

73953-1

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Court of Appeals  
Division I  
State of Washington

NO. 73953-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**CHAD C. WHITNEY,**  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

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**BRIEF OF RESPONDENT**

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SKAGIT COUNTY PROSECUTING ATTORNEY  
RICHARD A. WEYRICH, PROSECUTOR

By: KAREN L. PINNELL, WSBA#35729  
Deputy Prosecuting Attorney  
Office Identification #91059

Courthouse Annex  
605 South Third  
Mount Vernon, WA 98273  
Ph: (360) 336-9460

## TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT .....	1
II. ISSUES .....	1
III. STATEMENT OF THE CASE .....	1
1. STATEMENT OF PROCEDURAL HISTORY .....	1
2. STATEMENT OF FACTS .....	2
IV. ARGUMENT .....	4
1. THE EVIDENCE PRESENTED IS SUFFICIENT TO SUSTAIN A CONVICTION FOR BAIL JUMPING.....	4
2. THE TRIAL COURT DID NOT ERR IN IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.....	11
3. COUNSEL IN THIS CASE WAS EFFECTIVE.....	18
4. APPEAL COSTS SHOULD BE IMPOSED.....	20
V. CONCLUSION.....	22

## TABLE OF AUTHORITIES

Page

### CASES

<i>In re Pers. Restraint of Flippo</i> , 191 Wn. App. 405, 411, 362 P.3d 1011 (2015).....	11
<i>Schryvers v. Coulee Cmty. Hosp.</i> , 138 Wn. App. 648, 654, 158 P.3d 113 (2007).....	10
<i>State v. Aguilar</i> , 153 Wn.App, 265, 277 -78, 223 P. 3d 1158 ( 2009).....	7
<i>State v. Arredondo</i> , 190 Wn. App. 512, 538, 360 P.3d 920 (2015).....	12, 13
<i>State v. Baldwin</i> , 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).....	10, 13
<i>State v. Ball</i> , 97 Wn. App. 534, 536, 987 P.2d 632 (1999).....	6, 9
<i>State v. Bertrand</i> , 165 Wn. App. 393, 405, 267 P.3d 511 (2011), <i>review denied</i> , 175 Wn.2d 1014 (2012).....	10, 13
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	14, 16
<i>State v. Blazina</i> , 182 Wn.2d 827, 832, 344 P.3d 680 (2015).....	11
<i>State v. Bryant</i> , 89 Wn. App. 857, 870, 950 P.2d 1004 (1998) .....	6
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	5
<i>State v. Cardwell</i> , 155 Wn. App. 41, 47, 226 P.3d 243 (2010) .....	7
<i>State v. Carver</i> , 122 Wn.App. 300, 306, 93 P. 3d 947 (2004).....	7, 8
<i>State v. Curry</i> , 62 Wn. App. 676, 680-81, 814 P.2d 1252 (1991), <i>aff'd</i> , 118 Wn.2d 911. ....	10, 11
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980) .....	5, 9
<i>State v. Downing</i> , 122 Wn. App. 185, 192, 93 P.3d 900 (2004), <i>rev. denied</i> , 153 Wn.2d 1014 (2005) .....	6, 8
<i>State v. Duncan</i> , 180 Wn. App. 245, 253, 327 P.3d 699 (2014), <i>aff'd and remanded</i> , No. 90188-1, 2016 WL 1696698, 2016 Wash. LEXIS 573 (Wash. Apr. 28, 2016).....	12
<i>State v. Fiser</i> , 99 Wn. App. 714, 995 P.2d 107 (2000), <i>rev. denied</i> , 141 Wn.2d 1023, 10 P.3d 1074 (2000) .....	5
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 78, 917 P.2d 563 (1996).....	14
<i>State v. Hutton</i> , 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).....	5
<i>State v. Kuster</i> , 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) .....	10
<i>State v. Lord</i> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991) .....	15
<i>State v. Lundy</i> , 176 Wn. App. 96, 102, 308 P.3d 755 (2013) .....	9, 10, 13
<i>State v. McFarland</i> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) ....	14, 15
<i>State v. McNeal</i> , 98 Wn. App. 585, 991 P.2d 649 (1999) .....	5

<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002) .....	15
<i>State v. Munoz-Rivera</i> , 190 Wn. App. 870, 895 361 P.3d 182 (2015).....	12
<i>State v. Prestegard</i> , 108 Wn.App. 14, 28 P. 3d 817 ( 2001) .....	6, 7
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	5
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612, (2016).....	16
<i>State v. Tocki</i> , 32 Wn. App. 457, 462, 648 P.2d 99, <i>rev. denied</i> , 98 Wn.2d 1004 (1982) .....	6
<i>State v. Walton</i> , 64 Wn. App. 410, 415-16, 824 P.2d 533, <i>rev. denied</i> , 119 Wn.2d 1011, 833 P.2d 386 (1992).....	6
<i>State v. Ziegenfuss</i> , 118 Wn. App. 110, 112, 74 P.3d 1205 (2003), <i>review denied</i> , 151 Wn.2d 1016 (2004).....	13
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 176, 4 P.3d 123 (2000) .....	10

**STATUTES**

RCW 9A.76. 170( 1).....	6, 8
RCW 10.73.160.....	16
RCW 10.73.160(1).....	15
RCW 10.01.160(3) .....	9, 15
RCW 10.01.160(4) .....	10, 16

**RULES**

ER 406 .....	7
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## **I. SUMMARY OF ARGUMENT**

In order to sustain a conviction for Bail Jumping, the State must prove, among other things, that a defendant was released from custody by court order. The State produced evidence that defendant was out of custody and an order was signed by the defendant, showing that he had knowledge, requiring him to appear before the Court on a future date and that the defendant failed to show for court on that future date. Could a reasonable juror have inferred that defendant's release was authorized by court order?

## **II. ISSUES**

1. The evidence is sufficient to sustain a conviction for bail jumping.
2. The imposition of discretionary financial obligations (LFOs) was made not with boiler plate language but with a finding that the defendant is able bodied and able to pay LFOs for the duration of his sentence.

## **III. STATEMENT OF THE CASE**

### **1. Statement of Procedural History**

Chad Whitney was charged with Possession of a Controlled Substance (methamphetamine), Count 1; Identity Theft in the Second Degree, Count 2; and Bail Jumping, Count 3 by way of a Third Amended Information filed on February 24, 2015. CP 86-87. Chad Whitney signed a continuance order on September 5, 2013 which indicates his presence is

required for future court dates, specifically omnibus on September 20, 2013. 3/9/15 RP 34-35, exhibit 12. Chad Whitney failed to appear in court on September 20, 2013 which resulted in the Court issuing a warrant. 3/9/15 RP 34-35, exhibits 11 and 14.

Chad Whitney was convicted of Possession of a Controlled Substance, Count 1 and Bail Jumping, Count 3; he was acquitted on ID Theft in the Second Degree, Count 2. CP 88-90, 3/10/15 RP 31. Chad Whitney was sentenced to 24 months for Count 1 and 33 months for Count 3. CP 56. The Honorable Michael E. Rickert found that Chad Whitney is able bodied and able to pay the legal financial obligations over the life of his sentence. 6/12/15 RP 17-18.<sup>1</sup>

## **2. Statement of Facts**

Officers Paul Shaddy and David Deach responded to a 911 call complaining of noise disturbance where the subject was working on a vehicle and revving the engine loud and driving up and down the street on September 12, 2012. 3/9/15 RP 10-11, 45-46. Officers responded to find the subject working under the hood of a running vehicle. 3/9/15 RP 12, 14, 46, 65. When Officers asked the defendant for his name, he told them

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:  
"3/9/15, 3/10/15 and 6/12/15 RP Trial and Sentencing.

“Corey Whitney.” 3/9/15 RP 14-16, 46. When Officers asked for photo identification, the defendant told them it was inside his residence. 3/9/15 RP 16. Dispatch ran the name of “Corey Whitney” and advised officers that there were several outstanding warrants for “Corey Whitney.” 3/9/15 RP 16-17. Officers arrested the defendant for outstanding warrants. 3/9/15 RP 17, 47. Upon searching the defendant incident to his arrest, Officers found a glass smoking device commonly used to ingest methamphetamines, a capped needle and a syringe in the defendant’s back jeans pocket. 3/9/15 RP 17-20, 48-49. The residue in the pipe was tested positive for methamphetamine. 3/9/15 RP 59.

While being transported to the jail, the defendant told Officers that he was really “Chad Whitney” not “Corey Whitney,” and that “Corey Whitney” is his brother. 3/9/15 RP 21-22, 51. When Officers relayed the correct name of the defendant to dispatch they were advised that “Chad Whitney” also had outstanding warrants. 3/9/15 RP 22-23. The identity of Chad Whitney was confirmed through photo identification and fingerprinting at the jail when booked. 3/9/15 RP 23-24

The State entered, as exhibits, certified court documents from the case Chad Whitney was charged with in relation to the possession of a controlled substance charge as follows: Exhibit 11, Original Information Charging Chad Whitney; Exhibit 12, an agreed order which showed Chad

Whitney signed indicating his presence was required in Court on September 20, 2013, signed on September 5, 2013; Exhibit 13, clerks minutes from September 20, 2013 indicating that Chad Whitney did not appear for court; Exhibit 14, an Order dated September 20, 2013 directing the clerk to issue a bench warrant for Chad Whitney's arrest; and Exhibit 15, a copy of the resulting warrant for Chad Whitney's arrest dated September 20, 2013. 3/9/15 RP 33-36.

Chad Whitney admitted that he was released from jail and missed court because he had so many court dates after being "pr'd" 3/9/15 RP 69. Chad Whitney went on admitting that he missed court due to "mistracking the day." 3/9/15 RP 69. Chad Whitney indicated he didn't post bail when he was released, but released on a promise to appear for court due to the jail being "over packed." 3/9/15 RP 69-70. Chad Whitney admitted that he signed the order dated September 5, 2013 to appear in court on September 20, 2013 and further admitted that he failed to appear for court. 3/9/15 RP 73.

#### **IV. ARGUMENT**

##### **1. THE EVIDENCE PRESENTED IS SUFFICIENT TO SUSTAIN A CONVICTION FOR BAIL JUMPING**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find

the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

*State v. McNeal*, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *rev. denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. *Hutton*, 7 Wn. App. at 728, 502 P.2d 1037.

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *rev. denied*, 119 Wn.2d 1011, 833 P.2d 386

(1992). The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily. *State v. Tocki*, 32 Wn. App. 457, 462, 648 P.2d 99, *rev. denied*, 98 Wn.2d 1004 (1982).

*State v. Prestegard*, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001)

The bail jumping statute reads:

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1).

The elements of bail jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required.

*State v. Downing*, 122 Wn. App. 185, 192, 93 P.3d 900 (2004), *rev. denied*, 153 Wn.2d 1014 (2005).

The knowledge element of the crime of bail jumping requires that the State prove beyond a reasonable doubt that the defendant knew, or was aware, that he was required to appear at the scheduled hearing. *State v. Ball*, 97 Wn. App. 534, 536, 987 P.2d 632 (1999) (quoting *State v. Bryant*, 89 Wn. App. 857, 870, 950 P.2d 1004 (1998)), *see also*, *State v.*

*Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010). The State presents sufficient evidence that the defendant had knowledge of the requirement of a subsequent personal appearance when it " prove[ s] .. .the defendant] was given notice of his court date...." *State v. Carver*, 122 Wn.App. 300, 306, 93 P. 3d 947 (2004). In making a determination as to whether notice was given, a fact -finder can consider " [ e] vidence ... of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses" because such evidence " is relevant to prove that the conduct of the ... organization on a particular occasion was in conformity with the ... routine practice." ER 406; *See State v. Prestegard*, 108 Wn.App. 14, 28 P. 3d 817 ( 2001). Moreover, whether a person is guilty of bail jumping does not depend on whether the court convened to hear his or her case." *State v. Aguilar*, 153 Wn.App, 265, 277 -78, 223 P. 3d 1158 ( 2009).

The jury was given the standard bail jumping instruction which read in pertinent part:

To convict the defendant of the crime of bail jumping as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 20, 2013, the defendant failed to appear before a court;
- (2) That the defendant was charged with possession of a controlled substance, Methamphetamine;

(3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

(4) That any of these acts occurred in the State of Washington.

CP 35, WPIC 120.41

Chad Whitney was in court on September 5, 2013 and signed an order which indicated his presence was required for the next court date of September 20, 2013. 3/9/15 RP 33-36. This was evidence of his notice of a required court date. *State v. Carver*, 122 Wn.App. 300, 306, 93 P. 3d 947 (2004). The court in *Downing* determined that the bail jumping charge is satisfied by the defendant being charged with a crime, knowing of the required court appearance and failing to appear. *Downing* 122 Wn. App. 185 (2004). Here, there is sufficient evidence that Chad Whitney was charged with a crime of possession of methamphetamine, that he knew of the required court date and that he failed to appear.

To prove the allegation of bail jumping, the State was required at trial to prove that Chad Whitney was " released by court order or admitted to bail" when he subsequently failed to appear as alleged in the information. RCW 9A.76. 170( 1). The command and promise language of the order setting the hearing provides circumstantial evidence that Chad Whitney was released by court order pending his appearance at the subsequent hearing. Because circumstantial and direct evidence are equally reliable in

determining sufficiency of the evidence, the evidence in this case was sufficient to sustain the jury's verdict on this charge. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

By Chad Whitney's own admissions, he failed to appear for the required court appearance after being released on his own personal recognizance at an earlier date on this cause number. 3/9/15 RP 69-70, 73. This evidence shows that he knew he was supposed to appear on September 20, 2013 and he admitted he did not appear on that date because he "mistracked the day." 3/9/15 RP 73, *State v. Ball*, 97 Wn. App. 534, 536, 987 P.2d 632 (1999). In this case there was sufficient evidence, when viewed in a light most favorable to the prosecution, for a jury to convict Chad Whitney of bail jumping.

2. THE TRIAL COURT DID NOT ERR IN IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

RCW 10.01.160(3) states:

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

The statutory inquiry is required only for *discretionary* LFOs. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (mandatory fees, which include victim restitution, victim assessments, DNA fees, and criminal filing fees,

operate without the court's discretion by legislative design); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (victim assessment and DNA collection fee mandatory). Trial courts are not required to enter formal, specific findings. *Lundy*, 176 Wn. App. at 105. If a court does enter findings, they are reviewed under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012) (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

“A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).  
*Lundy, Id.*

RCW 10.01.160(4) allows the trial court to modify the monetary portion of a sentence and reduce the costs imposed when payment will impose a manifest hardship on the defendant or his family. These discretionary legal financial obligations are subject to revision and are not final.

*Lundy, Id. See State v. Curry*, 62 Wn. App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911.

The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one. *Lundy, citing State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). One of the factors looked at for imposing legal

financial obligations is the determination of whether or not a claim of indigency will likely end at some point in the future. *State v. Curry*, 62 Wn. App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911. While Chad Whitney may have been indigent for purposes of trial and for his appeal, he did not make a showing that his indigency would never end. As such, the entry of discretionary legal financial obligations in this case was appropriate. “A defendant who makes no objection to the imposition of *discretionary* LFOs at sentencing is not automatically entitled to review.” *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (emphasis added). Referencing the fact that a person has been found indigent under GR 34 does not change the law; it simply gives courts guidance when determining the individual’s ability to pay LFOs.” *In re Pers. Restraint of Flippo*, 191 Wn. App. 405, 411, 362 P.3d 1011 (2015).

Chad Whitney did not object to entry of the legal financial obligations at sentencing or the findings that he was able bodied and capable, nor did he produce any evidence that he did not have the ability to pay them. Only on appeal, for the first time, is he arguing that since he was found indigent for trial and for the appeal, he shouldn’t have to pay the discretionary legal financial obligations. At issue in this case is the \$250 jury demand fee, \$100 drug enforcement fund and \$100 crime lab fee – a total of \$450. While not lengthy, the Court did take into consideration the

fact that Chad Whitney is able bodied and capable of paying these discretionary fees when it entered the sentencing order.

In deciding whether to accept review of imposition of discretionary fees that were not objected to at the trial level, courts have “consider[ed] the administrative burden and expense of bringing [a defendant] to a new sentencing hearing and the likelihood that the LFO result would change.” *State v. Arredondo*, 190 Wn. App. 512, 538, 360 P.3d 920 (2015) (“An important consideration of this analysis is the dollar amount of discretionary LFOs imposed by the sentencing court.”), *review granted*, No. 92389-2 (Wash. Apr. 29, 2016). Another approach taken is to remand the issue to the trial court to make an individualized inquiry, as opposed to this court exercising its discretion to review whether the discretionary LFOs were properly imposed. *See State v. Munoz-Rivera*, 190 Wn. App. 870, 895 361 P.3d 182 (Wash.Ct.App. 2015). Other courts are refusing to review or remand the alleged LFO error because the issue was not preserved below. *See State v. Duncan*, 180 Wn. App. 245, 253, 327 P.3d 699 (2014), *aff’d and remanded*, No. 90188-1, 2016 WL 1696698, 2016 Wash. LEXIS 573 (Wash. Apr. 28, 2016).

If this matter were to be remanded, Chad Whitney would have to be transported to Skagit County to appear before the trial court, appointed a new public defense counsel, take court and prosecutor time, and possibly file a

new appeal. The trial court in this case found that Chad Whitney was able-bodied and capable for paying the legal financial obligation, even with him being indigent for purposes of obtaining a public defender for his trial. The discretionary fees ordered total \$450. In this case, the cost of conducting a new hearing is high compared to the small amount of discretionary fees ordered; and at a new hearing on remand, the likelihood of finding that Chad Whitney is able to pay the discretionary fees is high because there is no evidence that his indigency would not end at any point in the future. *See Arredondo*, 190 Wn. App. at 538.

This issue is also not ripe for review as it is not a final order until the State attempts to enforce it. *Compare State v. Ziegenfuss*, 118 Wn. App. 110, 112, 74 P.3d 1205 (2003) (“Because [the defendant] has not yet failed to pay her legal financial obligations, ... her argument is not yet ripe for review.”), *review denied*, 151 Wn.2d 1016 (2004), and *Baldwin*, 63 Wn. App. at 310 (“[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation.”), with *Bertrand*, 165 Wn. App. at 404-05 (reviewing the merits of the trial court's sentencing conditions because a *disabled* defendant was *ordered to commence payment* of legal financial obligations within 60 days of entry of judgment and sentence while still incarcerated). *Lundy, Id.*

“[T]he Constitution does not require an inquiry into ability to pay at the time of sentencing. Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment.” *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997) (appellate costs statute addressed).

### 3. COUNSEL IN THIS CASE WAS EFFECTIVE

A criminal defendant has the right under the Sixth Amendment to the United States Constitution to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either part of the test, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

“There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of

reasonable professional assistance.” *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). If the attorney's conduct “can be characterized as legitimate trial strategy or tactics,” the conduct cannot be the basis of an ineffective assistance claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To meet the prejudice prong, a defendant must show, “based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation.” *McFarland*, 127 Wn.2d at 337.

Chad Whitney’s counsel failed to object at the sentencing hearing when the trial court imposed the small discretionary LFOs, finding that Mr. Whitney is able-bodied and capable of paying them. The record does not indicate that the able-bodied Mr. Whitney would be unable to repay the \$450 in discretionary LFOs. Chad Whitney cannot show any prejudice from this action and his counsel should be deemed to have been effective.

#### 4. APPEAL COSTS SHOULD BE IMPOSED

Appellate courts “may require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1) Appellate costs “shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure.” RCW 10.73.160(3). An award of appellate costs becomes part of the judgment and sentence. RCW 10.73.160(3). A defendant may petition the sentencing court at any time for the remission of

costs if the amount due “will impose manifest hardship on the defendant or the defendant's immediate family.” RCW 10.73.160(4). Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, (Wash. Ct. App. 2016).

An award of costs under this section is made after review is completed; thus, there is no conflict with RAP 15.2(e), which provides for a presumption of indigency only “throughout the review.” *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (Wash. 1997).

The Court in *Sinclair* looked to the fact that he was 66 years old and sentenced to 280 months in prison among other things. *Sinclair, Id.* Chad Whitney’s date of birth is 06/13/1985, making him 31 years old today, and was sentenced to 33 months in prison. The trial court below found that he was able-bodied and capable of paying fees despite his current indigency allowing appointment of a public defender. There is nothing in the record below or at this level that Chad Whitney’s indigency will last forever and that he will never have the ability to pay costs and fees. As such, if a cost-bill is submitted by the State if they prevail, appellate costs should be awarded to the State. As the review in this case has not been concluded, this issue is also not ripe for consideration.

**V. CONCLUSION**

Due to the aforementioned arguments, this Court should deny Chad Whitney's Appeal.

DATED this 27<sup>th</sup> day of June, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 

KAREN L. PINNELL, WSBA#35729  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

**DECLARATION OF DELIVERY**

I, Karen R. Wallace, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, addressed as Nielsen Broman Koch PLLC, 1908 E. Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 28<sup>th</sup> day of June, 2016.



\_\_\_\_\_  
KAREN R. WALLACE, DECLARANT