

COA NO. 49742-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

OMAHA TUFONO,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The court erred in including prior California convictions for robbery in the offender score.

2. The court erred in including the prior California conviction for vehicular manslaughter in the offender score.

3. The court erred in imposing discretionary legal financial obligations in the absence of inquiry into ability to pay.

**Issues Pertaining to Assignments of Error**

1. Where the trial court ruled three prior California robbery convictions were not comparable to the Washington offense of robbery, whether the court erred in still including them in the offender score because, unlike incomparable federal offenses, incomparable out-of-state offenses do not contribute to the offender score under the plain language of the controlling statute?

2. Whether the prior California vehicular homicide conviction cannot be included in the offender score because it is not comparable to the Washington offense of vehicular homicide, as the mens rea element for the California offense is broader than the Washington counterpart and the record does not show factual comparability?

3. Assuming the California conviction for vehicular homicide is comparable to the Washington offense of vehicular homicide, whether

the California conviction washes out of the offender score because it was classified as a class B felony at the time of the offense and appellant spent 10 crime-free years in the community following release?

4. Whether the court wrongly imposed a discretionary \$400 fee for appointed counsel because it failed to make an individualized inquiry into appellant's ability to pay?

**B. STATEMENT OF THE CASE**

The State charged Omaha Tufono with first degree robbery, alleging he robbed a bank. CP 1. Tufono represented himself at trial. 2RP<sup>1</sup> 21-22. A jury found him guilty as charged. CP 60.

The State alleged the offender score should be six points based on a prior Washington conviction for first degree robbery, three prior California robbery convictions, and a prior California vehicular manslaughter conviction. CP 109-10. Documentation for these prior convictions was admitted into evidence at the sentencing hearing. RP 13; Ex. 1-5. The State previously notified Tufono that he was subject to a sentence of life in prison without the possibility of release as a persistent

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<sup>1</sup> This brief cites to the verbatim report of proceedings as follows: 1RP – 5/13/16; 2RP – 6/3/16; 3RP – 7/22/16; 4RP – 8/22/16; 5RP – one volume consisting of 8/30/16, 8/31/16; 6RP - 9/28/16; 7RP – 10/3/16; 8RP – two consecutively paginated volumes consisting of 10/5/16, 10/6/16, 10/10/16, 10/11/16, 10/12/16; 9RP – 10/6/16; 10RP – 12/13/16.

offender because he had two previous convictions for a "most serious offense." CP 138.

Tufono was represented by an attorney for sentencing. 10RP 3. Defense counsel argued the prior California convictions for robbery were not legally or factually comparable to a Washington robbery offense and therefore could not be counted as a strike offense or in the offender score. CP 103-08; RP 4-7. The Washington offense of robbery requires that the victim had an ownership, representative, or possessory interest in the property taken. CP 105-07 (citing State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015)). At the time Tufono committed the California robberies in 1999, California law did not require the victim of robbery to have an ownership, representative, or possessory interest in the property taken. CP 106 (citing People v. Mai, 22 Cal. App. 4th 117, 129, 27 Cal. Rptr. 2d 141 (Cal. Ct. App. 1994)); RP 4-6, 16. A year after Tufono's robbery convictions, the California Supreme Court disapproved Mai and held robbery requires that property must be taken from the possession of the victim. RP 5; CP 106 (citing People v. Nguyen, 24 Cal. 4th 756, 14 P.3d 221, 102 Cal. Rptr. 2d 548 (Cal. 2000)). When Tufono committed the California robberies, however, California law did not require an ownership, representative, or possessory interest in the property taken, so they were not comparable to the Washington offense of robbery. CP 105-07; RP 4-6.

Defense counsel also argued the California conviction for vehicular manslaughter was not legally or factual comparable to the Washington offense of vehicular homicide. CP 107-08; RP 6. According to counsel, the offender score should be two points based on the prior Washington offense of first degree robbery, which counted as a violent offense. RP 6. The State opposed defense counsel's arguments at the sentencing hearing. RP 7-16.

The court ruled the California vehicular manslaughter conviction was comparable to the Washington offense of vehicular homicide because "[m]aking an illegal U-turn and you kill someone, that is certainly reckless disregard, reckless driving." RP 17. The court further ruled the California robberies were not comparable to the Washington offense of robbery at the time Tufono pleaded to them based on Ritchie. RP 17-18.

The court then said "Now, obviously, we are going to need to recalculate. I think that gives him an offender score of three, or does vehicular homicide score at —" RP 18. The prosecutor responded that she would double check, but contended the robberies did not wash out: "I know the rule when it's an incomparable or an incomparable federal offense, is they are relegated to basically an unranked class C felony. Mr. Tufono was sentenced to eight years in February 2000 on those robberies, so even if they were a class C, I would submit, if he did half to two-thirds

of this time, they would not wash, given that his next offense that we know of was a municipal violation in August of 2009. So the next question is whether or not the robberies, the California robberies count in any format." RP 18-19. The court said "Okay. That's the next question then. For me to consider them as Class C unranked felonies, that gives him an offender score of six." RP 19. The prosecutor agreed. RP 19. The court later specified it counted the California vehicular manslaughter conviction as one point. RP 23.

The judgment and sentence reflects an offender score of six points. CP 117. A handwritten notation on the judgment and sentence indicates, with reference to the California vehicular manslaughter and robbery offenses, that they are not comparable to strike offenses but each count as a point in the offender score. CP 117. The court imposed 102 months in confinement — the top of the standard range. CP 117, 119. Tufono appeals. CP 128.

**C. ARGUMENT**

**1. THE CALIFORNIA CONVICTIONS CANNOT BE INCLUDED IN THE OFFENDER SCORE BECAUSE THE STATE FAILED TO PROVE COMPARABILITY.**

The court ruled the California robberies were not comparable to a Washington robbery but still counted them in the offender score. The

court mistakenly believed out-of-state convictions that are not comparable to a Washington offense are treated as class C felonies and count as one point. The law is that out-of-state convictions that are not comparable do not count in the offender score.

The court further erred in ruling the California conviction for vehicular manslaughter was comparable to the Washington offense of vehicular homicide. The California offense is not comparable due to a broader mental culpability requirement. Even if the California offense is comparable, it washed out of the offender score because it is classified as a class B felony and Tufono spent 10 crime-free years in the community following his release.

**a. Overview of the law on comparability.**

Offender score calculations are reviewed de novo. State v. Tewee, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). Comparability is also a question of law reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 97 P.2d 941 (2000). The prosecution bears the burden of proving the comparability of out-of-state convictions. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 880, 123 P.3d 456 (2005).

The first step of the comparability analysis is to determine whether the foreign offense is legally comparable. State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). This is done by comparing the elements of

the out-of-state crime with the elements of potentially comparable Washington crimes as defined on the date the out-of-state crime was committed. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Offenses are not legally comparable if the Washington statute defines the offense more narrowly than does the foreign statute. Id. at 255-56.

If offenses are not legally comparable, it must be determined whether the offenses are factually comparable. Thiefault, 160 Wn.2d at 415. The Sixth Amendment right to a jury trial imposes a constitutional limit on the facts that a sentencing court can use to support a sentence above a statutorily mandated range. Blakely v. Washington, 542 U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." Thiefault, 160 Wn.2d at 415. The court can go no further due to limitations imposed by the Sixth Amendment. State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007).

- b. Having ruled the California robbery offenses were not comparable to Washington robbery, the court erred in including them in the offender score because out-of-state convictions that are not comparable to a Washington offense do not count in the offender score.**

The court ruled the three California robbery convictions were not comparable to the Washington offense of robbery. RP 17-18. That should have been the end of the matter. If an out-of-state offense is not comparable, it cannot be counted in the offender score. But things went sideways. The prosecutor argued the California robbery convictions did not wash out — an argument that relies on the premise that they can be included in the offender score. RP 18. And the prosecutor supplied a rationale for why they should be included in the offender score: like incomparable federal offenses, incomparable out-of-state offenses should be treated as class C felonies that count as one point each. RP 18. The court bought the argument: "For me to consider them as Class C unranked felonies, that gives him an offender score of six." RP 19.

Examination of the relevant statutory provision shows why the court was wrong in treating the incomparable California robberies as the equivalent of a Washington class C felony in calculating the offender score. RCW 9.94A.525(3) provides:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal

convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

The plain language of the statute shows federal offenses that are not comparable to a Washington offense "shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute." RCW 9.94A.525(3). Federal offenses. Not out-of-state offenses. There is no equivalent rule for out-of-state convictions that are not comparable to a Washington offense. "If an out-of-state conviction involves an offense that is neither legally or factually comparable to a Washington offense, the sentencing court may not include the conviction in the defendant's offender score." State v. Arndt, 179 Wn. App. 373, 380, 320 P.3d 104 (2014). The trial court, having ruled the California robberies were not comparable to a Washington robbery, could not count the California robbery convictions in Tufono's offender score. The court did not identify any other Washington offense that is comparable to the California robberies. So Tufono's offender score must be reduced by three points — one for each of the robberies that should not have been included in the offender score.

- c. **The prior California vehicular manslaughter conviction cannot be included in the offender score because the State failed to prove it is comparable to the Washington offense of vehicular homicide.**

The court determined the prior California conviction for vehicular manslaughter was comparable to the Washington offense of vehicular homicide and so counted the California conviction as one point for the offender score. The court erred in so doing. The California offense requires mere negligence. The Washington offense requires heightened culpability. The California offense is not comparable because its mens rea requirement is broader than its Washington counterpart. For this reason, the California offense does not contribute to the offender score.

In 1985, the State of California charged Tufono with vehicular manslaughter, alleging as follows:

VIOLETION OF SECTION 192(C)(2) OF THE PENAL CODE, a felony. The said defendant, on or about April 27, 1985, did unlawfully kill a human being, to wit: ELOISA CARACHURE, without malice and without gross negligence, as a proximate result of the commission by said defendant of an unlawful act, a violation of Vehicle Code Section 21801(a), while driving a vehicle.

The abstract of judgment shows he pleaded guilty this crime on August 7, 1985. Ex. 3 (p. 4).

Former Cal. Penal Code § 192 (Stats. 1984, ch. 742, § 1, eff. Aug. 24, 1984), in effect at the time of Tufono's offense, provides in relevant part as follows:

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:

...

(c) Vehicular—

...

(2) Except as provided in paragraph (4), *driving a vehicle in the commission of an unlawful act, not amounting to felony, but without gross negligence*; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

...

(4) Driving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

The underlying unlawful act at issue, as specified in the charging document, is the failure to yield to a vehicle. Cal. Veh. Code § 21801(a).<sup>2</sup>

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<sup>2</sup> Cal. Veh. Code § 21801(a) provides "The driver of a vehicle intending to turn to the left or to complete a U-turn upon a highway, or to turn left into public or private property, or an alley, shall yield the right-of-way to all vehicles approaching from the opposite direction which are close enough to constitute a hazard at any time during the turning movement, and shall continue to yield the right-of-way to the approaching vehicles until the left turn or U-turn can be made with reasonable safety."

Former RCW 46.61.520(1) (Laws of 1983 ch. 164 § 1), in effect at the time of Tufono's California offense, defines the offense of vehicular homicide as follows:

When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner or with disregard for the safety of others, the person so operating such vehicle is guilty of vehicular homicide.

Comparing the two statutes, the distinction in mental culpability is immediately apparent. Under Cal. Penal Code § 192(c)(2), the prong of the manslaughter statute for which Tufono was charged and convicted, the unlawful act is committed "without gross negligence." Cal. Penal Code § 192(c)(2). The requisite culpability for vehicular manslaughter *without gross negligence* is ordinary negligence. In re Dennis B., 18 Cal. 3d 687, 696, 557 P.2d 514, 135 Cal. Rptr. 82 (Cal. 1976); People v. Bussel, 97 Cal. App. 4th Supp. 1, 6, 118 Cal. Rptr. 2d 159 (Cal. Ct. App. 2002).

In contrast, the Washington offense of vehicular homicide requires "the operation of any vehicle in a reckless manner." RCW 46.61.520(1). Recklessness is a heightened form of mental culpability as compared to negligence. In California, a person can be convicted of the offense by operating a vehicle with ordinary negligence. In Washington, a person

cannot be convicted of vehicular homicide merely by driving negligently. The Washington offense is narrower than the California offense.

The trial court determined the two offenses were comparable based on the notion that the California conviction showed Tufono acted recklessly. RP 17. But there is no legal comparability. The requisite mens rea for the California offense is ordinary negligence, not recklessness.

The Washington offense of vehicular homicide can also be committed where a vehicle is operated "with disregard for the safety of others." RCW 46.61.520(1). The phrase "disregard for the safety of others" means "an aggravated kind of negligence or carelessness, *falling short of recklessness* but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term 'negligence.'" State v. May, 68 Wn. App. 491, 496, 843 P.2d 1102 (1993) (quoting State v. Eike, 72 Wn.2d 760, 765-66, 435 P.2d 680 (1967)). Disregard for safety is "more serious than ordinary negligence." May, 68 Wn. App. at 496 (quoting State v. Jacobsen, 78 Wn.2d 491, 498, 477 P.2d 1 (1970)). The California offense, however, is committed with ordinary negligence. Dennis B., 18 Cal. 3d at 696; Bussel, 97 Cal. App. 4th Supp. at 6. The Washington offense is narrower than the California offense in this regard as well.

As a result, the two offenses are not legally comparable. The California offense of vehicular manslaughter under Cal. Penal Code § 192(c)(2) is broader than the Washington offense in terms of mental culpability. Due to the different mental elements, a person can commit a California vehicular manslaughter under 192(c)(2) without committing the Washington offense of vehicular homicide. An out-of-state offense that has an element broader than a Washington offense is not legally comparable. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999); Lavery, 154 Wn.2d at 255-56.

The State also failed to prove factual comparability. The court thought "[m]aking an illegal U-turn and you kill someone, that is certainly reckless disregard, reckless driving." RP 17. The trial court invented a fact: that Tufono drove recklessly in committing the unlawful act (failure to yield) that caused the death of another. When determining whether an out-of-state conviction is comparable to a Washington crime, a sentencing court may not assume "facts alleged in the charging document [that] are not directly related to the elements" of the offense have been proved or admitted. Thomas, 135 Wn. App. at 486. Nothing in the record shows Tufono drove recklessly. Nothing shows Tufono committed an illegal U-turn for that matter, as opposed to the illegal left turn specified in Cal. Veh. Code § 21801(a).

In assessing factual comparability, the court may look at the facts underlying the prior conviction to determine if the defendant's conduct would have resulted in a conviction in Washington. Lavery, 154 Wn.2d at 255. "[B]ut the portion of the foreign record that the Washington court can consider is very limited." State v. Jones, 183 Wn. 2d 327, 345, 352 P.3d 776 (2015). The only facts that can be relied on are those "that are admitted, stipulated to, or proved beyond a reasonable doubt." Thiefault, 160 Wn.2d at 415. Here, none of the sentencing documents show facts underlying the vehicular manslaughter conviction that were admitted, stipulated to or proven beyond a reasonable doubt.

The plea form recites " the facts on which I base my plea are: People v. West." Ex. 2 (p. 14). A plea under People v. West, 3 Cal.3d 595, 91 Cal.Rptr. 385 P.2d 409 (Cal. 1970) is a plea of nolo contendere that does not admit a factual basis for the plea. People v. Rauen, 201 Cal. App. 4th 421, 424, 133 Cal. Rptr. 3d 732 (Cal Ct. App. 2011) (citing In re Alvernaz, 2 Cal. 4th 924, 932, 830 P.2d 747, 8 Cal. Rptr. 2d 713 (Cal. 1992)). The lack of factual basis for Tufono's plea precludes factual comparability. In examining whether the State proved comparability, courts "cannot assume the existence of facts that are not in the record." State v. Werneth, 147 Wn. App. 549, 555, 197 P.3d 1195 (2008) (citing State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977)). "Absent a

sufficient record, the sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score." Ford, 137 Wn.2d at 480-81.

- c. Even if the California vehicular manslaughter is comparable to the Washington offense of vehicular homicide, the California conviction washed out of the offender score.**

Assuming the California vehicular manslaughter offense is comparable to the 1985 Washington offense of vehicular homicide, the offense washes out because Tufono spent 10 crime-free years in the community following his release. For this alternative reason, the California vehicular manslaughter conviction does not count towards the offender score.

In 1985, the Washington offense of vehicular homicide was a class B felony. Former RCW 46.61.520(2) (Laws of 1983 ch. 164 § 1). This is the determinative classification for purposes of computing the offender score. RCW 9.94A.525 governs the classification of out-of-state convictions for offender score purposes. It provides, in pertinent part: "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). In this context, the relevant comparison is to

"Washington criminal statutes in effect when the foreign crime was committed." State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).<sup>3</sup>

Thus, the requisite washout period for an out-of-state offense is the washout period for the comparable Washington offense. State v. McIntyre, 112 Wn. App. 478, 483, 49 P.3d 151 (2002). RCW 9.94A.525(2)(b) governs when class B felony convictions are not included in the offender score. That statute provides: "Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction."

The washout statute contains a "trigger" clause, which identifies the beginning of the 10-year period, and a "continuity/interruption" clause, which sets forth the substantive requirements a person must satisfy during the 10-year period. State v. Schmitt, 196 Wn. App. 739, 742, 385 P.3d

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<sup>3</sup> In 1996, the legislature amended the statute to make vehicular homicide a class A felony. Former RCW 46.61.520(2) (Laws of 1996 ch. 199 § 7). This legislative reclassification has no effect on Tufono's prior conviction. See Rivard v. State, 168 Wn.2d 775, 781-82, 231 P.3d 186 (2010) ("the subsequent reclassification of an offense from a class B to a class A felony has no effect on a prior conviction for that offense and does not retroactively convert the conviction to a class A felony.").

202 (2016), review denied, 188 Wn.2d 1002, 393 P.3d 353 (2017) (citing State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010) (addressing corollary 5-year period for class C felonies)). Any offense committed after the trigger date that results in a conviction resets the clock. Ervin, 169 Wn.2d at 821. The State bears the burden of proving prior criminal history for the purpose of calculating the offender score under the wash out provision. Cadwallader, 155 Wn.2d at 875-76, 880.

The date of offense for the California manslaughter is April 27, 1985. CP 117. Tufono was originally sentenced to a term of two years on August 7, 1985. Ex. 3 (p. 3). He received credit for 465 days spent in custody prior to sentencing. Ex. 3 (p. 7). In 1986, the court modified his sentence and remanded him to the custody of the sheriff for 365 days.<sup>4</sup> Id. The next offense listed in Tufono's criminal history did not occur until October 12, 1999. CP 117. On this record, Tufono's prior California vehicular manslaughter conviction washed out and should not have been included in his offender score because he did not commit any crime resulting in a conviction for a period of 10 years in the community following his last date of release. "[A] conviction that has washed out is not relevant to the calculation of an offender score." State v. Moeurn, 170

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<sup>4</sup> At sentencing, Tufono explained he was given "time served for one year in the county jail," which is why the offense is described as a misdemeanor in some of the documentation. RP 19-20.

Wn.2d 169, 176, 240 P.3d 1158 (2010). For this reason, the California vehicular manslaughter offense cannot be included in the offender score. This case must be remanded for resentencing with a lower offender score. State v. Wilson, 170 Wn.2d 682, 691, 244 P.3d 950 (2010) (resentencing is remedy for miscalculated offender score).

**3. THE COURT FAILED TO INQUIRE INTO TUFONO'S ABILITY TO PAY A DISCRETIONARY LEGAL FINANCIAL OBLIGATION.**

The trial court erred when it imposed a discretionary legal financial obligation (LFO) without making an individualized determination of Tufono's ability to pay. The \$400 fee for court appointed counsel should be reversed and the case remanded for inquiry into Tufono's ability to pay.

The court pronounced the sentence as follows: "The Court is going to impose 102 months, credit for time served. \$200 court fees. \$500 crime victim penalty assessment. \$100 DNA lab fee. He is represented by Department of Assigned Counsel, so he is indigent. Restitution, if any, by later order of the court." 10RP 25. This was the only reference to legal financial obligations at the sentencing hearing. The judgment and sentence lists the \$200 court fee, the \$500 victim penalty assessment and the \$100 DNA fee. CP 114. Tufono does not challenge these costs because they are considered mandatory. The judgment and sentence, however, also includes a \$400 fee for court-appointed counsel.

CP 114. This fee is discretionary. State v. Malone, 193 Wn. App. 762, 764, 376 P.3d 443 (2016). Tufono challenges the imposition of this fee because the court did not consider Tufono's ability to pay it.

A decision to impose discretionary LFOs is reviewed for abuse of discretion. State v. Clark, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). A decision is an abuse of discretion when it is exercised on untenable grounds or for untenable reasons. Id. A decision is made for untenable reasons if it is based on an incorrect legal standard. State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). The court did not apply the correct legal standard in imposing the discretionary LFO on Tufono. It made no inquiry whatsoever into Tufono's ability to pay.

Before imposing discretionary LFOs, the trial court must make an individualized inquiry into the defendant's present and future ability to pay. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The record must reflect this inquiry. Id. at 837-38. "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." RCW 10.01.160(3). The trial court must consider factors such as whether the defendant meets the GR 34 standard for indigency, incarceration, and the defendant's other debts, including restitution. Blazina, 182 Wn.2d at 838-39.

Here, the record does not reflect that the trial court inquired into Tufono's current and future ability to pay discretionary LFOs. The trial court did not consider factors set forth in Blazina, such as Tufono's financial resources, other debts, and incarceration. The trial court did note Tufono was indigent, but imposed the fee anyway. The only thing considered on the record cuts against imposition of the discretionary LFO. Including boilerplate language in the judgment and sentence stating that the defendant has an ability to pay does not satisfy the inquiry requirement. Blazina, 182 Wn.2d at 838; see CP 117.

Tufono did not object to the imposition of LFOs at sentencing. However, the imposition of discretionary LFOs without the requisite inquiry into ability to pay is a systemic problem. Blazina, 182 Wn.2d at 834-35. Appellate courts have the discretion to consider the challenge despite lack of objection below under RAP 2.5(a). State v. Lee, 188 Wn.2d 473, 501, 396 P.3d 316 (2017). Following Blazina, the Supreme Court has exercised its discretion to reach the merits of unpreserved LFO challenges in a number of cases. Lee, 188 Wn.2d at 501-02; State v. Marks, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016); State v. Duncan, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016). This Court has exercised its discretion as well. State v. Tedder, 194 Wn. App. 753, 756, 378 P.3d 246

(2016); State v. Cardenas-Flores, 194 Wn. App. 496, 521, 374 P.3d 1217 (2016), aff'd, 93385-5, 2017 WL 3527499 (slip op. filed Aug. 17, 2017).

In light of the systemic problem identified by Blazina and the decision to review unpreserved challenges to LFOs in a number of cases, Tufono requests that this Court exercise its discretion under RAP 2.5(a), reverse the imposition of the discretionary LFO, and remand for an individualized inquiry into his ability to pay.

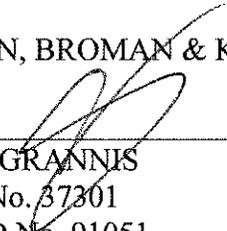
**D. CONCLUSION**

For the reasons stated, Tufono requests remand for resentencing based on a lower offender score and for inquiry into his ability to pay the discretionary LFO.

DATED this 31<sup>st</sup> day of August 2017

Respectfully Submitted,

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