now on appeal he takes those few sentences out of context, ignoring the defense argument to which they were a response. She was arguing that the State did not have to produce bank statements, not that the State did not have to prove the credit cards were actually access devices.

If Turner had objected at the time, and the court had sustained the objection, a curative instruction could easily have clarified the State's burden of proof. Therefore, even if the prosecutor had misstated the law, which is not the case, because there was no objection any error is not reversible unless there is a substantial likelihood that the verdict was affected. Dhaliwal, 150 Wn.2d at 578. Turner implicitly concedes that the evidence was

sufficient to prove that the credit cards were access devices. He was not prejudiced and there was no reversible error.

b. Turner misconstrues the prosecutor's rebuttal argument regarding credibility of the witnesses. There was no misconduct and no prejudice.

Once again, Turner takes the prosecutor's rebuttal argument out of context and gives it a meaning she did not intend. He claims that she informed the jury that they must believe everything a witness said, or nothing, but they could not believe some testimony and disbelieve other. It is apparent from the context that she was arguing something different.

Robert Simerly testified he did not know that anything had been stolen. On the way back to his residence, he saw an iPhone, a small black bag, and a makeup brush, but thought they belonged to Satack. RP 240. He said Satack asked where the rest of "it" was and Turner replied he had gotten rid of "it." RP 241. Turner's window was rolled down, but Simerly did not see him throw anything out the window. RP 242. Once inside his garage, Turner said they needed to get rid of the phone and smashed it with a hammer after Simerly refused to do so. RP 244-45.

Satack testified that she did not see the iPhone until they reached Simerly's residence and he produced the phone from his

pocket, saying "Look, we came up on an iPhone." RP 536-37. She saw Simerly smashing the phone with a hammer in the garage. RP 538. She further testified that Simerly was high on methamphetamines the entire night. RP 551, 563. Turner's testimony was very similar. He never saw the purse. RP 619. He never saw the iPhone until they reached Simerly's house and he pulled it out of his pocket, saying, "Look, we came up with an iPhone." RP 621, 623. Simerly smashed the phone with a hammer. RP 624.

In closing argument, Turner's counsel spent considerable time arguing that Simerly was the culprit. Simerly said nice things about Turner, but ultimately was protecting himself. RP 748. It was Simerly's house, Simerly would know where the hammer was, Simerly didn't have to let Turner and Satack park their car in his garage. RP 749. Simerly was nervous because he was lying on the witness stand by putting the blame on Turner. RP 750.

In rebuttal argument, the prosecutor said, in context:

> We talked about all of the things about Mr. Simerly and his statements, but notably all the statements involving Mr. Simerly that the defendants say there is no way he is lying about that, he is lying about that, but he is telling truth (sic) about everything else that helps them and is accurate that says bad things about the witnesses for the other party. Those things are all

> true, except when we get to the parts where he is uncomfortable, and they say bad things about the defendant? Well, it's a double-edged sword. It cuts both ways. Either he is lying about everything or he is telling the truth about everything, but you can't pick and choose the parts that help you and the parts that hurt you, and that's what they want you to do. So I would submit to you his credibility, especially based on what you see on the stand, is evaluated in the context of what all the other witnesses say. The (sic) who don't know him (sic) Adam, the other witnesses who saw the same behaviors, the same things, they testified about those.

Taken in context, it seems apparent that the prosecutor was not arguing that the jury must believe or disbelieve everything a given witness said. She was pointing out how convenient it was that when Simerly said things that helped the defendants, they claimed he was telling the truth, but when he said things that hurt their case, he was lying. When she said "you can't pick and choose," RP 782, she was referring to the defendants, not the jury. People often use "you" colloquially when referring to some unnamed people, *i.e.*, "you can't have your cake and eat it too." The prosecutor was making the point that no one can credibly claim that all good information about them is true and all bad information is false. Immediately after that statement she asked the jury to evaluate witness credibility in light of all the evidence. RP 782-83.

Again, Turner's counsel did not object, leading to the conclusion that he did not interpret the prosecutor's argument in the way that Turner now characterizes it. It may not have been the most articulate way to phrase the argument, but it was not invading the province of the jury, as Turner now claims. It was not improper argument.

c. The prosecutor did not impugn the role or integrity of defense counsel nor give a personal opinion about the veracity of the defendants.

Turner complains about two remarks made by the prosecutor in her rebuttal argument. The first was when she referred to Satack's unsupported claim that Simerly was high on drugs the night of the theft as a "smear campaign." RP 782. The second was her response to Turner's counsel's argument that the State was required to produce bank statements or credit card statements. She called it "insulting" and "offensive." RP 783. Turner did not object in either instance.

> If the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is usually waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."

State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (quoting State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). In Turner's case, the remarks were not improper, but even if they were, they can hardly be considered so "flagrant" and "ill-intentioned" that a curative instruction would have been useless.

The closing argument of the prosecutor is reviewed in the "context of the total argument; the issues in the case, the evidence addressed in the argument, and the jury instructions." State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). Even if the remarks constitute misconduct, they are nor grounds for reversal if they were "invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." Weber, 159 Wn.2d at 276-77; *see also*, Jones, 144 Wn. App. at 300; State v. Lindsey, 180 Wn.2d 423, 442, 326 P.3d 125 (2014). Prejudice will be found where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" Dhaliwal, 150 Wn.2d at 578 (quoting Pirtle, 127 Wn.2d at 672).

This rebuttal argument followed the closing argument of Turner's counsel, during which he repeatedly called Kylie Thorsen a liar. RP 738, 741, 743, 756, 758, 759. He called Simerly a liar.

RP 748-51. He argued that Detective Anderson had no basis for concluding that Simerly was not affected by drugs the night of the theft. RP 745-46. He argued at length that the State had failed to prove that the credit cards were access devices because it had not offered bank statements or a copy of the card itself. RP 753-55. Both of the challenged statements were in direct response to Turner's closing argument.

Turner implies, without actually arguing, that the "smear campaign" remark was an expression of the prosecutor's personal opinion. Appellant's Opening Brief at 18-19. He helpfully provides a dictionary definition of "smear," which may or may not have been what the prosecutor intended. Id. In fact, the prosecutor referred to Satack's "bare assertion with literally no facts to back that up" as a smear campaign. RP 782. Putting a label on something does not convert it into a personal opinion.

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Russell, 125 Wn.2d at 87. *See also* Dykstra, 127 Wn. App. at 8. A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the

prosecutor to argue that the evidence does not support the defense theory. Graham, 59 Wn. App. at 429. "When the State's evidence contradicts a defendant's testimony, a prosecutor may infer that the defendant is lying or unreliable." State v. Miles, 139 Wn. App. 879, 890, 62 P.3d 1169 (2007). Unless he or she unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999).

The prosecutor referred to Turner's extensive argument about bank statements and copies of the credit card as "insulting" and "offensive." The closing argument of defense counsel appeared to have been an attempt to goad the prosecutor into a response. He said, for example, that he anticipated the prosecutor would call his argument a red herring. RP 752. Prosecutors are held to higher standards than defense attorneys. Lindsey, 180 Wn.2d at 442. Even so, the prosecutor can properly respond to what he or she perceives to be misleading arguments. That does not equate to maligning defense counsel.

A prosecutor is prohibited from impugning the role or integrity of defense counsel. Lindsey, 180 Wn.2d at 431-32. Calling his argument insulting and offensive does not actually do either. In Lindsey, the court cited to some examples of remarks that

would not alone be reversible—"We're going to have like a sixth grader [argument]"; "[W]e're into silly." Id. at 432. It also referred to remarks from other cases which were reversible error.

> In *Negrete*[4], for example, the prosecutor said that defense counsel was "being paid to twist the words of the witnesses." 72 Wn. App. at 66. In *State v. Gonzales*, the prosecutor impermissibly contrasted the roles of prosecutor and defense counsel, stating that while the defense attorney's duty was to his criminal client, the prosecutor's duty was "'to see that justice is served.'" 111 Wn. A... 276, 283, 45 P.3d 205 (2002). And in *Bruno*[5], "the obvious import of the prosecutor's comments was that *all* defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth." 72 F.2d at 1194.

Lindsey, 180 Wn.2d at 433.

Even if it was error to use the words "insulting" and "offensive," it was not reversible error. "A curative instruction may be used to alleviate any prejudicial effect of an attack on defense counsel." State v. Lile, 193 Wn. App. 179, 209, ___ P.3d ___ (2016). Here an instruction certainly could have eliminated any prejudice, but Turner did not request one. He has waived his claim of prosecutorial misconduct. Weber, 159 Wn.2d at 270.

Finally, the jury was instructed that the law was contained in the instructions and that it was to ignore any arguments not

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4 State v. Negrete, 72 Wn. App. 62, 863 P.2d 137 (1993), *review denied*, 123 Wn.2d 1030, 877 P.2d 695 (1994).
5 Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983).

supported by the instructions. CP 15. Jurors are presumed to follow instructions. State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

Turner reargues his claims that the prosecutor misstated the evidence and the law during closing argument as a basis for finding the challenged remarks prejudicial. But, as discussed above, Turner has misinterpreted the prosecutor's arguments. There is nothing in this record to support a conclusion that Turner was prejudiced in any way, particularly because the jury acquitted him of one of the two charges for which he was tried. RP 804.

2. Defense counsel was not ineffective for failing to object to the prosecutor's rebuttal argument. There was nothing objectionable about the argument.

Turner argues that his attorney rendered ineffective assistance of counsel for failing to object to the portions of the prosecutor's closing arguments which he challenges on appeal.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas,

109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective

assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). "The requirement that counsel be effective is not a result-oriented standard. Counsel is required to be

competent, but not necessarily victorious." Wiley v. Sowders, 647 F.2d 642, 648 (6th Cir. 1981).

First, the prosecutor's arguments were not objectionable. Defense counsel has no duty to object to arguments just for the sake of making an objection. Second, even if objections would have been appropriate, which they were not, it cannot be said from the viewpoint of the entire trial that counsel rendered ineffective assistance. As argued above, an ineffective assistance of counsel claim is reserved for those instances where counsel's performance was truly substandard and the defendant did not get a real defense at all. That was not the case here. Counsel vigorously defended Turner and was able to convince the jury to acquit him of the third degree malicious mischief charge.

Defense counsel was not ineffective.

3. Statutes which impose certain mandatory financial obligations regardless of present ability to pay do not violate substantive due process. Due process comes into consideration when an attempt is made to collect those financial obligations. Further, because he did not raise the issue in the trial court, and because he lacks standing to claim a constitutional violation, this court should decline to review it.

At sentencing, the court imposed a $500 victim assessment, $200 in court costs, and a $100 DNA fee. CP 42-43. His attorney

asked that his legal financial obligations be limited to those amounts. Sentencing RP 10-11. The court declined to impose a witness fee. Turner made no objection in the trial court. Id.

On appeal, Turner makes a lengthy argument that imposing even mandatory financial obligations on defendants who have not been shown to have the ability to pay violates substantive due process under both the Fifth and Fourteenth Amendments to the United States Constitution and art. I, § 3 of the Washington Constitution. He does not allege that he is unable to pay the costs imposed, now or in the future.

Costs are authorized by statute. "[S]tatutes authorizing costs are in derogation of common law and should be strictly construed." State v. Moon, 124 Wn. App. 190, 195, 100 P.3d 357 (2004). RCW 9.94A.030(30) provides, in part, that a "legal financial obligation" is an amount of money ordered by the court and may include restitution, crime victims' compensation fees, court costs, drug funds, attorney fees, costs of defense, fines, and "any other financial obligation that is assessed to the offender as a result of a felony conviction."

a. LFOs that were imposed.

(i). Crime victim assessment.

A crime victim assessment is required by RCW 7.68.035.

> When any person is found guilty in any superior court of having committed a crime, [other than certain motor vehicle crimes], there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a).

The victim assessment of $500 is mandatory. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992); State v. Suttle, 61 Wn. App. 703, 714, 812 P.2d 119 (1991); State v. Eisenman, 62 Wn. App. 640, 646, 810 P.2d 55 (1991) (victim assessment is not a "cost"); State v. Bower, 64 Wn. App. 808, 812, 827 P.2d 308 (1992).

(ii). Court filing fee

Although this is listed with court costs on the judgment and sentence, the $200 filing fee is mandatory and cannot be waived.

RCW 36.18.020(2)(a) directs the clerk of the superior court to collect a $200 filing fee for the initiation of most litigation. RCW 36.18.020(2)(h) provides:

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction

> by a court of limited jurisdiction, a defendant is a criminal case shall be liable for a fee of two hundred dollars.

Because the court has no discretion regarding the filing fee, a court's failure to find the defendant has the ability to pay is not error. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

(iii). DNA collection fee.

A fee for DNA collection is required by RCW 43.43.7541: "Every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars." (Emphasis added.) Even if the state patrol crime lab already has a DNA sample from the defendant, the fee must be ordered for each sentence imposed for crimes specified in RCW 43.43.754. All other financial obligations take precedence and the DNA collection fee is the last to be collected, but it is mandatory. The fee is a "court-ordered legal financial obligation as defined in RCW 9.94A.030." RCW 43.43.754.

The imposition of a $100 DNA collection fee has been mandatory since June 12, 2008. RCW 43.43.7541; State v. Thompson, 153 Wn. App. 325, 336, 338, 223 P.3d 1165 (2009).

b. This court has discretion to accept or decline review of arguments raised for the first time on appeal. It should decline to review this claim.

The Supreme Court has held that it is error for the court to impose *discretionary* LFOs without an individualized inquiry into the defendant's present and future ability to pay. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The amounts imposed on Turner are not discretionary, as explained above. Blazina does not require the review of even discretionary LFOs when the claim is raised for the first time on appeal. State v. Malone, COA No. 32781-7-III (May 5, 2016), *slip op.* at 3.

"Trial courts must impose mandatory LFOs, and may impose discretionary costs as well." Malone, *slip op.* at 4. Turner is required to pay only $800 in mandatory LFOs, CP 42-43, not a huge sum to expect a young man to pay essentially over his lifetime. Blazina raised policy concerns about imposing LFOs on defendants without inquiry into their ability to pay, but Turner has not claimed he will never be able to pay $800. If he does not pay, somebody will—the taxpayers. The statutes making these LFOs mandatory are clearly an effort to shift the financial burden from the taxpayers to the people who cause the expense in the first place. In Malone, the court declined to review a due process challenge to

LFOs raised for the first time on appeal because Malone had not shown any evidence that he could not pay.

Turner was born on May 23, 1984. CP 40. At the time of sentencing he was 31 years old. He testified at trial that at the time the incident occurred, he worked at Popeye's in Lacey. RP 606. At sentencing his attorney said he held a certificate for asbestos removal and had been engaging in that type of work. 09/24/15 RP 10. Counsel told the court Turner had a limited ability to pay fines in the future, but did not explain why that was so. 09/24/15 RP 11. Turner submitted statements from his family saying he did what he could to be employed. 09/24/15 RP 14. Turner was given the low end of the standard range in confinement, and only mandatory LFOs were imposed.

There is no reason for this court to review this claim not raised below.

c. Turner lacks standing to raise this claim.

Except under circumstances not relevant here, a party may generally challenge a statute only if he is harmed by the feature of the statute that is claimed to be unconstitutional. Kadoranian v. Bellingham Police Dep't., 119 Wn.2d 178, 191, 829 P.2d 1061 (1992). Turner's claim is that, as applied to indigent offenders, the

statute is an unreasonable exercise of the State's power to recoup costs from defendants. To establish that he has standing, he must satisfy both prongs of a two-pronged test. First, he must show "'a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief.'" State v. Johnson, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014), *quoting* High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). The injury must be "(a) concrete and particularized; and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Witt v. Dep't. of Air Force, 527 F.3d 805, 811 (9th Cir. 2008), *quoting* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Second, Turner must establish that his claim falls "within the zone of interests protected by the statute or constitutional provision at issue." Johnson, 179 Wn.2d at 552.

The due process clause of the United States Constitution prevents a state from arbitrarily punishing indigent defendants for failing to pay court-imposed costs that they cannot pay. Bearden v. Georgia, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). A constitutional violation occurs when the State sanctions an indigent person without demonstrating a contumacious failure to pay. Johnson, 179 Wn.2d at 553. The individual, however, must

be constitutionally indigent. Id. While recognizing that there is no "precise definition" of constitutional indigence, it is not mere poverty. Id. The court must consider the totality of a defendant's financial status to determine constitutional indigence or lack of same. Id. at 553-54. Statutory indigence is not enough. Id. at 555.

> While we do not question the State may not punish an indigent defendant for the fact of his or her indigence, these constitutional considerations protect only the constitutionally indigent. . . . Requiring payment of the fine may have imposed a hardship on [Johnson], but not such a hardship that the constitution forbids it. Lewis, 19 Cal. Rptr. at 422[6] (the constitution does not require the trial court to allow a defendant the same standard of living he had become accustomed).

Johnson, 179 Wn.2d at 555.

Turner has not shown that he is, and will always be, unable to pay LFOs. Apart from a passing reference in his brief to "defendants such as Mr. Turner who do not have the ability to pay LFOs," the record includes his claim to have a $6000 debt, although he owns property valued at $4500. Appellant's Opening Brief at 41; CP 57. He sought an appeal bond, and in his statement of facts he said, "I have a family out there that need (sic) me, I am the sole provider, my job is a laborer . . . I do have possessions & a house I may lose." CP 53. Even if he qualified for court-appointed

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6 People v. Lewis, 19 Cal. App. 3d 1019, 97 Cal. Rptr. 419, 421 (1971).

counsel, which may well be the case, that is a finding of statutory indigence, not constitutional indigence. Turner has not shown himself to be in the class protected by the due process clause.

In addition to failing to show indigence, Turner has failed to show that he was harmed by the imposition of the costs. While he recites a list of complaints regarding the "broken" LFO system in this state, he does not claim that the State has attempted to collect any of these monies. A constitutional violation occurs when the State sanctions a constitutionally indigent individual who did not contumaciously fail to pay. Johnson, 179 Wn.2d at 553.

Turner has not shown indigence or harm from the statutes he challenges. He lacks standing to bring these claims, and the court should not reach the merits of those claims.

d. Imposing these LFOs does not implicate due process.

Turner bases his due process argument on the assertion that it is "irrational" to impose LFOs on "defendants who have not been shown to have the ability to pay." Appellant's Opening Brief at 35. He distinguishes State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), on the grounds that those cases address the collection

rather than the imposition of LFOs. Nevertheless, he argues that Blank actually supports his argument in that defendants are subject to enforced collection from the moment they are imposed. Appellant's Opening Brief at 38. It is not irrational for LFOs to be imposed at the time of sentencing. They may be enforced indefinitely. RCW 9.94A.760(4). An offender's financial status may change significantly in the years following the sentencing.

Turner points to the twelve percent interest rate on LFOs, implying that defendants begin paying interest from the time they walk out of the courtroom following sentencing. The statute, however, provides that the court *shall* waive all interest on LFOs other than restitution that accrues while the offender is in custody, upon a showing that it creates a hardship for the defendant or his or her family. RCW 10.82.090(2)(a). Interest on restitution may be reduced once the principal is paid. RCW 10.82.090(2)(b). If the defendant can show a good faith effort to pay interest on non-restitution LFOs, the court may reduce or waive the interest. RCW 10.82.090(2)(c). It is true that obtaining a reduction or waiver of interest requires some effort on the part of the offender. RCW 10.92.090(c), (d). It is not, however, the automatic and crushing burden that Turner portrays.

There are a number of statutes which protect defendants from the parade of horribles that Turner offers. For example, if the defendant is under supervision of the Department of Corrections (DOC), the Department may either modify the payment schedule or recommend to the court that it be modified when circumstances change. RCW 9.94A.760(7)(a). If DOC is not involved, the clerk's office may recommend changes to the payment schedule. RCW 9.94A.760(7)(b). Payroll deductions are limited to 25 per cent of disposable earnings. RCW 9.94A.7603(1). The offender may bring a motion to quash, modify, or terminate payroll deductions if he demonstrates hardship. RCW 9.94A.7605.

Turner's argument is based upon an implicit assumption that it somehow violates due process for a defendant to suffer any inconvenience, much less hardship, by simply having LFOs imposed. While there are mechanisms in place to collect those LFOs, there are also mechanisms for the offenders to seek relief from any real hardships. Under Turner's argument, a defendant who does not have the ability to pay at the time of sentencing would not have any LFOs imposed, even though later he may have a job, inherit money, win the lottery, or receive valuable gifts. The taxpayers would then be stuck with a bill he could pay.

"Due process precludes the jailing of an offender for failure to pay a fine if the offender's failure to pay was due to his or her indigence," and was not willful. State v. Mathers, COA 47523-5-II (May 10, 2016), *slip op.* at 13, citing to State v. Nason, 168 Wn.2d 936, 945, 233 P.3d 848 (2010). Mandatory financial obligations are constitutional as long as there exist safeguards against imprisoning defendants for indigency. Mathers, *slip op.* at 13-14. Simply imposing LFOs does not implicate due process rights.

4. It is clear from the record that the $200 in court costs imposed by the trial court was the filing fee, which is mandatory. It was not ineffective assistance of counsel for his attorney to fail to object to it.

Turner is correct that the only court cost which is mandatory is the criminal filing fee. Court costs are allowed by RCW 10.01.160 and 9.94A.760(1). "The court *may* require a defendant to pay costs." RCW 10.01.160(1), emphasis added. Costs are limited to the expenses the State specifically incurred in prosecuting the defendant's case. RCW 10.01.160(2). RCW 36.18.020(2)(a) directs the clerk of the superior court to collect a $200 filing fee for the initiation of most litigation. RCW 36.18.020(2)(h) provides:

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction

> by a court of limited jurisdiction, a defendant is a criminal case shall be liable for a fee of two hundred dollars.

Because the court imposed $200 in court costs without further clarification, it seemed apparent to the parties that it was imposing a filing fee. Claiming otherwise is a rather disingenuous argument.

The standard for reviewing a claim of ineffective assistance of counsel is set forth in Section 2 or this brief and will not be repeated here. Had counsel objected to the $200 in court costs, the trial court would certainly have clarified that it was the filing fee, and the outcome would be exactly the same. There was no prejudice, and no ineffective assistance of counsel.

5. This court should wait until the issue of appellate costs is ripe before deciding whether to award them.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976[7], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. Id., .160(2). In State v. Barklind, 87 Wn.2d 814, 557

7 Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. Id., at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In State v. Blank, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997), the Supreme Court held this statute constitutional, affirming the Court of Appeals' holding in State v. Blank, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), noted that in State v. Keeney, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. Keeney, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in State v. Edgley, 92 Wn.

App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. Nolan, 141 Wn.2d at 624-625, 628.

In Nolan, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. Id., at 622. As suggested by the Supreme Court in Blank, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in State v.Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016), prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* Blank, 131 Wn.2d at 242; State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing State v. Baldwin, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. Baldwin,

63 Wn. App. at 311; *see also* State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. Id. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." Blank, 131 Wn.2d at 241–242. *See also* State v. Wright, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See* Lundy, 176 Wn. App. at 104 n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See* State v. Woodward, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See* Blank at 236-237, quoting Fuller v. Oregon, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); Woodward, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In Blazina, 182 Wn.2d 827, the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. Id., at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. Id., at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants

taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

Even though Turner has been found indigent in the trial court that is not a finding of indigency in the constitutional sense. Constitutional indigence is more than poverty. State v. Johnson, 179 Wn.2d 534, 553-54, 315 P.3d 1090, *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014). Only the constitutionally indigent are protected from the requirement to pay. Id. at 555. Indigency, moreover, is a "relative term" that "must be considered and measured in each case by reference to the need or service to be furnished." State v. Rutherford, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964); Johnson, 179 Wn.2d at 555.

As Blazina instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Sinclair points out at 389, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition

for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. It is to be hoped, pursuant to Blazina, that trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

In this case, the State has yet to "substantially prevail." It has not submitted a cost bill. Turner offers no evidence of his future ability to pay other than that he was found indigent in the trial court. Appellant's Opening Brief at 46. This Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Turner's conviction for second degree theft.

Respectfully submitted this 10th day of June, 2016.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of June, 2016, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

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