No. 94483-1

COA # 34972-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NORMAN RAY GOODRUM,

Petitioner.

ON REVIEW FROM
THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION THREE
AND THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

PETITION FOR REVIEW

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PARTY

Norman Ray Goodrum, appellant below, is the Petitioner herein.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4.(b)(1) and (3), Mr. Goodrum seeks review of the decision of the court of appeals, Division Three, issued April 18, 2017, in State v. Goodrum, __ P.3d __ (2017 WL 1406280). A copy of the decision is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Does a person "enter or remain unlawfully" and thus commit burglary where he enters into an open, public motel office, goes behind an open counter and breaks into a drawer?

2. Should this Court grant review to address clarify what is required to prove the essential element of unlawful entry or remaining for the crime of burglary because it has been some time and the courts of appeals are still grappling with the requirement in ways which lead to decisions like the erroneous ruling in this case?

3. Is it flagrant, prejudicial misconduct in a case where the only issue is the identification of the defendant as the person who committed the crimes for the prosecutor to tell the jury that the defendant was guilty because there as no evidence to the contrary and if he was not guilty he should buy a lottery ticket because he had run through so much bad luck with all the coincidences?

4. Is a trial court required to consider the defendant's present and future ability to pay before imposing even discretionary legal financial obligations under State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and its progeny? Does Division Three's holding to the contrary conflict with this Court's decision in State v. Duncan,185 Wn.2d 430, 374 P.3d 83 (2016)?

D. OTHER ISSUES PRESENTED FOR REVIEW

5. Should review be granted on the issues presented in Mr. Goodrum's Statement of Additional Grounds?

E. STATEMENT OF THE CASE

a. Procedural posture

Petitioner Norman Goodrum was convicted of first-degree robbery, second-degree robbery and third-degree theft in Pierce County Superior Court. CP 8-10, 82-84. He appealed to Division Two of the court of appeals, which transferred the case for decision to Division Three for caseload reasons. See Order of Transfer (January 10, 2017) (Court of Appeals, Division Two, Case Events #48201-1-II). On April 18, 2017, Division Three issued an unpublished opinion affirming the convictions and rejecting Mr. Goodrum's arguments, both those raised by counsel and those raised in Goodrum's Statement of Additional Grounds. App. A. This Petition timely follows.[1]

b. Facts relevant to issues presented

A motel manager was called away to fix something in a room, did not lock the motel office where people came in to register, then returned to see that the wood facing on a desk drawer he used as a sort of cash register behind an open, L-shaped counter had been ripped off and there was no cash inside the drawer. 2RP 101-102. About $400 was taken, and Norman Goodrum, Petitioner, was accused, in large part by the allegations of a woman whose versions of the events changed because of her significant heroin habit and brain issues. 3RP 20-24. Goodrum was also accused of being the person who wore a mask who came into the office a

[1] Mr. Goodrum filed a pro se request to extend time for filing a Petition for Review on May 12, 2017. He has since indicated to counsel that he wished for counsel to pursue the Petition instead and is expected to file a letter to that effect forthwith.

few days later, pointed a gun at the manager and ordered the manager to hand over the money in the drawer, despite having an alibi witness. 3RP 70.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. BURGLARY REQUIRES UNLAWFUL ENTRY OR REMAINING AND DOES NOT APPLY TO BREAKING INTO A DRAWER BEHIND THE COUNTER IN A PUBLICLY OPEN MOTEL OFFICE

To prove second-degree burglary, the state must show that, with intent to commit a crime against a person or property therein, the defendant "enters or remains unlawfully in a building or dwelling." RCW 9A.52.030(1). In this case, this Court should grant review to address whether "unlawful entry or remaining" occurs when a person whose license to enter an open, public hotel office has not been revoked and he goes into that office, walks behind a counter and breaks into a drawer.

It is well-settled that state and federal due process require the state to bear the full weight of proving every essential element of the charged crime, beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991); Fifth Amend.; 14th Amend.; Art. 1, § 9. The question presented here goes directly to this basic constitutional underpinning of our system. Further, the issue of when there is an "unlawful entry or remaining" in a public place sufficient to prove burglary keeps arising in the lower appellate courts and this Court's most relevant guidance in State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988), was years ago and lacks

sufficient clarity to answer the question.

Division Three's decision in this case shows the need for this Court's review. And that division is not the only court to have been challenged by how to apply the requirement for "unlawful entry or remaining" contained in RCW 9A.52.030(1), along with the definition of unlawful entry or remaining as occurring when one "is not licensed, invited, or otherwise privileged to enter or remain" under RCW 9A.52.010. Prosecutors continue to try to expand the coverage of the burglary statute to situations where a crime is committed in a public, open place or a place where one had permission to enter, based on the theory that there was not "license" to enter to commit a crime, or that it is revoked upon the intent to commit a crime being formed. See State v. Klimes, 117 Wn. App. 758, 767-68, 73 P.3d 416 (2003), overruled in part and on other grounds by State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005); State v. Thomason, 71 Wn. App. 634, 861 P.2d 492 (1993). Indeed, this Court has also wrestled with this same question, in a case which has left lingering questions and doubt, Collins.

In that case, the defendant was convicted of burglary after he was invited into the home to make a phone call, made the call, then dragged the elderly ladies who had answered the door into a bedroom, threw them on the bed, raped one, chased the other when she escaped, dragged her back to the bedroom and dislocated her shoulder. 110 Wn.2d at 255. The court of appeals held that the element of unlawful entry or remaining had not been proved, because the assailant had permission to enter the home. Id. On review, this Court held that Collins had committed the crime of

burglary by remaining unlawfully, "because he exceeded the scope of his invitation" to use the phone, his invitation "expired" when he had done that and he then remained in the house and committed crimes. 110 Wn.2d at 255-56.

Unfortunately, courts have struggled with what exactly Collins held. See, e.g., Thomson, 71 Wn. App. at 639. It is assumed that Collins depended upon "an implied limitation as to place" made by the invitation to make the phone call. 71 Wn. App. at 639. The Collins decision is also assumed "to have held or recognized that the record was sufficient to show" an implied limitation which "expired" after the defendant had completed his call. Thomson, 71 Wn. App. at 640.

A little more recently, this Court looked at the issue again in State v. Howe, 116 Wn.2d 466, 805 P.2d 806 (1991), where juveniles were convicted of burglary for committing a crime in his parent's house. The Court restated the maxim that a person unlawfully enters or remains when not then licensed, invited or otherwise privileged to enter or remain, and that a person who is so privileged cannot be convicted of burglary for committing a crime therein. 116 Wn.2d at 469. The Court decided that a parent may revoke the juvenile's privilege to enter the family home, if that revocation is made expressly and unequivocally and the parent provides some alternative means of guaranteeing their statutory duty of caring for their child has been met. 116 Wn.2d at 476-77.

Neither Collins nor Howe answers the question presented here: whether a person lawfully permitted to enter an open motel office commits *burglary* by so entering, then going behind an open counter in that office

and breaking into a drawer. But the courts of appeals have held that, under RCW 9A.52.010(2), entering without "invitation, license or privilege" does not include breaking into a locked container in a public place, such as cash boxes in a self-service carwash facility (State v. Miller, 90 Wn. App. 720, 722, 954 P.2d 925 (1998)), or taking something from a publicly open wrecking yard instead of paying for it (Klimes, 117 Wn. App. at 766-67), but does include shoplifting in a public shopping mall when the defendant was given written notification that his license to enter had been revoked for a year and the crime occurred before that time was up. State v. Kutch, 90 Wn. App. 244, 247, 951 P.2d 1139 (1998).

In this case, the trial prosecutor never argued either unlawful entry or remaining. See 3RP 94; 3RP 96. There was no argument at trial that entry into the open, unlocked motel office was "unlawful," or that there was somehow unlawful "remaining." Id. The prosecution's theory was instead that the burglary had occurred and the only question was "who done it." Id. On review, the court of appeals held that the state had proved the element by showing unlawful "remaining," as a trier of fact could have inferred that there was a limitation on entry that precluded going behind the open counter and breaking into the locked drawer. App. A at 4.

But the jury was never asked to make such an inference. 3RP 94-96. And the case the court of appeals relies upon, Allen, involved a high rise with a bank open to the public but a room which was a separate office, not specifically so open, into which the defendant went. 127 Wn. App. at 128. This Court has never held that breaking into a locked drawer behind an open "L" counter in a motel office open to the public is sufficient to

show unlawful "entry or remaining." Review should be granted to address this issue.

2. IT IS FLAGRANT, PREJUDICIAL MISCONDUCT IN AN IDENTIFICATION CASE TO ARGUE THE DEFENDANT WAS GUILTY BECAUSE THERE WAS NO EVIDENCE HE WAS NOT AND IF HE WAS NOT HE NEEDED TO "BUY A LOTTERY TICKET BECAUSE HE'S USED UP A LIFETIME OF BAD LUCK TO GET ALL THESE COINCIDENCES"

There was no dispute that someone took money after breaking open a cash drawer at the motel office on March 6, or that almost two weeks later someone came in with a gun, demanding money. The only issue at trial was whether the state had proved, beyond a reasonable doubt, that the person who committed those crimes was Petitioner Goodrum. In arguing guilt, the prosecutor here repeatedly told the jury that Goodrum was guilty because "[t]here is no other explanation, there is no reasonable doubt" (3RP 127), and "there's no evidence of any other suspects for the robbery" (3RP 130) (not just no evidence that Goodrum was set up).

This Court should also grant review of the decision of the court of appeals finding that these comments were not improper and did not shift a burden of proof. The court of appeals instead characterized it as a situation where the prosecutor just argued that the evidence did not support the defense theory that Mr. Goodrum might have been set up by the state's witnesses, that they had such a motive and could have involved someone else. App. A at 4-5. The court thus conflated the right of the prosecution to respond that there is no evidence to support a defense with improper conduct of telling jurors that, because there was evidence *someone* had burgled the place and the defendant had been seen there he

was guilt, "[t]here is no other explanation, there is no reasonable doubt." While this Court has found that prosecutor's enjoy "wide latitude" in making closing remarks and are allowed to draw "reasonable inferences" from the evidence, State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009), the remarks here went too far. They shifted the burden of proof to Mr. Goodrum to *disprove* guilt. This is especially clear given that the prosecutor mocked the idea that Goodrum could be innocent, telling jurors Goodrum should go buy a lottery ticket because, if he was not guilty, he had clearly used up all of his bad luck for life in being at the motel at the wrong time. This Court should grant review on this issue, as well.

3. ABILITY TO PAY IS PART OF THE INQUIRY FOR NON-DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS WHERE THE DEFENDANT IS INDIGENT

A trial court is required to consider a defendant's present or future ability to pay legal financial obligations before imposing them, under the recent landmark decision of Blazina, supra. This applies even when there is no objection about inability to pay below. See Duncan, 185 Wn.2d at 433-34.

Just as in Blazina, in this case, there was a preprinted finding on a judgment and sentence which contained a "boilerplate" finding of ability to pay. CP 94. Mr. Goodram was also ordered to pay them within 18 or 24 months. CP 95-96. Payments are ordered to begin immediately, amount to not less than $25 a month and bear interest (12%) from the date of sentencing. CP 101. Goodrum faces time in custody if he does not pay. CP 101-102.

In affirming, Division Three held that there was no requirement for considering ability to pay for "*discretionary* LFOs." App. A at 8 (emphasis in original). In Duncan, however, this Court held that the required inquiry had to occur even though the legislature "has designated some of these fees as mandatory." 185 Wn.2d at 436 n. 3. This Court should grant review because the holding here conflicts with this Court' decision in Duncan. Mr. Goodrum's indigence does not depend upon whether the fee is considered "discretionary" or "mandatory" and this Court's decisions in Blazina and Duncan should have been held to grant him relief. This Court should grant review and so hold.

G. OTHER ISSUES PRESENTED FOR REVIEW

4. REVIEW SHOULD ALSO BE GRANTED ON ALL OF THE ISSUES PETITIONER RAISED PRO SE

Mr. Goodrum filed a pro se RAP 10.10 Statement of Additional Grounds for Review ("SAG"), but the court of appeals rejected all of his claims presented therein. See App. A. Counsel was not appointed to assist or research the issues contained in that SAG. See RAP 10.10(f). Those issues include 1) ineffective assistance of counsel, 2) additional prosecutorial misconduct and 3) cumulative error depriving him of a fair trial. See App. A at 11-13.

In State v. Brett, 126 Wn.2d 136, 206, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996), this Court held that it would not address arguments incorporated by reference from other *cases*, but did not state anything about incorporation by reference of arguments or issues raised in the current case. To comply with RAP 13.7(b) and raise all the issues in

the Petition without making any representations about their relative merit, incorporated herein by reference are Mr. Goodrum's pro se arguments, contained in his RAP 10.10 SAG. This Court should grant review on those issues as well.

H. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 18th day of May, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Piece County Prosecutor's Office via email at pcpatcecff@ao.pierce.wa.us, and caused a true and correct copy of the same to be sent to appellant by deposit in U.S. mail, with first-class postage prepaid at the following address: Norman Goodrum, DOC 385825, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 18th day of May, 2017.

/s/ Kathryn Russell Selk
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2017 WL 1406280
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

STATE of Washington, Respondent,
v.
Norman Ray **GOODRUM**, Appellant.

No. 34972–1–III
|
APRIL 18, 2017

UNPUBLISHED OPINION

Lawrence–Berrey, J.

***1 Norman Goodrum** appeals his convictions for first degree robbery, second degree burglary, and third degree theft. He argues insufficient evidence supports his second degree burglary conviction because the State failed to prove he "entered or remained unlawfully" in a building. He also argues the prosecutor committed misconduct in rebuttal argument by shifting the burden of proof and by arguing facts not in evidence. Finally, he contends the trial court erred in imposing legal financial obligations (LFOs) without inquiring into his ability to pay. In a statement of additional grounds for review (SAG), Mr. Goodrum claims he received ineffective assistance of counsel, alleges additional instances of prosecutorial misconduct, and argues cumulative error deprived him of a fair trial. We disagree with Mr. Goodrum's arguments and affirm.

FACTS

On February 27, 2015, Mr. Goodrum rented a room at the Travelodge hotel in Longview, Washington. When Mr. Goodrum returned to the hotel office, he and the front desk manager, Brandon Excell, began arguing about Mr. Goodrum's damage deposit. The two argued for 30 minutes, and Mr. Excell eventually returned Mr. Goodrum's deposit to end the argument.

On March 6, Mr. Excell was again managing the front desk at the Travelodge. At around 6:30 p.m., Mr. Excell received a telephone call from Sharon Hockett in room 111. Mr. Goodrum was in the room and had broken the toilet, so Ms. Hockett asked Mr. Excell to come fix it. Mr. Excell left the office to go fix the toilet. Mr. Excell thought he would only be gone for a short time, so he did not lock the door.

Shortly after the telephone call, surveillance video showed a man walk out of room 111 and ride away on a bicycle. In the video, the man was wearing a black and gray Fox-brand sweatshirt, jeans, and black and white Nike shoes.

Moments later, Mr. Excell arrived at room 111 and knocked on the door. Only Ms. Hockett was there. Mr. Excell looked inside the toilet tank and saw the chain between the handle and the flapper had been disconnected. Mr. Excell hooked the chain back up.

As Mr. Excell was fixing the toilet, a person in a black and gray Fox sweatshirt, jeans, and black and white Nike shoes entered the Travelodge office. The person had the hood pulled over his or her head. The person approached the front desk, which was "L" shaped and faced the comer of the room. The person walked behind the front desk area, bent over behind the counter, and used a crowbar to pry open one of the drawers. The person took a stack of cash from inside the drawer and walked out of the office.

On March 18, Mr. Excell was again managing the front desk at the Travelodge. Around 9:30 p.m., a masked person wearing a black and gray Fox sweatshirt and black and white Nike shoes walked in the door. The person pointed a handgun at Mr. Excell and told him to hand over the money in the drawer. The robber's voice sounded familiar to Mr. Excell, but he was unable to place it. Mr. Excell took the money from the drawer and gave it to the person.

***2** Mr. Excell thought about the incident over the next week and realized he recognized the robber's voice from his earlier argument with Mr. Goodrum. Officer Steve Dennis interviewed Mr. Goodrum. Another officer showed Mr. Goodrum a picture from the March 6 surveillance video of the person outside room 111 wearing the black and gray Fox sweatshirt. Mr. Goodrum admitted the person in the picture was him. The police later obtained a search warrant and searched Mr. Goodrum's home. They found a used gun cleaning kit in Mr. Goodrum's bedroom. They also found Nike shoes and a black and gray Fox sweatshirt in the house.

The State charged Mr. Goodrum with first degree robbery, second degree burglary, and third degree theft. At trial, the State played the Travelodge's surveillance videos for the jury, which showed the incidents on March 6 and March 18.

In closing argument, the prosecutor noted the central question in the case was whether Mr. Goodrum was the person in the surveillance videos. The prosecutor argued it was Mr. Goodrum who burglarized the Travelodge on March 6 because Mr. Goodrum later admitted he was

outside room 111 that night, and the person who took the cash from the drawer two minutes later was wearing the same exact clothing as Mr. Goodrum. The prosecutor also argued it was Mr. Goodrum who robbed the Travelodge on March 18 because the robber again wore the same clothing and the police found a used gun cleaning kit in Mr. Goodrum's house, which suggested Mr. Goodrum previously had a gun.

In the defense's closing argument, defense counsel implied Mr. Excell and Ms. Hockett could have framed Mr. Goodrum. Defense counsel argued Mr. Excell could have used his knowledge of the Travelodge surveillance system to make it appear Mr. Goodrum was responsible for the crimes. Defense counsel suggested Mr. Excell may have done this to retaliate against Mr. Goodrum for their argument over the damage deposit. Defense counsel also argued Ms. Hockett, who was a drug addict and desperate for money, could have conspired with another unknown person.

In rebuttal, the prosecutor argued it was unlikely that Mr. Excell and Ms. Hockett framed Mr. Goodrum twice. The prosecutor later asked the jury to conclude Mr. Goodrum was the burglar based on the physical evidence. He then stated, "There is no other explanation, there is no reasonable doubt." Report of Proceedings (RP) (Aug. 12, 2015) at 127.

The prosecutor then re-outlined the evidence supporting the robbery charge. He then stated, "There's a gun case for a gun that's never located but was seen during the robbery, we see a gun. Mr. Goodrum has the—has a gun case." RP (Aug. 12, 2015) at 130. The prosecutor then concluded that Mr. Excell and Ms. Hockett did not know each other, and there was "no evidence of any other suspects for the robbery." RP (Aug. 12, 2015) at 131. Defense counsel did not object to any of these statements.

The jury found Mr. Goodrum guilty as charged. At sentencing, the trial court imposed a $500 victim assessment but struck all other fees and costs. Mr. Goodrum did not object to the imposition of the victim assessment. Mr. Goodrum appeals.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE FOR SECOND DEGREE BURGLARY

Mr. Goodrum argues insufficient evidence supports his conviction for second degree burglary because the State failed to prove he entered or remained unlawfully in the building. He argues the Travelodge hotel office was unlocked, open to the public, and no one ever revoked his license to be there. Therefore, he argues, even if he intended to commit a crime, his presence in the building was lawful.

When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.*

***3** A person commits second degree burglary "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). A person unlawfully enters or remains in a building when he or she is not licensed, invited, or otherwise privileged to enter or remain. Former RCW 9A.52.010(5) (2011).

"A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public." *Id.* Thus, a person still commits second degree burglary when he or she initially enters a building lawfully, but then exceeds the scope of the implied or express privilege by intruding into areas of the building not open to the public. *State v. Allen*, 127 Wn. App. 125, 135, 110 P.3d 849 (2005). A trier of fact may infer limitations on the scope of a person's privilege to be on the premises from the particular facts of the case. *State v. Collins*, 110 Wn.2d 253, 261–62, 751 P.2d 837 (1988).

For example, in *Allen*, the manager of a U.S. Bank branch—which was located on the first floor of a high rise office building open to the public—saw Joel Allen walk out of his personal office. *Allen*, 127 Wn. App. at 128. The manager went to his office and discovered his wallet was missing. *Id.* The manager later saw Mr. Allen out on the street, confronted him, and held him until police arrived. *Id.* at 128–29. The State charged Mr. Allen with second degree burglary. *Id.* at 127.

The *Allen* court reversed Mr. Allen's convictions on other grounds, but nevertheless held sufficient evidence supported his burglary conviction. *Id.* at 137. The court acknowledged the office building was open to the public and, therefore, Mr. Allen was initially privileged to enter. *Id.* However, the court noted Mr. Allen exceeded that privilege when he entered the manager's office, which was physically separated from the lobby and teller areas by a partial wall and a portion of the escalator. *Id.* at 138. The court also noted the manager placed some chairs to create a narrow opening into his office, which supported a reasonable inference that the office was not part of the public area of the bank and that Mr. Allen exceeded the scope of any privilege by entering the office. *Id.*

Here, the Travelodge office was unlocked and open to the public, and thus Mr. Goodrum was initially privileged to enter. But as the surveillance video shows, the front desk—which was in an "L" shape and facing the comer of the office—was plainly reserved for Travelodge employees. Much like the chairs that left a narrow opening to the manager's office in *Allen*, the

narrow pathway leading behind the Travelodge front desk supports a reasonable inference that this area was not part of the public area of the office. Because Mr. Goodrum intruded into an area that was not open to the public, he exceeded the scope of the implied privilege to be in the office.

Drawing all reasonable inferences in favor of the State, we conclude the evidence was sufficient for a rational jury to find that Mr. Goodrum remained in the office unlawfully. Accordingly, sufficient evidence supports his conviction for second degree burglary.

B. PROSECUTOR'S COMMENTS IN REBUTTAL ARGUMENT

Mr. Goodrum argues the prosecutor committed misconduct during rebuttal by shifting the burden of proof to him to prove his innocence. He also contends the prosecutor improperly argued facts not in evidence.

***4** The prosecutorial misconduct inquiry consists of two prongs: first, whether the prosecutor's comments were improper and, if so, whether the improper comments caused prejudice. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). However, when the defendant fails to object to the prosecutor's conduct or request a curative instruction at trial—as is the case here—the misconduct is reversible error only if the defendant shows the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Id.*

In the context of closing arguments, the prosecutor has " 'wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.' " *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)). This court considers a prosecutor's alleged improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Anderson*, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009).

1. *Alleged burden shifting*

Mr. Goodrum argues several of the prosecutor's statements in rebuttal argument shifted the burden of proof to the defense. He argues the remarks suggested he was guilty because there was no evidence to prove his innocence.

The prosecutor may not shift the burden of proof to the defendant. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). Because the defendant has no duty to present evidence, it may be misconduct for a prosecutor to argue that the defense did not call witnesses or explain the factual basis of the charges. *Anderson*, 153 Wn. App. at 428; *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553 (2009); *also State v. Blair*, 117 Wn.2d 479,

485–92, 816 P.2d 718 (1991) (holding a prosecutor may comment on defendant's failure to call particular witnesses under the missing witness doctrine). A prosecutor may not imply that a defendant is guilty because he or she failed to explain the State's evidence. *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076(1996).

For example, in *Fleming*, the prosecutor argued in closing that " 'you ... would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter]. And several things, they never explained.' " *Id.* at 214 (emphasis omitted) (alterations in original). The prosecutor then argued the defendants had not explained several pieces of the State's evidence, such as how the alleged rape victim got scratched. *Id.* at 214–15. The prosecutor implied the defendants had a duty to explain this evidence and, because they did not, they were guilty. *Id.* at 215.

However, it is not misconduct for a prosecutor to argue that the evidence does not support the defense theory. *Lindsay*, 180 Wn.2d at 431; *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. Even if a prosecutor's response is improper, this court will not reverse if the remarks were invited or provoked by defense counsel, in reply to defense counsel's argument, pertinent, and not incurably prejudicial. *Id.* at 86; *State v. Thierry*, 190 Wn. App. 680, 690, 360 P.3d 940 (2015), *review denied*, 185 Wn.2d 1015, 368 P.3d 171 (2016).

Here, defense counsel implied Mr. Excell and Ms. Hockett could have framed Mr. Goodrum, argued they both had motive to do so, and implied an unknown third person could have helped. In rebuttal, the prosecutor responded that such a conspiracy was unlikely, and then later re-outlined the evidence supporting the burglary charge:

> ***5** We know that the guy outside 111 in the beginning is the Defendant. We know because he told you. And we know, based on the physical evidence, that it was the Defendant that burgled the place two minutes later. *There is no other explanation, there is no reasonable doubt.*

RP (Aug. 12, 2015) at 127 (emphasis added).

Mr. Goodrum argues the italicized remarks improperly shifted the burden of proof. We disagree. The prosecutor did not imply Mr. Goodrum had a duty to explain the State's evidence for the jury to acquit him. Rather, the prosecutor summarized the State's evidence and argued that, in light of this evidence, there was no other explanation for the crime. These comments were not improper.

The prosecutor concluded rebuttal by arguing:

> There's no evidence here that says ... Excell knew Hockett. I mean, there's just nothing. They—she said he didn't know her; he said she didn't know him. They'd seen each other, but that's it. There's no evidence, *and there's no evidence of any other suspects for the robbery.*

RP (Aug. 12, 2015) at 130–31 (emphasis added).

Mr. Goodrum argues the italicized remarks also improperly shifted the burden of proof. Again, we disagree. Defense counsel argued in closing that another unknown suspect could have conspired with Mr. Excell and Ms. Hockett to frame Mr. Goodrum. The prosecutor was entitled to respond to this argument and argue the evidence did not support this theory. The fact the prosecutor did not make similar statements in his initial closing argument further demonstrates these remarks in rebuttal were merely a response to the defense theory. *See* *Thierry*, 190 Wn. App. at 692. Accordingly, these comments were not improper.[1]

1 Mr. Goodrum also cites the prosecutor's statement that Mr. Goodrum "should probably 'buy a lottery ticket because he's used up a lifetime of bad luck to get all of these coincidences.' " Br. of Appellant at 20. However, Mr. Goodrum does not explain how this comment shifted the burden of proof.

2. *Alleged reference to facts not in evidence*

Mr. Goodrum also contends the prosecutor improperly argued facts not in evidence. He cites the prosecutor's reference to a "gun 'case,' " which the prosecutor argued he possessed. Br. of Appellant at 21. He argues there was no evidence of a gun case at trial.

It is improper for a prosecutor during closing argument to make statements or submit to the jury facts that are not supported by the evidence. *Glasmann*, 175 Wn.2d at 704–05; *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

During trial, the State called a police officer who testified he found a used gun cleaning kit in Mr. Goodrum's bedroom. The prosecutor argued in his initial closing argument that this cleaning kit suggested Mr. Goodrum previously had a gun. The prosecutor attempted to make this same reference during rebuttal argument, but called it a "gun case" instead of a "gun cleaning kit." RP (Aug. 12, 2015) at 130. Although the remark was a misstatement of the evidence, it was likely an unintentional misstatement. Had defense counsel objected, the prosecutor could have easily corrected the misstatement. This isolated misstatement does not warrant reversal.

3. *Ineffective assistance of counsel*

Mr. Goodrum also argues defense counsel provided ineffective assistance because he did not object to these comments or request a curative instruction. To succeed on an ineffective assistance claim, the defendant must show both deficient performance and a reasonable probability the attorney's conduct affected the case's outcome. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993).

***6** Because the prosecutor did not shift the burden of proof to the defense, his remarks were not improper and defense counsel did not perform deficiently by not objecting. *See State v. Larios–Lopez*, 156 Wn. App. 257, 262, 233 P.3d 899 (2010).

Even assuming defense counsel's failure to object to the prosecutor's "gun case" remark was deficient, Mr. Goodrum fails to show prejudice. The jury was likely aware the prosecutor was attempting to reiterate the same point from his initial closing argument about the gun cleaning kit. There is no evidence the jury interpreted the "gun case" statement as anything other than a simple misstatement. Mr. Goodrum's ineffective assistance claim fails.

C. ALLEGED LFO ERROR

Mr. Goodrum argues the trial court erred in imposing the $500 victim assessment without considering his ability to pay. He also argues the court erred because it did not make any specific findings about his financial situation.

Mr. Goodrum did not object to the imposition of this LFO at the sentencing hearing. He is, therefore, not entitled to appellate review as a matter of right. *See State v. Blazina*, 182 Wn.2d 827, 832–35, 344 P.3d 680 (2015). But even assuming he had preserved the issue, his claim is meritless.

RCW 10.01.160(3) only requires the trial court to inquire into a defendant's ability to pay before it imposes *discretionary* LFOs. *E.g., State v. Shelton*, 194 Wn. App. 660, 673, 378 P.3d 230 (2016), *review denied*, 187 Wn.2d 1002, 386 P.3d 1088 (2017). The $500 victim assessment is mandatory, and trial courts must impose it regardless of a defendant's ability to pay. *See, e.g., State v. Curry*, 118 Wn.2d 911, 917–18, 829 P.2d 166 (1992); *State v. Mathers*, 193 Wn. App. 913, 922–24, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015, 380 P.3d 482 (2016); *Shelton*, 194 Wn. App. at 673–74. Because the trial court only imposed mandatory LFOs, it was not required to consider Mr. Goodrum's ability to pay, nor was it required to make findings about his financial situation.[2]

2 Trial courts are not required to enter formal findings regarding a defendant's ability to pay court costs. *See Curry*, 118 Wn.2d at 914–16. Citing *State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016), Mr. Goodrum appears to argue that trial courts are required to make findings regarding a defendant's ability to pay before imposing mandatory LFOs. The only relevant portion of *Duncan* is where the court states "[t]he constitution does not require that the trial court enter formal findings, though of course it is a good

practice and helpful on review." *Id.* at 436–37. *Duncan* does not help Mr. Goodrum because (1) it still does not *require* findings, and (2) Mr. Goodrum is not asserting a constitutional claim that he is being sanctioned for nonwillful failure to pay, but a statutory claim that the trial court violated RCW 10.01.160(3) in imposing the LFO.

D. APPELLATE COSTS

Mr. Goodrum argues that this court should not presumptively impose appellate costs against indigent defendants who lose on appeal and then require those defendants to rebut that presumption. He also argues this court "cannot impose costs on appeal unless it considered the appellant's actual ability to pay." Br. of Appellant at 34.

***7** An appellate court has discretion to require a convicted defendant to pay appellate costs to the State. *See* RCW 10.73.160(1); RAP 14.2. Generally, "the party that substantially prevails on review" will be awarded appellate costs, unless the court directs otherwise in its decision terminating review.[3] RAP 14.2. An appellate court's authority to award costs is "permissive," and a court may, pursuant to RAP 14.2, decline to award costs at all. *See State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

3 "A 'prevailing party' is any party that receives some judgment in its favor." *Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010). "If neither party completely prevails, the court must decide which, if either, substantially prevailed." *Id.* Here, the State is the substantially prevailing party.

Unlike RCW 10.01.160(3), which was at issue in *Blazina*, 182 Wn.2d 827, the statute authorizing appellate costs does not require an inquiry into the defendant's financial resources before appellate costs are imposed. *See* RCW 10.73.160; *State v. Sinclair*, 192 Wn. App. 380, 389, 367 P.3d 612, *review denied*, 185 Wn.2d 1034, 377 P.3d 733 (2016) (noting that while ability to pay is an important factor that may be considered under RCW 10.73.160, it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor); *State v. Wright*, 97 Wn. App. 382, 384, 985 P.2d 411 (1999) (finding that RCW 10.73.160 only requires an inquiry into ability to pay at the point of collection and not when the recoupment order is made).

Because this court's authority to award appellate costs is permissive and discretionary, this court does not *presumptively* impose appellate costs against defendants. Rather, the court determines which party substantially prevailed, considers the appropriate factors, and exercises its discretion.

Mr. Goodrum also argues that this court may not constitutionally impose appellate costs unless it considers the appellant's actual ability to pay. Our Supreme Court expressly rejected this argument in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). There, the court considered "whether, *prior* to including a repayment obligation in defendant's judgment and sentence, it is

constitutionally necessary that there be an inquiry into the defendant's ability to pay, his or her financial resources, and whether there is no likelihood that defendant's indigency will end." *Id.* at 239. The *Blank* court held the constitution does not require an inquiry into ability to pay at the time the costs are imposed. *Id.* at 242. "Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment." *Id.* "If at that time defendant is unable to pay through no fault of his own, ... constitutional fairness principles are implicated." *Id.*

Because Mr. Goodrum is not yet faced with the alternatives of payment or imprisonment, his constitutional objection to appellate costs on the grounds of indigency is premature. Mr. Goodrum acknowledges *Blank*, but argues our Supreme Court cast doubt on *Blank's* continuing validity when it decided *Blazina*, 182 Wn.2d 827. However, our Supreme Court decided *Blazina* solely on statutory grounds. *See id.* at 839. *Blazina* has no bearing on the constitutionality of Washington's appellate cost scheme.

Under ordinary circumstances, Division Three's June 2016 "General Order" would dictate the outcome of Mr. Goodrum's request to deny the State appellate costs.[4] However, this case was originally assigned to Division Two. It was transferred to this division pursuant to RCW 2.06.040, RAP 4.4, and CAR 21(a) after briefing was complete.[5] Because the Division Three General Order sets forth various requirements and deadlines for criminal appellants *during* the briefing process, we decline to require Mr. Goodrum to strictly comply with the General Order.

4 The General Order directs defendants who want this court to exercise its discretion not to impose appellate costs to make their requests either in their opening briefs or in a RAP 17 motion, which must be filed within 60 days after the defendant's opening brief. If a defendant alleges inability to pay as a factor supporting his or her request, the order also requires the defendant to designate evidence relating to the trial court's determination of indigency and the defendant's current or likely ability to pay discretionary LFOs. It also requires defendants to file a report as to continued indigency with this court no later than 60 days after they file their opening briefs.

5 These provisions are all silent as to whether the transferee division may apply its own general orders to the transferred cases.

***8** Division Two of this court generally exercises its discretion to waive appellate costs when the trial court has previously found the defendant indigent, reasoning that under RAP 15.2(f), appellate courts presume a defendant's indigence throughout review unless the court finds the defendant's financial situation has improved. *E.g., State v. Hart*, 195 Wn. App. 449, 463, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 480 (2017). Here, the trial court found Mr. Goodrum indigent for purposes of appeal. Because the parties had no control over the fact this case was transferred to Division Three, we exercise our discretion consistent with Division Two's policy and waive appellate costs in this matter.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

A defendant is permitted to file a pro se SAG in a criminal case on direct appeal. RAP 10.10(a). This statement is not required to cite authorities or to the record itself, but must have sufficient specificity to inform the court of the "nature and occurrence" of specified errors. RAP 10.10(c). The SAG must not rely on matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

In his SAG, Mr. Goodrum argues he received ineffective assistance of counsel, alleged additional instances of prosecutorial misconduct, and argues cumulative error deprived him of a fair trial.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Goodrum first argues he received ineffective assistance because trial counsel failed to call additional witnesses to support his alibi defense. However, there is nothing in the record on appeal regarding what information these unknown witnesses could have supplied, whether they would have testified, if counsel knew about them, and if he did, why he declined to call them.[6] Because the record is inadequate to determine whether trial counsel's failure to call these witnesses was deficient or prejudicial, this court cannot consider this issue on direct review. *See McFarland*, 127 Wn.2d at 337–38. The appropriate means of raising this issue is through a personal restraint petition. *Id.* at 335.

6 Mr. Goodrum names his mother as one of these potential witnesses, but does not specify who the others are.

Mr. Goodrum also argues he received ineffective assistance because trial counsel was unable to operate the courtroom audio-visual equipment. He argues this affected counsel's ability to argue he was not the same height as the burglar or robber. The record demonstrates trial counsel had some initial trouble with the courtroom audio-visual equipment, but was eventually able to operate it after the prosecutor assisted him. *See* RP (Aug. 12, 2015) at 117–18.

Mr. Goodrum also argues trial counsel failed to adequately address the fact Ms. Hockett used heroin prior to testifying. Ms. Hockett testified she had been an addict for eight or nine years, had used heroin earlier that day, and if she had not used heroin she would have been sick and would have been "no good" as a witness. RP (Aug. 12, 2015) at 22. The prosecutor asked if she had any trouble focusing, and Ms. Hockett responded she was nervous but it had nothing to do with her heroin use. Rather than focusing his cross-examination on Ms. Hockett's drug use that day, defense counsel instead focused on whether Ms. Hockett remembered what happened on March 6. This was not deficient performance.

Finally, Mr. Goodrum argues he received ineffective assistance because trial counsel failed to address the fact that Mr. Excell recognized the robber's voice from his earlier argument with Mr. Goodrum. But because this was particularly unfavorable evidence to Mr. Goodrum, trial counsel may have not wanted to highlight it. *See* *Benn*, 120 Wn.2d at 665 (defense counsel does not perform deficiently if his or her trial conduct can be characterized as legitimate trial strategy or tactic).

***9** We conclude Mr. Goodrum did not receive ineffective assistance of counsel.

B. PROSECUTORIAL MISCONDUCT

Mr. Goodrum argues the prosecutor committed misconduct by vouching for Ms. Hockett's credibility in closing argument. A prosecutor cannot express a personal opinion as to a defendant's guilt or a witness's credibility, independent of the evidence actually in the case. *Lindsay*, 180 Wn.2d at 437; *Glasmann*, 175 Wn.2d at 706. But a prosecutor may draw inferences from the evidence as to why the jury would want to believe one witness over another. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

In summarizing the evidence, the prosecutor referenced Ms. Hockett's testimony that Mr. Goodrum was in room 111 on March 6. The prosecutor then stated, "[I]t's up to [the jury] to decide if she was telling the truth." RP (Aug. 12, 2015) at 109. The prosecutor then implied Ms. Hockett's testimony was believable because she had testified about some embarrassing information. This was not improper. The prosecutor correctly informed the jury that its role was to determine whether Ms. Hockett testified truthfully, and then drew an inference from the evidence as to why the jury should believe her.

Mr. Goodrum also contends the prosecutor misstated the facts when he argued that Mr. Goodrum confessed to the crime. However, the prosecutor did not argue Mr. Goodrum confessed to the *crime.* Rather, the prosecutor's remarks referenced Mr. Goodrum's admission to Officer Steve Dennis that he was the individual in the black and gray Fox sweatshirt outside room 111 on March 6. *See* RP (Aug. 11, 2015) at 151; RP (Aug. 12, 2015) at 99, 110.

Mr. Goodrum also contends the prosecutor misstated the facts when he argued that Mr. Goodrum broke the toilet in room 111. However, Officer Dennis testified that Mr. Goodrum admitted he broke the toilet. *See* RP (Aug. 11, 2015) at 151.

Mr. Goodrum finally contends the prosecutor committed misconduct when he argued the Nike shoes the police found in Mr. Goodrum's house were the same shoes from the surveillance videos, when they were actually different shoes. This was not the prosecutor's argument. Rather, the prosecutor, who was playing the video footage for the jury, argued the shoes Mr. Goodrum wore outside room 111 matched the burglar's shoes, and these also matched the robber's shoes. *See* RP (Aug. 12, 2015) at 101, 106, 109.

C. CUMULATIVE ERROR

Mr. Goodrum argues his conviction should be reversed based on cumulative error. The cumulative error doctrine applies if there were several trial errors, none of which standing alone is sufficient to warrant reversal, that when combined may have denied the defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, there were not multiple errors and, therefore, there was no cumulative error.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Fearing, C.J.

Korsmo, J.

All Citations

Not Reported in P.3d, 2017 WL 1406280

RUSSELL SELK LAW OFFICE

May 18, 2017 - 1:59 PM

Transmittal Information

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Appellate Court Case Number:	94483-1
Appellate Court Case Title:	State of Washington v. Norman Ray Goodrum
Superior Court Case Number:	15-1-00356-6

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