

No. 48201-1-II  
#15-1-00356-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

NORMAN RAY GOODRUM,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
COWLITZ COUNTY

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The Honorable Michael H. Evans, Trial Judge

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*APPELLANT'S OPENING BRIEF*

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR. . . . . 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. . . . . 2

C. STATEMENT OF THE CASE. . . . . 3

    1. Procedural Facts. . . . . 3

    2. Testimony at trial. . . . . 3

D. ARGUMENT. . . . . 14

    1. THE BURGLARY CONVICTION MUST BE REVERSED AND DISMISSED WITH PREJUDICE BECAUSE THE PROSECUTION FAILED TO MEET ITS BURDEN OF PROVING APPELLANT GUILTY AS CHARGED, BEYOND A REASONABLE DOUBT. . . . . 14

    2. THE PROSECUTOR COMMITTED REPEATED FLAGRANT MISCONDUCT WHICH COMPELS REVERSAL AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE. . . . . 18

    3. THE SENTENCING COURT ERRED IN FAILING TO CONSIDER ACTUAL ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS AND TERMS ON THE INDIGENT DEFENDANT. . . . . 22

    4. INTERPRETING SINCLAIR TO REQUIRE IMPOVERISHED APPELLANTS TO REBUT AN APPARENT PRESUMPTION OF IMPOSITION OF COSTS ON APPEAL FUNS AFOUL OF NOLAN AND IS UNCONSTITUTIONAL UNDER FULLER AND BLANK. . . . . 26

E. CONCLUSION. . . . . 36

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). . . . . 1, 2, 26, 28

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). . . . . 1, 2, 26, 29, 30,  
32, 34

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). . . . . 1, 2, 22-27, 32,  
34, 35

State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978). . . . . 18, 19

State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988). . . . . 16, 17

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). . . . . 19

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). . . . . 18

State v. Duncan, 185 Wn. 2d 430, \_\_ P.3d \_\_ (No. 90188-1) (2016). . . . . 24,  
25

State v. Giles, 148 Wn.2d 449, 60 P.3d 1208 (2003). . . . . 29

State v. Hendrickson, 129 Wn.2d 61, 917 P.3d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). . . . . 22

State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). . . . . 18

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2001). . . . . 19

State v. Smith, 104 Wn.2d 497, 707 P.2d 1306 (1985). . . . . 21

State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999). . . . . 22

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). . . . . 21

WASHINGTON COURT OF APPEALS

State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005). . . . . 15-17

<u>State v. Cleveland</u> , 58 Wn. App. 634, 794 P.2d 546, <u>review denied</u> , 115 Wn.2d 1029 (1990), <u>cert. denied</u> , 499 U.S. 948 (1991).....	14
<u>State v. Fateley</u> , 18 Wn. App. 99, 56 P.2d 959 (1977).....	17
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.3d 1076 (1996), <u>review denied</u> , 131 Wn.2d 1018 (1997).....	21
<u>State v. Jackson</u> , 150 Wn. App. 877, 209 P.3d 553 (2009).....	21
<u>State v. Klimes</u> , 117 Wn. App. 758, 73 P.3d 416 (2003), <u>overruled in part and on other grounds by State v. Allen</u> , 127 Wn. App. 125, 110 P.3d 849 (2005).....	15, 16
<u>State v. Kutch</u> , 90 Wn. App. 244, 951 P.2d 1139 (1998). . . . .	16
<u>State v. Miller</u> , 90 Wn. App. 720, 954 P.2d 925 (1998).....	16, 17
<u>State v. Sinclair</u> , 192 Wn. App. 380, 367 P.3d 612 (2016). . . . .	1, 2, 26-29, 32, 33, 36
<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993). . . . .	18, 19
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 864 P.2d 426 (1994). . . . .	19
<u>State v. Thomason</u> , 71 Wn. App. 634, 861 P.2d 492 (1993).....	15

FEDERAL AND OTHER STATE CASELAW

<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), <u>overruled in part and on other grounds by Stirone v. United States</u> , 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).....	18
<u>Burks v. United States</u> , 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).....	14
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).....	19
<u>Douglas v. California</u> , 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).....	29
<u>Draper v. Washington</u> , 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963).....	29
<u>Evitts v. Lucey</u> , 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).....	30

<u>Fuller v. Oregon</u> , 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).....	1, 2, 26, 30, 31, 34
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 368 (1970). . . . .	14
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	17
<u>McKane v. Durston</u> , 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894).....	29

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Art. I, § 9. . . . .	14
Article 1, § 22. . . . .	1
Fifth Amend.. . . . .	14
Fourteenth Amend.. . . . .	14
RAP 15.2(f). . . . .	27
RAP 2.5(a) . . . . .	23
RCW 10.01.160.....	25
RCW 10.73.160.....	31-34
RCW 9.41.010.....	3
RCW 9.94A.533(3). . . . .	3
RCW 9.94A.825. . . . .	3
RCW 9A.52.030(1). . . . .	3, 14
RCW 9A.56.020(1)(a). . . . .	3
RCW 9A.56.050(1). . . . .	3
RCW 9A.56.190. . . . .	3
RCW 9A.56.200(b). . . . .	3
Sixth Amendment. . . . .	1, 22

OTHER AUTHORITIES

Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. Mich. J. of L. Reform 323 (2009). . . . . 33

LaFave and Scott, *Substantive Criminal Law*, § 8.13(a) (1986 & 1995 Supp.). . . . . 15

A. ASSIGNMENTS OF ERROR

1. The conviction for second-degree burglary must be reversed and dismissed with prejudice under the due process clauses of the state and federal constitutions, because the prosecution failed to present sufficient evidence to prove the essential element of either an unlawful entry or an unlawful remaining.
2. Appellant Norman Goodrum was deprived of his rights to a fair trial when the prosecutor committed repeated misconduct which was so flagrant, prejudicial and ill-intentioned that it could not have been cured by instruction.
3. Mr. Goodrum was also deprived of his Article 1, § 22, and Sixth Amendment rights to effective assistance of appointed counsel by counsel's unprofessional failures, which prejudiced his client's rights.
4. The trial court erred in failing to consider ability to pay prior to imposition of costs and terms for legal financial obligations.
5. If this Court chooses to adopt the procedures Division One crafted in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), and change its positions regarding imposition of costs on appeal, interpreting Sinclair to apply a presumption that appellate costs will be imposed on an impoverished person who has exercised his constitutional right to appeal unless he objects and proves such costs should not be imposed is in direct conflict with the Supreme Court's decision against such a presumption in State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), and is further unconstitutional under Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).
6. Even if this Court were to change its position that State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), applies directly to the determination of imposition of costs on appeal because it interprets a different statute, the holding of Blazina provides sufficient evidence that our system of imposing costs on appeal in indigent cases is no longer constitutional and Blank no longer controls.
7. This Court should not exercise its considerable discretion regarding costs on appeal to impose them on an indigent appellant who has exercised his constitutional right to appeal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove second-degree burglary, the prosecution had to prove the appellant entered or remained unlawfully in a building with intent to commit a crime therein.  
  
Did the prosecution fail to meet that burden and is reversal and dismissal required where the money was stolen from a locked drawer in a motel office which was open to the public and there is no evidence there had been a withdrawal of the license or privilege to enter or remain?
2. In closing argument, the prosecutor told the jury that if Goodrum was not guilty he would have to be the victim of such bad luck he should buy a lottery ticket. He also told the jury that there was “no other explanation” besides appellant being guilty and “no evidence of any other suspects” for one of the crimes. Is reversal required for this flagrant, prejudicial misconduct?
3. In the alternative, even if the misconduct could possibly have been cured with objection and instruction, should reversal be granted based on counsel’s unprofessional failure to attempt to minimize the prejudice to his client?
4. Did the trial court err in failing to follow the mandates of Blazina and consider appellant’s actual ability to pay prior to imposing legal financial obligations and terms?
5. To the extent that Sinclair might be seen to create an additional briefing requirement which amounts to a presumption of imposition of costs on appeal against an indigent person who has exercised his constitutional right to appeal, does Sinclair run afoul of Nolan and the constitutional requirements of Fuller as set forth in Blank?
6. Although Division One held in Sinclair that Blazina did not apply because it did not interpret the appellate costs statute, should this Court exercise its considerable discretion to deny costs on appeal in the event the decision this Court ultimately issues is favorable enough to the prosecution that the state may have a claim it is the “substantially prevailing party” on review?
7. Should this Court decline to impose costs on appeal against appellant who was found indigent for trial and appeal where there has been no evidence presented of any change in his financial situation?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Norman Ray Goodrum was charged by information with first-degree robbery with a firearm enhancement, second-degree burglary and third-degree theft. CP 8-10; RCW 9A.01.010; RCW 9A.02.025; RCW 9A.03.033(3); RCW 9A.05.030(1); RCW 9A.06.020(1)(a); RCW 9A.06.050(1); RCW 9A.06.190; RCW 9A.06.200(b).

Pretrial hearings were held before the Honorable Marilyn Haan and Stephen Warning on March 30 and 31, 2015, and the Honorable Michael Evans on April 7, 27, May 21, June 16 and 23, July 9 and August 6 and 7, after which trial was held before Judge Evans on August 11 and 12, 2015. 1RP 1, 2RP 1, 3RP 1.<sup>1</sup> Mr. Goodrum was found guilty of the offenses. CP 82-84. On September 22, 2015, Judge Evans imposed standard-range sentences. CP 90-102.

Mr. Goodrum appealed and this pleading follows. See CP 106-19.

2. Testimony at trial

Brandon Excell was working at what was then a Travel Lodge hotel in Longview, Washington, in March of 2015, as a front desk person and also the “general manager.” 2RP 97. He described his duties as including checking in of guests, helping with rooms, keeping the office clean and helping with laundry - “basically everything” except room

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<sup>1</sup>The verbatim report of proceedings consists of three volumes, each separately paginated, which will be referred to as follows:  
the volume containing the proceedings of March 30 and 31, April 7 and 27, May 21, June 16 and 23, July 9, August 6 and 7, September 8 and September 22, 2015, as “1RP;”  
August 11, 2015, as “2RP;”  
August 12, 2015, as “3RP.”

cleaning. 2RP 97. On March 6, he was called to a room and when he returned, he saw that someone appeared to have “ripped open” the cash drawer in the office and stolen the cash inside. 2RP 97.

Excell said the call had come from Room 111, which was rented to “George Paul Andes.” 2RP 98. The person who called was a woman and she had reported a problem with the toilet. 2RP 98.

Excell left the motel office open. 2RP 109. He said he did not bother finding the key for the office and locking the door when he left, thinking he would be back quickly. 2RP 109.

The office is where people would come in and ask about rooms or get registered. 2RP 126. When asked how many people, “on average,” he talked to there every day, Excell admitted that it was probably about 15-20 people a day during winter months. 2RP 126.

When Excell got to the room, he had found that the chain was off inside the tank, so he hooked it back up and fixed it. 2RP 98-99. As he was leaving, the people there told him that housekeeping had not left them towels that day, so he went and got some from the laundry room, leaving them in the room when he came back and they were not there. 2RP 99.

Excell opined that the problem with the toilet seemed “off” to him, because it seemed unusual for the chain to unhook, so he thought it might have been done “on purpose,” although he did not know. 2RP 100-101, 132.

According to Excell, he heard a man’s voice in the background when the woman called for help with the toilet. 2RP 99. Excell was fairly sure that the man speaking was not Andes, “[b]ecause Mr. Andes has been

a regular customer of sorts for years,” and Excell thought he knew Andes’ voice “well enough to recognize it if I hear it.” 2RP 99. The prosecutor also asked Excell if it was “fair to say” he was “better with voices than names,” and Excell responded, “[y]es.” 2RP 100.

When he returned to the office, Excell said, he noted the wood facing on the desk drawer which held the cash and served as a sort of cash register had been ripped off. 2RP 101. He opened it up and saw there was no cash left, so he tried to determine what was missing by checking what he thought he had “taken in” with how much money was still “in the back,” presumably another part of the motel. 2RP 101. Excell could not remember the amounts, because “it was several months ago,” but thought it was somewhere around \$400. 2RP 101-102.

At that point, Excell locked the front door, locked the back door, called police and pulled up surveillance footage. 2RP 102. He did not recognize the person shown entering the motel office during the relevant time. 2RP 110.

Almost two weeks later, on March 18, at about 9:30 at night, Excell was working in the office when someone came in the door, pointed a gun at him and demanded the money in the drawer. 2RP 110-11. Excell grabbed the drawer key, took the money out and gave it to the person. 2RP 110. Excell said the person asked if there was any money beneath the drawer and Excell picked it up to show them there was not. 2RP 110. The person took the money and left. 2RP 111.

Excell could not describe the gun, saying he was “not much of a gun person” and it was not “the largest priority” for him. 2RP 113. He

could tell the gun appeared real enough that he was “not willing to risk it” by challenging the man. 2RP 113. Excell had not been robbed before, nor had the motel. 2RP 114.

The person who came in was wearing a mask and Excell could not see their face. 2RP 115. Excell also could not really see anything else about the person, because they were wearing a hood. 2RP 115.

But Excell maintained that, somehow, he found the person’s voice familiar. 2RP 115. He admitted it “wasn’t immediately placeable,” but said he “knew” he had heard it before. 2RP 115. Excell told police that the voice was not familiar “enough” for him to be able to “immediately” identify the speaker. 2RP 115.

Only after spending the “next week or so speaking with the police about it and thinking back on the voice” did Excell “eventually realize why,” deciding that the voice he had heard during the very brief incident on the 18<sup>th</sup> sounded like the voice of a person he had been in an argument with several weeks before. 2RP 121-22.

That argument had occurred when Excell had given a room deposit to people who had checked out of the room, not the person who had rented it and left the deposit. 2RP 122. When the man who had actually given the motel the money returned to pick it up, Excell told him it had already been returned and the motel did not owe anything. 2RP 122. Excell said he was trying to explain the situation calmly but the man was raising his voice “in a disrespectful manner.” 2RP 136. Excell admitted, however, that the man wanted his money and Excell was not giving it back. 2RP 134-38. And although Excell said he was “somewhat concerned” during

the argument about a potential physical response from the man who was a “somewhat physically imposing person” in comparison to Excell, the manager admitted that, in fact, he could not really say if the man was larger or smaller than Excell, because during the argument, Excell had remained seated. 2RP 145-46.

Excell himself was not happy being confronted. 2RP 136-37. He gets “[e]xceptionally” stressed when there is a confrontation and has to work to “try very hard to remain collected under pressure.” 2RP 141. He also conceded it can be stressful for him to “maintain eye contact” with people looking right in his face. 2RP 141-42. After 20-30 minutes of arguing, he finally just gave the man his \$20 back just to be done with it. 2RP 142.

At trial, Excell would identify the man who wanted his deposit back as probably Norman Goodrum 2RP 122. Excell was not sure, he admitted, because “[i]t has been several months since then,” so he could not say “with one hundred percent certainty” but, at trial when he saw Goodrum at the defense table, Excell said, “the Defendant’s face is familiar to me and does remind me of that situation.” 2RP 122. Excell was also not “one hundred percent” on his identification of Goodrum from a photographic montage he was shown. 2RP 127, 135. That montage was *not* for him to identify the person who had pointed a gun at him on the 18<sup>th</sup> but instead for Excell to try to identify the man with whom he had the argument weeks prior to that. 2RP 127, 135.

Excell said he might not remember someone he had spoken to once but said if you were a “regular customer” or, “in this case, the situation

which I speak to you is memorable,” it would make him “more inclined to remember” the voice when he heard it again. 2RP 122-23.

Excell would testify at the later trial that, while the night of the 18<sup>th</sup> he thought the voice was “instantly familiar” he had not been “instantly able” to identify it, but it took him “more remembering the date the argument had happened, so that I could associate it with the correct person that - - I was able to associate it with an argument I’d had, but. . .” 2RP 126. He admitted it had been “roughly a month past” at that point and “it was not fresh in my mind what had happened.” 2RP 126. Excell also talked to between 15-20 people a day on average and time had passed. 2RP 126.

Sharon Hockett was the woman who called Excell about the toilet that day, although she had the date wrong. 3RP 14, 20. She admitted that she was addicted to heroin at the time and had trouble with her memory. 3RP 14, 20.

That day, Hockett went to do some “business” with a man she knew, “Andes,” who had rented a room at the motel. 3RP 15. Hockett was going there to sell him her “sexual services,” because she wanted to get more money to “stay high” on drugs. 3RP 15-16. Andes usually bought her services around the first of the month at the same motel, and Hockett had stayed there a few times before. 3RP 26.

Hockett had been convicted of theft and “retail theft” in 2009 but was allowed to say she “completed the whole program. . .with no issues in five years.” 3RP 21.

Hockett admitted, however, that she was still using heroin. 3RP

21. In fact, she had injected the drug earlier that day on the day she testified. 3RP 21-22, 277.

Her addiction was so strong that, she said, she would be “no good” to the state if she had not abused heroin before testifying, because she would “be sick” without the drug. 3RP 21. She then said she had injected heroin before testifying “[j]use to make myself well, not to make myself all high.” 3RP 21-22. She had been using for 8-9 years “[o]ff and on” and thought she had a “fairly good idea” of what “maintenance level” of heroin she had to ingest to get herself “out the door.” 3RP 22.

Hockett maintained that, at trial, while she was “a little nervous,” it had “nothing to do with the heroin” she had shot up earlier. 3RP 22. In fact, she said, she had done a little less than usual before her testimony, “just to make sure,” and she was “probably just a tiny little bit withdrawing” from heroin as she sat there in the courtroom. 3RP 22.

Hockett was napping at the time Andes called for her, around noon, so she did not arrive for a couple of hours. 3RP 15. When she got there, Hockett said, Andes “dinked around,” said stuff about going to the thrift store to buy some clothes for her and was “pretty drunk.” 3RP 16. They went “up to Goodwill,” the thrift store, where they got separated. 3RP 16. She went back to the motel and he had left the key to the room in the door, so anyone could get in. 3RP 16.

Hockett went into the room and used the phone to call Andes, trying to figure out where he was and he said he was at an automatic teller machine getting money to pay her and would meet her back at the room. 3RP 16.

She waited a long time but he did not come back. 3RP 16. While she waited, she watched television and sat around, but at some point she had the door open and she was starting to pace because she thought he was “taking forever.” 3RP 16-17. At some point, she left to walk to a nearby “AM/PM” mini-mart and saw someone she knew as “Norm” in front of something called “Topper’s,” which was next to the motel. 3RP 17. Hockett walked by, saying nothing, but started chatting when she saw he was still sitting there when she left the store and headed back. 3RP 17. They spoke briefly and she went back to the motel room and kept waiting. 3RP 17. She made one more trip to the AM/PM to try to meet up with her “job,” but he did not show. 3RP 18.

Hockett’s version of events sometimes got confused and she would testify at the later trial that her lack of recall was because “[t]his was six months ago, seven months ago.” 3RP 19.

At the time of the incidents in March, Hockett was a heroin addict and was “using” that drug “[q]uite a bit.” 3RP 20. She conceded that the drug has a “great effect” on her memory, because she was “knocked out” and would “black out a lot.” 3RP 20, 27. She said that was part of the reason that she was having trouble “remembering exactly what happened[.]” 3RP 20. She also said that, at the time, things really did not seem “as important.” 3RP 20.

At some point, however, she knew she had let “Norman” in to use the bathroom. 3RP 20. She did not really remember what he was wearing but said she thought he was wearing a white t-shirt. 3RP 20. She did not really remember what she saw “on the surveillance video,” saying it was

“too brief” and “quick.” 3RP 21.

Hockett had been shown the surveillance video by police in the end of March or beginning of April. 3RP 23. She had re-watched the video again the day before testifying, and she said it “triggered a lot of memories.” 3RP 24. Hockett said “even a normal, functioning brain is going to have trouble remembering stuff six months ago, let alone an addict’s brain.” 3RP 24.

When she was interviewed closer in time to the event, Hockett told police Goodrum was wearing a white t-shirt and jeans, but said nothing about a sweatshirt. 3RP 24. Hockett said she talked to Goodrum about 3-4 minutes in the room. 3RP 25.

After the money went missing, Hockett admitted, she was questioned about whether she was herself involved in the theft. 3RP 27. In fact, she was asked that question multiple times and was worried the police might think she was involved in the crime. 3RP 28. She said she was “upset” and “felt stupid.” 3RP 28. When asked if that would cause her to want Goodrum to be convicted, she said she did not want that based on being “upset at him or anything” but only “if he did it.” 3RP 27-28. She said, “I believe that he did.” 3RPR 27-28.

Hockett, however, confused the incidents and thought that there had been a robbery with a gun on March 6. 3RP 28. When asked if “not everything is clear” to her, she responded, “of course not, it was seven months ago.” 3RP 30. She denied being in on the burglary herself. 3RP 30.

Hockett conceded that she “needed money pretty bad” that night

and in fact did “every day” because she had a big habit for drugs. 3RP 31-32. She was “pretty desperate” for money. 3RP 32. When she spoke with police, she was very clear that she did not get any money and was upset. 3RP 32.

Norman Goodrum was arrested and interviewed by Longview Police Department (LPD) officer Steve Dennis. 2RP 147. Goodrum agreed to answer questions and said he had rented a room at the Travel Lodge in Longview on February 27 for some friends, Brandy and Justin. 2RP 148. Goodrum said that, when he went back on the 29<sup>th</sup> to get his deposit, he found out the manager had given the money to Brandy and Justin and they got into an argument about it. 2RP 149.

Officers showed Goodrum a photograph of Hockett and Goodrum knew her as “Sharon” from being at the hotel in the past. 2RP 151. Goodrum also said that she had let him come inside and use the bathroom one day when she had a room there, and he broke the toilet. 2RP 151, 159. When shown a still photograph taken outside Room 111 on March 6, Goodrum said it was him, and he was wearing a gray, hooded “fox” sweatshirt he had borrowed from his brother, as well as riding his brother’s bike. 2RP 151, 152.

At Goodrum’s home, officers found a gun cleaning kit in a “Cabela’s” store bag in the room they said was Goodrum’s. 2RP 152. No firearm was found. 2RP 167. The gun-cleaning kit had a worn outside case and looked like parts of it were “fairly dirty” and looked used. 2RP 167.

An officer was allowed to testify that, based on his viewing of the

video from March 18, he went and took pictures and tried to “calibrate” and compare, concluding the man involved was probably about 6 feet 2 inches high. 3RP 54, 3RP 60. The officer admitted that the cap and “hoodie” the man in the video was wearing might make him look taller than he was, but said he was also kind of “bent down,” so there was not really a “completely accurate” view of height. 3RP 64-65. The man involved appeared to be wearing a “fox” sweatshirt but it also appeared to have blue on it, although an officer thought that appeared to be “haze” due to “lighting.” 3RP 60.

Alexander Bell remembered March 18<sup>th</sup>, because it was his girlfriend’s birthday. 3RP 70. She had been calling on his cell phone, wanting him to spend time with her that day, when he was with Goodrum. 3RP 70-71. Bell, Goodrum and a few other friends were at Goodrum’s home, having all gotten together at about 4 or 5 in the afternoon and hanging out five or six hours, eating food and playing video games. 3RP 71-72. Bell finally got dropped off at his girlfriend’s house about 11, to spend the last hour of her birthday with her. 3RP 71-72. They had only dated a really short period of time and it did not last long. 3RP 74.

Bell identified several other people who had been there, too. 3RP 72-73. Bell had only been friends with Goodrum for about a year at the time. Bell admitted prior convictions for several crimes of dishonesty. 3RP 73.

D. ARGUMENT

1 THE BURGLARY CONVICTION MUST BE  
REVERSED AND DISMISSED WITH PREJUDICE  
BECAUSE THE PROSECUTION FAILED TO MEET ITS  
BURDEN OF PROVING APPELLANT GUILTY AS  
CHARGED, BEYOND A REASONABLE DOUBT

It is by now well-settled that both the state and federal due process clauses require the prosecution to bear the full weight of the burden 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.; Fourteenth Amend.; Art. I, § 9. When the prosecution fails to meet this burden, reversal and dismissal with prejudice is required, as the prosecution is not allowed a second chance to marshal its evidence and prove guilt. See Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

In this case, the conviction for second-degree burglary must be reversed, because the prosecution failed to present sufficient evidence to prove all of the essential elements of that crime, beyond a reasonable doubt.

Second-degree burglary is defined in RCW 9A.52.030(1), as follows:

A person is guilty of burglary in the second degree 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 dwelling.

It is the essential element of unlawful entry or “remaining” which

the state failed to prove. Unlawful “entry” and unlawful “remaining” are separate means of committing the same crime. 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). While the two means are not necessarily “repugnant” to each other, they are different factually and require different proof. Allen, 127 Wn. App. at 127-28.

More specifically, a person enters unlawfully if they enter without “invitation, license of privilege.” See RCW 9A.52.010(3). A person remains unlawfully if they have lawfully entered but 1) their invitation, license or privilege has been revoked or impliedly limited, 2) the person’s conduct violates those limits and 3) the person acts with intent to commit a crime in the building. See State v. Thomason, 71 Wn. App. 634, 861 P.2d 492 (1993); RCW 9A.52.010(3).

But entry into a building open to the public is by definition **not** unlawful entry, even if the defendant has the intent to commit a crime inside. See Allen, supra. An “unlawful entry” is one which is “uninvited.” See id. The “unlawful” nature of the entry is the current iteration of the common law requirement of a “breaking and entering” in burglary, no longer requiring a “breaking” to prove the crime but encompassing the concept of the illegality of the entry by requiring that it have been “unlawful.” See LaFave and Scott, Substantive Criminal Law, § 8.13(a) (1986 & 1995 Supp.).

Where, however, a place is open to the public, there is no illegal

“entry” by a member of the public unless there is notification of exercise of a right to exclude. See State v. Kutch, 90 Wn. App. 244, 247, 951 P.2d 1139 (1998). Thus, in Kutch, where the defendant shoplifted from a store in a shopping mall and was given a written form notifying him that his “invitation to enter” the mall was revoked for a year, which he signed, his subsequent shoplifting of clothes from the mall before the year was up could amount to burglary. 90 Wn. App. at 246.

Similarly, a defendant did not commit the crime of burglary when he entered an open self-service car wash, broke into several cash boxes and took money from them. State v. Miller, 90 Wn. App. 720, 722, 954 P.2d 925 (1998). The prosecution argued that, because no owner would grant a license or privilege to enter with intent to commit a crime, any “license, invitation or privilege is granted only for a legitimate purpose” and entry or remaining for an improper or criminal purpose would obviously be a violation of the “license, invitation or privilege” to enter. Miller, 90 Wn. App. at 724-25. The Miller Court soundly rejected this theory, noting, “Washington courts have never held that violation of an implied limitation as to purpose is sufficient to establish unlawful entry or remaining.” 90 Wn. App. at 725; see also, State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988); Allen, 127 Wn. App. at 136-37; Klimes, 117 Wn. App. at 766-77.

Indeed, prosecutors have repeatedly tried to convince courts to follow this theory that entering a place open to the public converts the entry into one without “license” and thus makes it unlawful. See e.g., Allen, supra, Klimes, supra. Courts, however, have rejected the idea,

because it would convert all indoor crimes into burglaries. See Collins, 110 Wn.2d at 261-62; Allen, 127 Wn. App. at 137. As one court declared, nothing in the law “supports the argument that the harboring of criminal intent” somehow “violate[s] an implied limitation” or establishes “revocation of any license, invitation or privilege.” Miller, 90 Wn. App. at 727.

In this case, the prosecutor never presented any evidence that the entry into the open, unlocked motel office was “unlawful” or that there was somehow unlawful “remaining.” Instead, in closing argument, he simply declared the motel had been “burgled” and that the only question was “who done it.” 3RP 94; 3RP 96 (“a bunch of witnesses” said “that basically there was a burglary”). Indeed, throughout, the prosecutor referred to “the burglary” without ever establishing there had been any unlawful entry or remaining. 3RP 95, 96, 97-102.

Evidence is only sufficient if, taken in the light most favorable to the state, any rational trier of fact could have found that the prosecution proved all of the essential elements beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). This means that there must be more than a mere scintilla of evidence; there must be “substantial evidence,” defined as enough evidence to “establish circumstances from which the jury could reasonably infer” the relevant fact. See State v. Fateley, 18 Wn. App. 99, 102, 56 P.2d 959 (1977).

Here, no reasonable trier of fact could have found that the state proved that there was any unlawful entry or unlawful remaining in the

open, unlocked motel office into which the public regularly went. That failure to prove an essential element of the crime of burglary is fatal to the conviction. Because there was insufficient evidence to prove all the essential elements of the crime, reversal and dismissal of the second-degree burglary conviction is required. Further, because that conviction was counted in the offender scores for the other offenses, remand for resentencing with reduced offender scores is required for the other offenses.

2. THE PROSECUTOR COMMITTED REPEATED FLAGRANT MISCONDUCT WHICH COMPELS REVERSAL AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Unlike defense attorneys, prosecutors enjoy a special status as “quasi-judicial” officers. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). As a result, the words of the prosecutor carry great weight with the jury. See State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). With this special status, however, comes added responsibility, which includes the duty to seek justice instead of acting as a “heated partisan” by trying to gain conviction at all costs. See Charlton, 90 Wn.2d at 664-65; State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969).

Because of their special role, the acts of the prosecutor may not

only amount to misconduct but also may have a significant impact on the defendant's due process right to a fair trial. See State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2001); see Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Only a fair trial is a constitutionally proper trial, as only with a fair trial can we be confident that our system has worked and guilt properly decided. See State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). When a prosecutor fails his duties and commits misconduct, he thus not only denigrates the integrity of the prosecutor's office but also deprives the defendant's of the due process right to a fair trial. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In this case, the prosecutor committed multiple acts of misconduct which, taken separately or together, compel reversal. Further, counsel's unprofessional failures regarding the repeated misconduct prejudiced Mr. Goodrum, so that Goodrum was deprived of not only his due process rights to a fair trial but also his constitutional rights to effective assistance of appointed counsel.

To understand the gravity of the misconduct and why it compels reversal, it is crucial to look at the issues at trial. Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18.

Here, there was no dispute that someone took money after breaking into the cash drawer in the open motel office on March 6. And there was no dispute that someone came into the motel on March 18 with what

appeared to be a gun, demanding and leaving with money. The only issue in the case was whether the prosecution had proven, beyond a reasonable doubt, that the person who committed those crimes was Mr. Goodrum.

All of the misconduct in this case went to that crucial question and the jury's ability to fairly and impartially decide that issue.

In closing argument, the prosecutor repeatedly indicated to the jury that Goodrum was guilty because there was no evidence to prove he was not. First, he said that, if Goodrum was not guilty he was the victim of bad luck to have been at the motel wearing the sweatshirt on May 6 when the cash drawer was broken into. Then, in rebuttal, the prosecutor argued that if Goodrum was actually not guilty, he should probably "buy a lottery ticket because he's used up a lifetime of bad luck to get all of these coincidences[.]" 3RP 123.

The prosecutor then said, "we start with what we know," 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.**" 3RP 127 (emphasis added).

Also in rebuttal closing argument, the prosecutor referred to a gun case which was not in evidence, saying:

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.**

3RP 130 (emphasis added). A few moments later, the prosecutor returned to the "no evidence" theme, responding to the suggestion that Excell and Hockett might have set up Goodrum, saying there was no evidence of that,

but further declaring, “**and there’s no evidence of any other suspects for the robbery.**” 3RP 130 (emphasis added).

These arguments were serious, flagrant, ill-intentioned and prejudicial misconduct which compel reversal. There is no question that counsel are permitted “latitude to argue the facts in evidence and reasonable inferences” flowing therefrom. See State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). A defendant has no duty to present evidence to rebut the state’s case; it is the prosecution which must bear the full weight of the burden of *proving* that case in the first instance. See State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (2009). A prosecutor commits misconduct in arguing that the jury should find the defendant guilty because there was no evidence showing he was not. See State v. Fleming, 83 Wn. App. 209, 215, 921 P.3d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

In addition, it is highly prejudicial and improper for the prosecutor to argue facts not in evidence. Stith, 71 Wn. App. at 18. There was no evidence of a gun “case” introduced at trial, yet the prosecutor used the specter of one, said Goodrum had one and implied it belonged to the gun seen in the video of March 16.

In the unlikely event the Court finds any of the misconduct could have been cured had counsel objected and requested a proper instruction below, reversal is still required, because counsel was ineffective in his failures on this issue below. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v.

Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984);  
State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.3d 563 (1996),  
overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70,  
127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth. Amend.; Art. I, § 22.  
Counsel is ineffective despite a strong presumption to the contrary if his  
conduct falls below an objective standard of reasonableness and  
prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973  
P.2d 1049 (1999).

Those standards are amply met here. As noted *infra*, the  
misconduct was flagrant and prejudicial. Yet counsel sat mute, allowing  
the prosecutor's misconduct to go unchecked.

If the Court finds that the misconduct does not compel reversal  
under the standard applicable for misconduct to which counsel has  
objected below, it should nevertheless reverse based on counsel's  
unprofessional failure to request such cures below. There could be no  
legitimate tactical reason to fail to object to the serious, prejudicial  
misconduct in this case. Reversal and remand for a new trial is required.

3. THE SENTENCING COURT ERRED IN FAILING TO  
CONSIDER ACTUAL ABILITY TO PAY BEFORE  
IMPOSING LEGAL FINANCIAL OBLIGATIONS AND  
TERMS ON THE INDIGENT DEFENDANT

In Blazina, *supra*, the state Supreme Court held that a trial court is  
prohibited from imposing legal financial costs on any defendant in a  
criminal case unless the court makes a specific finding that the person has  
the present or future ability to pay those costs. 182 Wn.2d at 835. Further,  
the Court held, the finding must be based on a detailed look at such things

as the length of incarceration, existing financial obligations and whether the defendant qualified for a public defender and thus was indigent. Id.

Blazina was a highly unusual, historic decision. In that case, the Court relied on an extremely rare method of reaching an issue, because it felt the urgency to do so in the interests of justice. 182 Wn.2d at 833-34. More specifically, the Blazina Court recognized that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” 182 Wn.2d at 834. The Court chronicled widespread “problems associated with LFO’s imposed against indigent defendants,” including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems “caused by inequitable LFO systems.” Id.

The Court then noted the flaws in our own state’s LFO system and the system’s “problematic consequences.” Id. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. Id. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford \$25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because

courts retain jurisdiction until LFOs are completely paid off. 182 Wn.2d at 836-37. This increased involvement “inhibits reentry,” the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other “reentry difficulties increase the chances of recidivism.” Id. Finally, the Blazina court pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. Id. The Court also noted that certain counties seem to have higher LFO penalties than others. Id. The fact that the LFO system effectively ensured that people in poverty would be supervised by courts far longer than those who could pay off their LFOs right away - and the resulting social costs of that continuing contact - were also of grave concern. Id.

Blazina represented historic recognition by our highest state court that the legal financial obligation system has become an impediment to the very principles of the system it seeks to serve. It applies disproportionately to people in poverty. It ensures those people will be under the jurisdiction of the courts for far longer than people with means. And it fails to serve the principles underlying the SRA. That is why the Blazina Court took such an extraordinary step of granting relief even absent objection.

Our highest Court has recently reaffirmed Blazina, supra, even extending it to apply in cases where there was no objection below. See State v. Duncan, 185 Wn. 2d 430, \_\_ P.3d \_\_ (No. 90188-1) (April 28,

2016). In Duncan, the Supreme Court remanded to the trial court for resentencing and proper consideration of ability to pay, even though the defendant had not raised the issue below. After first noting that the imposition and collection of LFOs impacts constitutional issues, the Court rejected the idea that the issue was somehow waived or should not be addressed, stating, “[h]ad Duncan objected at trial to the LFOs sought by the state, the trial court *would have been obligated to consider* his present and future ability to pay before imposing the LFOs.” (Emphasis added). Further, the Court referred to making the required findings for even those portions of the LFOs declared “non-discretionary.” 185 Wn.2d at \_\_\_ (slip op. at 2 n. 3).

Just like the defendants in Blazina, Mr. Goodrum is indigent. Preprinted on the judgment and sentence form in this case was the following “boilerplate” language, condemned in Blazina:

**Legal Financial Obligations/Restitution** The court has considered the total amount owing, the defendant’s present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. (RCW 10.01.160).

CP 94 (emphasis in original). Also, under the portion of the judgment and sentence regarding confinement, the Court also placed a “check” mark in boilerplate language preprinted on the judgment and sentence which provided as follows:

[x] THAT THE DEFENDANT MUST HAVE HIS/HER LEGAL FINANCIAL OBLIGATIONS PAID WITHIN **18/24 (CIRCLE ONE)** MONTHS. PAYMENTS TO BE MADE AS SET FORTH IN PARAGRAPH 4.1 OF THIS JUDGMENT AND SENTENCE, UNLESS OTHER ARRANGEMENTS HAVE BEEN MADE WITH THE

COWLITZ COUNTY SUPERIOR COURT  
COLLECTION DEPUTY.

CP 95-96 (emphasis in original). Section 4.4 of the judgment and sentence provided that payments are to begin immediately - despite Mr. Goodrum's being sent to prison. CP 101. The payments are to be not less than \$25.00 per month and the amount ordered bears interest from the date of the judgment until payment in full." CP 101. The judgment and sentence further told the defendant that he would remain under jurisdiction of the court to pay LFOs regardless of the statutory maximum for the crime, and that **"Failure to make the required payments or advise of any change in circumstances is a violation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 in jail."** (Emphasis in original). The trial court ordered a \$500 victim fee to be subject to these rules. CP 101-102. But the court did not make any specific findings about Mr. Goodrum's actual financial situation, ability to pay, existing financial and other obligations as required under Blazina before ordering that amount and those terms. Reversal and remand for resentencing is required.

4. INTERPRETING SINCLAIR TO REQUIRE IMPOVERISHED APPELLANTS TO REBUT AN APPARENT PRESUMPTION OF IMPOSITION OF COSTS ON APPEAL FUNS AFOUL OF NOLAN AND IS UNCONSTITUTIONAL UNDER FULLER AND BLANK

In Sinclair, supra, a defendant/appellant unsuccessfully appealed his criminal conviction and, after the decision on the merits so holding, the prosecution filed a request for costs. Sinclair, 192 Wn. App. at 385. The defendant objected. Id. On reconsideration, the prosecution urged

Division One to impose costs on appeal against an unsuccessful appellant in *every* criminal case, claiming that the statutory opportunity for a defendant to later bring a request to remit costs was sufficient to ensure that appellate costs were proper. 192 Wn. App. at 388-89. While Division One disagreed, it also disagreed with this Court that Blazina applied, instead finding that the issue of costs on appeal involved a different statute and more than just a question of “ability to pay.” Sinclair, 192 Wn. App. at 388-89. Further, the Court disagreed with this Court’s remedy of ordering costs on appeal in such situations conditioned upon a finding of remand by the trial court that the indigent defendant had “ability to pay” as defined in Blazina. Sinclair, 192 Wn. App. at 388-89.

The Sinclair Court then crafted two new pleading requirements; 1) an appellant must set forth “[f]actors that may be relevant to an exercise of discretion” to impose appellate costs in case there is a future request by the respondent for such costs to be imposed, and 2) the prosecution must make arguments regarding this issue in its “brief of respondent” in order to “preserve the opportunity to submit a cost bill” should it later decide one is warranted. 192 Wn. App. at 390-91.

The Sinclair Court also ruled on the merits of the request in that particular case. 192 Wn.2d at 391-92. Division One recognized a presumption of indigence which applies throughout the appeal under RAP 15.2(f), unless it is rebutted by the state. Sinclair, 192 Wn. App. at 391-92. That Court then rejected the idea that imposition of costs on appeal was proper because of the defendant’s prior solid work history and the lack of evidence that he might be “unable” to work in the future. Id.

Instead, the Court pointed out that Mr. Sinclair had been found indigent both at trial and on appeal, and there was “no reason to believe Sinclair is or ever will be able to pay \$6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent).” Id. Because there was no trial court order that Sinclair’s financial situation had improved or was likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s if he did not die in prison, the Court exercised its discretion to deny the state’s request for appellate costs. Id.

This Court has not yet indicated if it will follow the decision in Sinclair and change its existing procedures. But Sinclair should not - and cannot - be interpreted to create a presumption that costs on appeal will be imposed against an indigent appellant unless they meet a requirement of proving otherwise, because of the fundamental constitutional rights involved.

At the outset, this very question has been decided by our highest Court. In Nolan, supra, the prosecution argued that costs should be awarded virtually as an “automatic” process in every criminal case, even if the defendant is indigent and the appeal not wholly frivolous. Nolan, 141 Wn.2d at 625-26. The Court rejected those claims. Even if a party establishes that they were the “substantially prevailing party” on review, the Court held, the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide in an exercise of its discretion whether to impose costs even when the party seeking costs is technically entitled to them. Nolan, 141 Wn.2d at 628.

There is a second problem with interpreting Sinclair to provide that an appellant's failure to preemptively object to imposition of costs on appeal will result in automatic imposition of such costs. In order to fully understand this issue, it is important to look at the rights involved. There is no federal constitutional right to appeal a criminal conviction. See McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894). Our state constitution, however, guarantees such a right. Blank, 131 Wn.2d at 244-46.

As a result, anyone convicted of a crime in our state courts has a constitutional right to a full, fair and meaningful appeal - and further, to appointed counsel at public expense if the person is indigent. See State v. Giles, 148 Wn.2d 449, 450-51, 60 P.3d 1208 (2003); Blank, 131 Wn.2d 244.

The state constitutional right to appeal is not, however, the only right involved. Where, as here, a state creates a right, federal due process and equal protection mandates apply to that right and preclude the state from burdening it in particular ways. See Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). As a result, when there is a state-created constitutional right to appeal, that appeal must be more than a "meaningless ritual" and must comport with basic notions of fairness. See Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). The due process clause of the Fourteenth Amendment guarantees a criminal appellant who is pursuing her first appeal of "right" in a state court certain minimum safeguards to make the appeal "adequate and effective," including the right to counsel. Id. Further, even though no

federal right to *appeal* is involved, federal due process and equal protection mandates apply to the procedures used in deciding a first appeal as right. See Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

Thus, state constitutional rulings are not the only arbiter of the constitutionality of a state practice in an appeal brought as a matter of state constitutional right.

This intertwining of federal and state constitutional principles is at issue here, where an impoverished person chooses to exercise a state constitutional right and is required to pay to do so. In general, it is unconstitutional to require payment for the exercise of a constitutional right. See Fuller, supra. In Fuller, however, the U.S. Supreme Court upheld a statute requiring an indigent defendant who received appointed counsel on appeal due to poverty to later repay that cost if he had become able. 417 U.S. at 45.

In reaching its conclusion, the Fuller Court relied on several crucial features of the statute in question. First, the statute did not make repayment mandatory. 417 U.S. at 45. Second, it required the appellate court to “take into account the defendant’s financial resources and the burden that payment would impose.” See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller). Third, the statute provided that no payment obligation could be imposed “if there was no likelihood the defendant’s indigency would end.” Fuller, 417 U.S. at 46. Fourth, under the statute, no convicted person could be held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

Based upon these careful proscriptions on how the repayment obligation was imposed and enforced, the Fuller Court was convinced the relevant statute did not penalize those who exercised their rights but simply “provided that a convicted person who later becomes able to pay . . . may be required to do so.” 417 U.S. at 53-54. Because the legislation was “tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to to meet it without hardship,” the statute was constitutional. 417 U.S. at 53-54.

In Blank, supra, our Supreme Court examined Fuller and upheld our state’s own “recoupment” statute for appeals, RCW 10.73.160. That statute provides, in relevant part:

- (1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.
- (2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.
- (3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence.
- (4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or

of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

Blank, 131 Wn.2d at 245; quoting, RCW 10.73.160.

In upholding the constitutionality of our statute, the Blank Court was convinced that the remission procedure in subsection (4) of the statute would operate to ensure that the statute was consistent with the mandates of Fuller. Blank, 131 Wn.2d at 246. Indeed, the Blank Court was confident that trial courts would be following the analysis and requirements of Fuller in deciding issues regarding enforcement and collection of costs on appeal. Blank, 131 Wn.2d at 246.

Blank was decided in 1997. But last year, in Blazina, the Supreme Court issued its decision which cast serious doubt on the continuing validity of Blank - and whether the recoupment statute can still be deemed "constitutional." Blazina dealt with the related issue of imposition of trial costs on an indigent defendant if he is convicted of a crime. 182 Wn.2d at 832. But nearly all of the very same considerations apply for costs imposed as a result of an unsuccessful appeal - and more. Although there is no evidence of racism in determining costs on appeal, there is the added concern that imposing costs on appeal amounts to a requirement of payment to exercise the constitutional right to appeal.

And while Division One was correct when it noted, in Sinclair, that Blazina examined a different statute, it is a distinction without real difference. RCW 10.01.160(3) provides, in relevant part, "[t]he court shall

not order a defendant to pay costs unless the defendant is or will be able to pay them,” and that “the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” In contrast, in RCW 10.73.160, there is no explicit requirement of “ability to pay;” rather there is simply a discretionary grant of authority, allowing that courts “may require an adult offender” to pay appellate costs, leaving it up to the Court’s discretion to decide those parameters. Some of those have been set forth in the procedures of RAP Title 14, which limits costs to only those for the “substantially prevailing party.”

By statute, an award of costs on appeal becomes part of the judgment and sentence, so that it may be collected against by the state just as trial LFOs. RCW 10.73.160(3). The same 12 percent interest that the Supreme Court found untenable, the same ever-deepening hole of collection, the same problems of enforcement against an indigent, the same difficulty of the defendant to make any money let alone sufficient money to pay off the costs of appeal while in custody - in short, all but the concerns about the racial disparity in imposition of costs are clearly present in both situations.

In addition, there is a difference between costs on appeal and trial costs not discussed in Sinclair - the difference of purpose. Costs imposed at trial are part of the punishment and sentence. The ostensible purpose of “recoupment” statutes, however, is “not punishment but simply a fiscal interest in recovering money expended and in discouraging fraudulent assertions of indigency.” Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for their Court-Appointed Counsel Through*

*Recoupment and Contribution*, 42 U. Mich. J. of L. Reform 323, 339 (2009).

As noted in Blank and Fuller, the constitution provides additional requirements. And we now know, because of Blazina, that the protections the Court relied on in Blank does not exist and people are, in fact, spending time in jail for nonpayment of legal financial obligations they are unable to pay because of poverty. Because appellate costs are included as part of those LFOs because they are added to the judgment and sentence, the impacts noted in Blazina will fall equally on appellants such as Mr. Goodrum.

Thus, even though the language of RCW 10.73.160(3) does not apply to costs on appeal, Fuller does. Under Fuller as noted in Blank, to be constitutional, a repayment requirement for exercising the constitutional right to appeal must be imposed only after the appellate court “take[s] into account the defendant’s financial resources and the burden that payment would impose.” See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller). In addition, any failure to pay must not result in a finding of contempt when the failure is due to poverty. And no payment obligation can be imposed “if there was no likelihood the defendant’s indigency would end.” Fuller, 417 U.S. at 46.

Blazina noted that lower courts are, in fact, finding contempt for failure to pay when that failure is due to poverty, in some counties more than others. 182 Wn.2d at 132. Further, under Fuller, this Court cannot impose costs on appeal unless it considered the appellant’s actual ability to pay, not simply based on a presumption that costs *will* be imposed unless

the defendant provides sufficient evidence that they should not or meets some briefing requirement on that point.

Notably, there is no likelihood that Mr. Goodrum's indigency will end. He was found indigent by a court at trial and also for the purposes of appeal. He is in custody for several years. When he is released, his prospects of getting a job, stable housing, etc., will be limited due as a felon. He is not able to pay - and will not be, given his situation. Even if ordering costs on appeal can still be found to pass constitutional muster somehow, to award costs in this case would require turning a blind eye to Mr. Goodrum's indigency and the very real concerns raised in Blazina.

E. CONCLUSION

The burglary conviction must be reversed and dismissed for insufficiency of the evidence. Further, the prosecutor's repeated acts of misconduct were so flagrant and prejudicial that reversal for a new trial on the other counts is required. At a minimum, resentencing is required in order to have the trial actually consider Goodrum's ability to pay. Finally, this Court should not adopt Sinclair and that case cannot be interpreted to support imposition of costs on an indigent appellant after an unsuccessful appeal unless the appellant somehow proves costs should not be ordered runs afoul of caselaw and constitutional principles. Costs on appeal should not be awarded where, as here, the appellant has been found indigent for trial and appeal and the presumption of continued indigence has not been rebutted.

DATED this 30th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

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 Opening Brief to opposing counsel via first-class postage prepaid, to Cowlitz County Prosecuting Attorney, 312 S.W. 1<sup>st</sup> Ave, Kelso, WA. 98626, and to Mr. Norman Goodrum, COD 385825, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 30th day of June, 2016

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