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No. 51432-0-II

Pierce County No. 16-1-03678-5

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

STATE OF WASHINGTON,

Respondent,

v.

KENSHON STOKES,

Appellant.

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

The Honorable Gerry Costello, trial judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving a “first aggressor” instruction, Instruction 16, over defense objection. Mr. Stokes assigns error to the instruction, which provides:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 99.¹

2. The “first aggressor” instruction misstated and relieved the state of its constitutionally mandated burden by failing to inform the jury that it could not find Stokes was the “first aggressor” and thus not entitled to self-defense based solely on verbal “aggression,” as this Court recently held in State v. Kee, __ Wn. App. __, __ P.3d __ (2018 WL 6626733).²
3. Because the state bears the constitutional burden of disproving self-defense, the error further improperly relieved the state of the full weight of its constitutional burden of disproving self-defense beyond a reasonable doubt.
4. The prosecutor committed flagrant, prejudicial misconduct in misstating the law regarding the crucial issue of when a person may use force to retrieve property and whether the jury could find the defendant was the “first aggressor” based upon verbal “aggression.”
5. Appellant is entitled to relief from the \$200 criminal filing fee and other repayment terms under the recent state Supreme Court decision in State v. Ramirez, 191 Wn.2d

¹A copy of the jury instruction packet is attached hereto as Appendix A. The “first aggressor” instruction is at page 19.

²A copy of the decision is attached hereto for the Court’s convenience as Appendix B.

B. QUESTIONS PRESENTED

1. Did the trial court err in giving a disfavored “first aggressor” instruction over defense objection where the alleged “aggression” by Mr. Stokes was verbal?
2. Was the instruction unconstitutional in failing to inform the jury that the “act” amounting to the “first aggression” could not be verbal, as this Court recently held in Kee, *supra*?
3. Was the instruction improperly given where the alleged “aggression” which the defendant used was to resist the physical efforts of the victim to retrieve property she had previously said he could have?
4. Does the prosecutor’s flagrant, prejudicial misconduct compel reversal where the only issue was whether Mr. Stokes had acted in self-defense for the fourth-degree assault and the prosecutor misstated the crucial law on when a defendant cannot raise such a defense, thus relieving the state of the full weight of its constitutional burden?
5. Where the Supreme Court issues a decision declaring that 2018 Legislative changes to the legal financial obligations statutes apply to all cases pending on direct review despite when the sentencing occurred, is appellant entitled to such relief where he was indigent at the time of sentencing and the changes affect obligations ordered in his case?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Kenshon D. Stokes was charged by amended information with (count I) second-degree assault charged as a “domestic violence incident” and with a firearm enhancement, and (count II) fourth-degree assault, alleged to have been committed against “a family

³A copy of the decision is attached as Appendix C.

or household member.” CP 35-35; RCW 9.41.010, RCW 9.94A.510, RCW 9.94A.530, RCW 9.94A.533, RCW 9A.36.021, RCW 9A.36.041, RCW 10.99.020.

After pretrial proceedings before the Honorable Commissioner Helen Whitener on September 11, the Honorable Judge Stephanie Arend on September 26, October 12, November 27, and December 7, and the Honorable Judge Bryan Chuschoff on December 27, 2017, a jury trial was held before the Honorable Judge Jerry Costello on January 8-11, 2018.⁴

The jury acquitted Mr. Stokes of second-degree assault but found him guilty of the fourth-degree assault and of committing the crime against a “family or household member.” CP 109-12. Judge Costello sentenced Mr. Stokes to a standard-range sentence of 364 days suspended upon conditions. SRP 18-20; CP 113-17. Mr. Stokes appealed and this pleading follows. See CP 118.

2. Testimony at trial

During their relationship, Kalia Brown and her husband, Kenshon Stokes, would sometimes “butt heads” and by July or early August of 2017 they were having “issues.” TRP 108-14. At the later trial, Brown would testify that she thought Stokes’ “aura” was not “right” and his

⁴The verbatim report of proceedings consists of 10 volumes, not all of which are chronologically paginated. They will be referred to as follows:
the volume containing the chronologically paginated proceedings of September 11 and November 27, 2017, as “1RP;”
the three volumes containing the chronologically paginated proceedings of September 26, October 12 and December 7, 2017, as “2RP;”
December 27, 2017, as “3RP;”
the three chronologically paginated volumes containing the trial proceedings of January 8-11, 2018, as “TRP;”
the sentencing hearing of January 19, 2018, as “SRP.”

"vibes were totally off" at the time. TRP 115. It was "awkward" and there was tension in the house. TRP 115.

Ms. Brown admitted that part of that awkwardness was because both she and Stokes had allegedly been unfaithful. TRP 115-17, 172-73.

In the early morning hours of September 10th, Brown and Stokes were at their home in Lakewood and started bickering about the issue. TRP 115-17. Ms. Brown said Stokes was asking her about her infidelity and said he really needed some answers about their relationship. TRP 115-17. She did not respond, which seemed to frustrate him and make him angry. TRP 115-17. At the later trial, she would say, "it made it seem like I was ignoring him." TRP 115-17.

Ms. Brown would later testify that, at some point, Stokes grabbed her phone from the dining room table and started scrolling through it. TRP 118-19. According to Brown, when she then tried to get the phone back, he refused to give it to her, grabbed her by the shirt and said, "you need to tell me the truth; is there somebody else that you're talking to?" TRP 120. Ms. Brown's version of events, however, charged upon cross-examination. On direct, she testified in a way that made it seem she had asked for the phone back right away after he picked it up and Stokes immediately refused to comply. TRP 119.

On cross-examination, however, Brown admitted that actually, she first had *told* Stokes he was free to look through her phone if he was so concerned about who she had communicated with recently. TRP 172-73. She was in the other room when he went to do so. TRP 117, 172-73. She did not try to ask for the phone back for several minutes. TRP 118-

19, 172-73.

At some point, however, Brown decided she wanted the phone back and demanded it. TRP 174. She said he came into the room where she was and was asking her questions so she asked for her phone back. TRP 118. Although she first denied that she had been "jumping" on him trying to get him after her initial consent, she ultimately conceded she had gone over to him to try to grab the phone physically out of his hand. TRP 118-20, 174.

Mr. Stokes held the phone away from her, she said, and this made her upset. TRP 118-20, 174-75. It was while this altercation was going on that she claimed he had grabbed onto the collar of her shirt and demanded to know if she was "talking to" someone else, and she responded by telling him to "get off" and "back off," which he did. TRP 120-21, 124.

At trial, Brown was clear that Stokes did not push her or punch her or anything like that. TRP 121. Brown said, however, that "[i]n a sense when he did grab" her shirt, it seemed "kind of like the pushback, just like holding the shirt tight[.]" TRP 121.

After walking away, Brown went into the living room. TRP 125. At trial, she would testify that she sat down on the couch in the living room and was still there a moment later when Stokes came around the corner holding their shotgun, so she ran out the door. TRP 125. She admitted that she did not actually see the gun pointed at her and that she only got a "glimpse." TRP 125.

When she spoke to police, however, Brown had said she had seen

the gun directly pointed at her. TRP 125-26, 152-53, 176-77. She was clear at trial that this was not so. TRP 178.

Mr. Stokes was acquitted by the jury of an assault charge for the alleged gun pointing. TRP 178-79.

When police arrived, they asked Stokes about the alleged fight and he said they had argued without it turning physical. TRP 203-204. After speaking with Brown, an officer returned to speak again to Stokes. TRP 204. When confronted, Stokes said he had grabbed Brown only to the extent he had held her off from taking back her phone when she had attacked him to get it. TRP 204.

Mr. Stokes testified that, initially, Brown had told him to “go ahead” and look through her phone. TRP 222-25. She also told him that he would be disappointed by what he found. TRP 222-25. Eventually, Brown demanded the phone back and was grabbing at Stokes while he had the phone up away from her with his arm extended. TRP 226. She gave up after a minute and walked away into the living room. TRP 226-27.

Stokes was clear at trial that he did not grab Brown’s shirt and only touched her when he was “holding her off.” TRP 222-34.

D. ARGUMENT

1 MR. STOKES SHOULD BE GRANTED A NEW TRIAL
BASED ON THE IMPROPERLY GIVEN,
UNCONSTITUTIONAL “FIRST AGGRESSOR”
INSTRUCTION

Mr. Stokes was acquitted of the alleged holding or pointing of the gun, but convicted of assault for having grabbed Ms. Brown by the collar

as she physically tried to retrieve her phone. That assault conviction should be reversed based upon the trial court's error in giving a "first aggressor" jury instruction over defense objection. The disfavored instruction was not supported by the facts, because Ms. Brown was trying to *retrieve* property, not defend it, when she responded physically to Mr. Stokes' verbal refusal to return it after Brown had first told him he could have it and look through it. Even worse, the instruction was constitutionally insufficient in failing to properly inform the jury of the relevant law under this Court's decision in Kee, supra.

This constitutional error was further exacerbated by the prosecutor's serious, prejudicial and ill-intentioned misconduct in repeatedly misstating the crucial law relevant to when the state has met its burden of proof.

First, jury instruction 16 was improperly given, because the state failed to meet its burden of production. Under state and federal due process mandates, the prosecution must bear the full weight of proving any criminal charge against the accused, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed. 2d 368 (1970); City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). In some cases, this means bearing the burden of *disproving* an affirmative defense. See State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Because a claim of self-defense negates an essential element of a crime, the state must bear the burden of proving not only all of the essential elements of a crime but also that the defendant *did not* act in self-defense if self-defense is properly raised. Id. After the trial court decides

that a defendant has met the burden of production supporting a claim of self-defense, the constitutional burden then shifts to the state to disprove self-defense, beyond a reasonable doubt. See State v. Douglas, 128 Wn. App. 555, 562-63, 116 P.3d 1012 (2005).

A “first aggressor” instruction disrupts that constitutional shift. State v. Riley, 137 Wn.2d 903, 909, 976 P.2d 624 (1999). Under the “first aggressor” doctrine, a defendant is not entitled to claim self-defense if his own aggression causes his need to take the acts he claims were “self-defense.” See Douglas, 128 Wn. App. at 562. Put another way, a defendant may not provoke an attack and then claim he had to use force in its defense. See Riley, 137 Wn.2d at 909-10. As a result, the state may request a “first aggressor” instruction if there is credible evidence the defendant provoked the use of force by the alleged victim against the defendant in the first place. Id.

Because such an instruction disrupts and shifts back the constitutional weight of the burden of proof however, it raises serious constitutional concerns. Riley, 137 Wn.2d at 910 n 2. The Supreme Court has cautioned courts to give a “first aggressor” instruction only in a very limited number of cases. Id. In fact, the Court has declared:

“[F]ew situations come to mind where the necessity for an aggressor is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction.” While an aggressor instruction should be given when called for by the evidence, an aggressor instruction impacts a defendant’s claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.

Riley, 137 Wn.2d at 910 n. 2 (citations omitted).

In following this mandate, lower appellate courts have similarly warned that a “first aggressor” instruction “is to be given only sparingly and carefully, in cases where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction.” State v. Bea, 162 Wn. App. 570, 576-77, 254 P.3d 948, review denied, 173 Wn.2d 1003 (2011). And such cases are not expected to be often. See id.

In this case, counsel objected to the “first aggressor” instruction proposed by the state. TRP 250. He argued that the evidence was insufficient to support it, because Mr. Stokes took the phone *with* Ms. Brown’s permission, taking it from the table in a room she was not in at the time. TRP 250.

Put bluntly, counsel pointed out, saying you would not give someone’s phone back it is not a “physical” aggression, so that no “first aggressor” instruction was proper. TRP 250.

In deciding to give the instruction, the judge focused on Stokes having “physical possession” of Brown’s property at the time the physical contact occurred. TRP 250-51. The judge was convinced that Stokes’ refusal to return the phone was sufficient to support giving the instruction, because the physical contact occurred when Brown was just “wanting to get the phone back.” TRP 251-52.

The court was wrong as a matter of fact, law and constitution in making this ruling - and giving the instruction in this case.

At the outset, the standard of review this Court applies is different than in the normal case, because of the nature of a “first

aggressor” instruction. State v. Sullivan, 196 Wn. App. 277, 289, 383 P.3d 574 (2016). On review, in asking whether the trial court properly decided to give the instruction, this Court asks whether the state introduced sufficient evidence to support it. Id. This amounts to a burden of production and this Court reviews de novo whether the state met that burden below. State v. Stark, 158 Wn. App. 952, 959, 244 P.3d 433 (2010).

Applying such review, this Court should hold that the trial court erred in giving the “first aggressor” instruction, because the state failed to satisfy its burden. It is proper to give a first aggressor instruction where there is conflicting evidence about whether the defendant’s conduct incited a subsequent fight. See State v. Wingate, 155 Wn.2d 817, 827, 122 P.3d 908 (2005).

But the victim must be using force which is *lawful*. Riley, 137 Wn.2d at 911. The underpinning of the first aggressor doctrine is “the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force.” 137 Wn.2d at 911-12. And the use of force is not lawful in this state when it is used to recover property.

Under RCW 9A.16.020, the “use, attempt, or offer to use force upon or toward the person of another is not unlawful” in defense of property

(3) Whenever used by a party about to be injured. . .in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other **malicious interference with real or personal property lawfully in his or her possession**, in case the force is not more than is necessary.

RCW 9A.16.020 (emphasis added).

Put another way, in this State, “[i]t is the generally accepted rule that a person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances in order to protect that property[.]” See Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 506, 125 P.2d 681 (1942).

The use of force regarding protection of property requires, however, that the person seeking to invoke the defense of property must be acting *defensively*, to protect against interference, not *offensively*, to go get back property no longer in their possession. The plain language of RCW 9A.16.020(3) is that force is lawful in “preventing or attempting to prevent” someone from malicious “interference” with property *still* in his or her possession. See State v. Larson, 184 Wn.2d 843, 848, 365 P.3d 740 (2015) (plain language of statute is “surest indication of legislative intent”); see also, State v. Yelovich, 191 Wn.2d 774, 426 P.3d 723 (2018). Once the interference with the property is over - or complete - the use of force to recover it is *not* lawful. See Yelovich, 191 Wn.2d at 776-77. In other words, the use of force is lawful when the property is in the alleged victim’s possession, to resist a taking, not when the property was previously taken, in an effort to recover it. See Yelovich, 191 Wn.2d at 776-77. This is a part of a nationwide “trend” away from the old rule of violent self-help and towards resolution of disputes in courts instead. See State v. Valentine, 132 Wn.2d 1, 18, 935 P.2d 1294 (1997); see also Yocum v. State, 777 A.2d 782, 784 (Del. 2001) (using force “in the protection of property does not extend to efforts to retrieve the property

after the theft is accomplished;" "[t]o hold otherwise would sanction a form of vigilantism").

Here, Ms. Brown was not even in the room when Mr. Stokes picked up the phone. TRP 172-73. And he took possession of it *after she told him to if he wanted*. TRP 172-73.

Further, although Brown first presented the incident using language at trial which implied that Stokes had picked up the phone without permission and she had demanded it back right away (TRP 118-19), on cross-examination Brown admitted to the contrary that 1) she told Stokes he was free to look through her phone if he was so concerned about who she had communicated with recently, 2) she was in the other room when he went to do so, 3) the phone was on the table in that other room, 4) she did not complain or ask for the phone back for several minutes, 5) when she finally decided she wanted to retrieve her phone, she asked for it and he verbally said "no," and 6) she responded to that "no" by going over to him and started trying to physically grab it from him. TRP 118-20, 171-75.

Thus, the physical assault started with Brown approaching and engaging in physical acts *first*. There is no question that Stokes said he would not return the phone. There is no question that, as she physically tried to grab it from him, he held it away from her. TRP 118-20, 174-75. But it was Brown who approached well after Stokes had picked up the phone with permission. And it was Brown who started the physical part of the altercation.

Further, Stokes did not take the phone from Brown's "lawful

possession.” RCW 9A.16.020(3) permits the lawful use of force in “preventing or attempting to prevent” someone from malicious “interference” with property. Brown was not trying to prevent Stokes from picking up the phone in the first place - she told him he could. She was not resisting attempted taking of the phone from her possession - it was on a table in a different room when Stokes picked it up, not in Brown’s possession. TRP 120-21, 124.

Thus, the “first aggressor” instruction was not proper. The facts in this case did not support a conclusion that Brown was somehow using “lawful force” in physically trying to grab the phone. She was not resisting the property being taken. She had changed her mind and was trying to retrieve it well after he had picked it up with her permission. As a result, the state was improperly relieved of the full weight of its constitutional burden of disproving self-defense. The trial court erred in giving the instruction over defense objection based on the evidence and this Court should so hold and should reverse.

In addition, the instruction given in this case was constitutionally infirm. To be proper, such instructions must make manifestly apparent to the jury the relevant legal standards they must apply. See Kee, supra. Here, the instruction failed to meet that standard. For a person to be the “first aggressor,” there must be more than just verbal provocation. Riley, 137 Wn.2d at 908-909. This is because a victim “cannot. . . lawfully respond with force to a defendant’s use of words alone.” 137 Wn.2d at 912. The instruction given here failed to make that standard manifestly clear.

Kee, supra, is instructive. In Kee, this Court followed Riley and reversed where the trial court gave a “first aggressor” instruction essentially the same as the one given here - modeled on the Washington Pattern Jury Instruction (WPIC). Kee, ___ P.3d at ___ (App. B at 3). The Kee instruction provided:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that [the] defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

___ P.3d at ___, quoting, 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04, at 256 (4TH ed. 2016) (WPIC 16.04) (App. B at 3).⁵

On appeal, Kee first argued that there was insufficient evidence to support giving a “first aggressor” instruction. ___ P.3d at ___ (App. B at 2-3). In rejecting that claim, the Court noted there was conflicting evidence about whether Kee had thrown the first punch after engaging in verbal provocation, or whether the alleged victim had hit Kee first. ___ P.3d at ___ (App. B at 3-4). As a result, the Court held, it was not error for the trial court to find that the state had met its burden of production. Id.

⁵For comparison, the instruction given here provided:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 99.

But this Court then reversed because of the failure of the “first aggressor” instruction to make it clear that mere “verbal” taunts did not support a “first aggressor” finding. Id. The instruction was constitutionally inadequate, because it failed to inform the jurors that they could not convict based solely on the defendant’s *verbal* “acts.” Id.

Pointing to Riley, this Court noted that words alone were not sufficient provocation to support giving a “first aggressor” instruction. Id. The Riley Court had so held, declaring that a “victim” is “not entitled to respond with force” when “faced with only words.” Riley, 137 Wn.2d at 910-11. Indeed, the Riley Court pointed out, if words alone - even insults - could justify the victim in using force in response and “preclude the speaker from self defense,” the right of self-defense would be “rendered essentially meaningless.” Riley, 137 Wn.2d at 910-11. Further, the Court noted, allowing even aggressive words to suffice would run contrary to the underpinnings of the “first aggressor” rule, which is “the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force.” 137 Wn.2d at 911-12.

In following Riley and reversing based on the unconstitutional instruction in Kee, this Court noted that the instruction focused on “acts,” but that provocation by words is also an “act.” ___ Wn. App. ___ (App. B at 4). The Court also noted that the prosecutor had suggested to jurors that the altercation had been provoked by the defendant’s words and conduct, so that the jury could easily have convicted on an improper basis as a result of the improper instruction. Id.

This Court concluded, “[w]here there is evidence that the defendant provoked an altercation with words, particularly when the State suggests that those words constitute first aggression, the language of WPIC 16.01 is inadequate to convey the law” and reversal is required. Id.

Here, the trial court gave essentially the same instruction as in Kee. The instruction here provided:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 99. Compare Kee, __ P.3d at __ (App. B at 2-3). And the court here gave the instruction based upon the improper belief that Stokes’ words in refusing to give the phone back could support a conviction. See TRP 252.

Further, in closing argument, the prosecutor in this case emphasized the instruction and used it to misstate the law. TRP 270-71. The prosecutor described the “primary aggressor” instruction as providing that no one can “basically provoke a response where somebody is naturally going to create a physical altercation between the two of them.” TRP 270.

The prosecutor then did not limit the provocation as required under Riley. To the contrary, the prosecutor gave a “prototypical example” which involved only verbal provocation. TRP 270. The prosecutor declared this normal “example” as occurring “if you get up

into somebody's face in a bar" and start swearing at them and a fight occurs. TRP 270. The prosecutor told jurors, "you don't get to say self-defense when you punched them because you provoked that fight **with your language and your demeanor.**" TRP 270 (emphasis added).

The prosecutor thus specifically made arguments that the first "aggression" could be verbal, several times. And the prosecutor then went on:

This case is an even better example. **You don't get to take somebody's cell phone, refuse to give it back, and then claim self-defense when a fight ensues. She has a right to that phone a right to get it back. You don't get to do that.** As such, the defendant was the primary aggressor in this case and he's not entitled to the self-defense instruction. Your analysis would end there.⁶

TRP 270-71 (emphasis added). The prosecutor invited the jury to find Stokes was the "first aggressor" based on refusing to return the cell phone, which reasonable jurors could have thought included just verbal provocation.

The prosecutor thus emphasized the idea that verbal aggression was legally sufficient to support the conviction, contrary to Riley and its progeny, as discussed in Kee. Just as in Kee, here, the instruction given over defense objection was constitutionally improper. It failed to make the relevant law manifestly clear by not telling jurors that words alone were not enough. The prosecutor then invited jurors to convict on an improper basis. Under Kee, reversal and remand is required.

The prosecutor's repeated misstatements of the crucial, relevant

⁶The prosecutor's arguments were also misconduct as discussed, *infra*.

law also compel reversal, as flagrant, ill-intentioned and prejudicial misconduct. Unlike other attorneys, prosecutors are considered “quasi-judicial” officers. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). They therefore shoulder additional, specific duties, different than those borne by other counsel, such as counsel for the defense. See State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

These duties arise because the prosecutor represents not only the public and the alleged victims but also the defendants and justice system itself. Id.; see Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed.2d 1314 (1935). As a result, the prosecutor’s true role is to seek a verdict based on reason and evidence, rather than using improper means or argument. Berger, 295 U.S. at 88. This is a duty to ensure a fair trial, rather than acting as a “heated partisan” trying to “win” a conviction. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Where a prosecutor commits misconduct, she may violate the defendant’s state and federal due process rights to a fair trial. See, Dye v. Hofbauer, 546 U.S. 1, 4-5, 126 S. Ct. 5, 163 L. Ed. 2d 1 (2005); see also, State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Such a violation occurs if the prosecutor makes improper comments and there is a substantial likelihood that they affected the jury’s verdict. Reed, 102 Wn.2d at 145.

Notably, this is a different question than whether the state presented sufficient evidence to support a conviction. See In re Glassman, 175 Wn.2d 696, 286 P.3d 673 (2012). In fact, most cases involving reversible misconduct do not also involve insufficient evidence.

Id. This Court reviews alleged misconduct in light of the evidence, the issues in the case, the jury instructions and the total argument made. See State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Even if counsel fails to object below, where the prosecutor's misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice, reversal is required. See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

As a threshold matter, there is no question that prosecutors have "wide latitude" in making arguments and drawing reasonable inferences from the evidence in closing. Fisher, 165 Wn.2d at 747. But a prosecutor is still prohibited from misstating the law. See Davenport, 100 Wn.2d at 763.

Indeed it has long been recognized that prosecutors are viewed with great trust by average jurors and the prosecutor's words thus hold great sway. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); State v. Suarez-Bravo, 72 Wn. App. 359, 369, 864 P.2d 426 (1994). Misstating the law can amount to serious, prejudicial and ill-intentioned misconduct even if the prosecutor's misstatements have not previously been publicly condemned by a Washington court. State v. Johnson, Jr., 158 Wn. App. 677, 685, 243 P.3d 936 (2010).

Here, the prosecutor did not just misstate the proper law regarding whether a verbal "aggression" was enough - the prosecutor also misstated the proper and lawful use of force in defense of property. TRP 270-71 (emphasis added). And in doing so, the prosecutor invited jurors to improperly convict.

The trial court erred in giving the "first aggressor" instruction over defense objection. The state failed to meet its burden of production under the facts of the case. Further, the instruction was constitutionally insufficient and failed to make the proper standard manifestly apparent in a way which went to the only issue at trial - whether the jury would believe that Stokes acted in self-defense. The prosecutor invited the jury to find Stokes the first aggressor - and thus unable to raise self-defense - based on being the "first aggressor" with an improperly given and constitutionally insufficient instruction and further misstated the law by telling jurors mere words were enough. And a "first aggressor" instruction was given based on a theory of defense of property which is not the law - an error the prosecutor compounded with argument below. The prosecutor was thus relieved of the constitutional weight of the burden of disproving self-defense. This Court should grant a new, fair trial on the fourth-degree assault.

2. THE LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN UNDER THE CONTROLLING PRECEDENT OF RAMIREZ

Mr. Stokes was found indigent prior to trial and at the time of sentencing. See CP 8, 119-20. In the judgment and sentence, Judge Costello ordered that Mr. Stokes was to pay a \$200 fee for "Court Costs." CP 114-15. The portion of the document for "Attorney fees as reimbursement" had the following words written;" "waived pursuant to Blazina analysis[.]" CP 115-16.

Also preprinted on the judgment and sentence document was the following, in relevant part:

THE FINANCIAL OBLIGATIONS IMPOSED IN THIS JUDGMENT SHALL BEAR INTEREST FROM THE DATE OF THE JUDGMENT UNTIL PAYMENT IN FULL, AT THE RATE APPLICABLE TO CIVIL JUDGMENTS.

CP 116.

This Court should strike the interest provision and \$200 criminal filing fee under Ramirez, supra. In that case, the Supreme Court recently held that the changes to our state's legal financial obligation system made by the 2018 Legislature applied to all cases still pending on direct review, regardless when sentencing occurred. Ramirez, 191 Wn.2d at 735. The determination of when a case meets that standard was defined by the high court based on RAP 12.7. Id. In that rule, the appellate court "loses the power to change or modify its decision" on direct appeal after issuance of a mandate. See RAP 12.7(a) and (b). A "mandate" is defined as "the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review." RAP 12.5(a). In general, a mandate only issues after a decision has been made on the merits. See RAP 12.5(b).

Thus, under Ramirez, the 2018 changes to the legal financial obligations statutes apply to this case, as no mandate has issued. Further, under the amendments, Mr. Stokes is entitled to relief.

Those amendments were contained in Engrossed Second Substitute House Bill ("Bill") 1783, and include a total prohibition against "the imposition of certain LFOs on indigent defendants." See Laws of 2018, ch. 269. Further, the Bill eliminates the authority to impose a criminal filing fee of \$200 on an indigent defendant, eliminates "interest

accrual” on all nonrestitution LFOs, establishes that the DNA database fee is no longer mandatory in some situations and provided new limits to remedies for failure to pay. Laws of 2018, ch. 269.

In Ramirez, the defendant was sentenced prior to the Bill and was ordered to pay a number of LFOs which were then considered “mandatory.” 191 Wn.2d at 733. Indeed, his entire intermediate appellate court case had been decided and his case was pending on Petition for Review in the Supreme Court when the Bill was enacted. 191 Wn.2d at 733-37.

The Ramirez Court concluded that the triggering event for the Bill’s amendments was “the court’s ability to impose costs on a criminal defendant following conviction,” which did not occur until the conclusion of the case. Id. Because Mr. Ramirez’s case was still pending on first direct appeal as a matter of right, his case was deemed “not yet final under RAP 12.7” when the Bill was enacted, and, as a result, the Bill’s amendments applied. Id.

Thus, even though the costs imposed had been deemed “mandatory” at the time of Mr. Ramirez’ sentencing and that sentencing occurred well before the 2018 legislative changes, the Supreme Court held that the statutory changes to the LFO scheme applied to Mr. Ramirez and all other cases still pending on direct review. Id.

Here, Mr. Stokes is entitled to relief, even though his sentencing occurred before the Bill was enacted. His case is still on direct review and thus not yet final under RAP 12.7. See RAP 12.7. This is his opening brief on appeal. Like Mr. Ramirez, Mr. Stokes was ordered to pay a \$200

filing fee and interest, both of which are no longer authorized under the Bill. Mr. Stokes is entitled to have these conditions and costs stricken under Ramirez. This Court should so hold.

E. CONCLUSION

For the reasons stated herein, the Court should reverse the conviction or, in the alternative, grant relief from the legal financial obligations and terms under Ramirez.

DATED this 28th day of January, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kathryn Selk', written in a cursive style.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that I served the attached document as follows: by this Court's portal upload I filed this document with the Pierce County Prosecutor's Office at pcpatcecf@co.pierce.wa.us, and Kenshon Stokes, 4418 S. Asotin Street, Tacoma, WA. 98418.

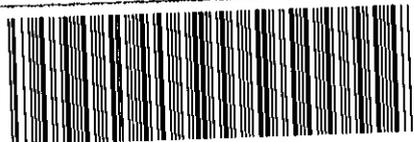
DATED this 28th day of January, 2019.



KATHRYN A. RUSSELL SELK, WSBA 23879
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APPENDIX A

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1/12/2018 3881



17-1-03436-5 50583978 CTINJY 01-11-18



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
KENSHON STOKES,
Defendant.

CAUSE NO. 17-1-03436-5

COURT'S INSTRUCTIONS TO THE JURY

DATED January 10, 2018

JUDGE *Jerry Costello*
JERRY T. COSTELLO

ORIGINAL

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1/12/2018

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

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INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

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INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately.

Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

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INSTRUCTION NO. 5

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

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INSTRUCTION NO. 7

A person commits the crime of assault in the second degree when he or she intentionally assaults another with a deadly weapon.

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INSTRUCTION NO. 8

An assault is an intentional touching or striking of another person with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

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INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

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INSTRUCTION NO. 10

A firearm, whether loaded or unloaded, is a deadly weapon.

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INSTRUCTION NO. 11

To convict the defendant of the crime of assault in the second degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:

1. That on or September 10th, 2017, the defendant intentionally assaulted Kalia Brown with a deadly weapon; and
2. That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

A person commits the crime of assault in the fourth degree when he or she commits an assault.

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INSTRUCTION NO. 13

To convict the defendant of the crime of Assault in the Fourth Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 10th, 2017, the defendant assaulted Kalia Brown;
- and
- (2) That this act occurred in the State of Washington, Pierce County.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

It is a defense to a charge of Assault in the Fourth Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

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INSTRUCTION NO. 15

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

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INSTRUCTION NO. 16

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

INSTRUCTION NO. 17

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.

The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be “not more than is necessary,” the law does not impose a duty to retreat. Retreat should not be considered by you as a “reasonably effective alternative.”

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INSTRUCTION NO. 18

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and four verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

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For verdict forms Count I – Count II, you must fill in the blank provided in each verdict form the words “not guilty” or the word “guilty”, according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 19

You will also be given a special verdict form for each count. On each count, if you find the defendant not guilty, do not use the special verdict form associated with that count. If you find the defendant guilty of that count, you will then use the special verdict form and fill in the blank(s) with the answer "yes" or "no" according to the decisions you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

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INSTRUCTION NO. 20

For purposes of this case, “family or household members” means spouses, former spouses, persons who have a child in common, regardless of whether they have been married or have lived together at any time, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, a person sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship.

“Dating relationship” means a social relationship of a romantic nature. In deciding whether two people had a “dating relationship,” you may consider all relevant factors, including (a) the nature of any relationship between them; (b) the length of time that any relationship existed; and (c) the frequency of any interaction between them.

INSTRUCTION NO. 21

For purposes of the firearm special verdict form the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I: ASSAULT IN THE SECOND DEGREE.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

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APPENDIX B

2018 WL 6626733

Only the Westlaw citation is currently available.
Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,

v.

Tiana Leeann KEE, Appellant.

No. 50203-8-II

|

Filed December 18, 2018

Appeal from Clark Superior Court, Docket No: 16-1-01626-0, Honorable Robert A. Lewis,
Judge

Attorneys and Law Firms

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Prosecuting Attorney Clark County, Clark County Prosecuting Attorney, P.O. Box 5000,
1013 Franklin Street, Vancouver, WA, 98666-5000, Lauren Ruth Boyd, Attorney at Law,
1013 Franklin St., Vancouver, WA, 98660-3039, for Respondent(s).

PUBLISHED OPINION

Sutton, J.

¶ 1 A jury found Tiana Leeann Kee guilty of second degree assault. Kee appeals her conviction, arguing that the trial court erred by giving the jury a first aggressor jury instruction. We hold that, although sufficient evidence supported the first aggressor jury instruction, the trial court erred in giving the instruction without also instructing the jury that words alone are not sufficient to make a defendant the first aggressor in an altercation. Therefore, we reverse Kee's conviction and remand for further proceedings consistent with this opinion.

FACTS

¶ 2 The State charged Kee with the second degree assault of Adam Ostrander based on an incident on August 1, 2016, when she punched him in the face and broke his nose. The case proceeded to a jury trial.

¶ 3 Brandon Lester, Ostrander’s younger brother, testified that he and Ostrander were walking down the street and listening to music. An older man, Cody Bemis, asked them to stop the music. Ostrander then briefly got into a verbal altercation with Bemis but he ended it.

¶ 4 As Lester and Ostrander started to walk away from Bemis, Kee approached them and asked Ostrander if he owed Bemis money. Lester testified that Ostrander called Kee a “bitch.” I Verbatim Report of Proceedings (VRP) at 61. Kee then said, “[D]o you want me to ‘F’ you[r] little butt up?” I VRP at 56. Ostrander said, “[D]o it,” and the altercation became physical. I VRP at 56. Lester testified that Kee hit Ostrander first. Lester also stated that Ostrander and Kee hit each other back and forth several times and that Kee broke Ostrander’s nose with her last hit.

¶ 5 Ostrander testified that when Kee approached him:

I proceeded to conversate [sic] with her for about thirty seconds and then walk away from her and she made a derogatory comment and I told her to—bitch go home. And that’s when she threatened me that if I didn’t be [quiet] that she was going to kick my ass.

I VRP at 82-83. Ostrander stated that he told Kee “to go ahead,” and she hit him in the face three times. I VRP at 88. Ostrander testified that he starting kicking Kee and that she hit him in the face a fourth time, breaking his nose. Ostrander also stated that he hit Kee in the chin after she had hit him for the fourth time. X-rays later confirmed that Ostrander’s nose was broken.

¶ 6 Bemis testified that he was sitting on his porch when Ostrander and Lester walked by playing music very loudly. When Bemis asked them to turn the music down, Ostrander started yelling at him. The verbal altercation escalated into a physical altercation, and after Ostrander made a few failed attempts to hit Bemis, Ostrander left. A few minutes later, Bemis witnessed the altercation between Kee and Ostrander. Bemis testified that Ostrander hit Kee first.

¶ 7 Kee testified that she observed the initial altercation between Bemis and Ostrander, and that Ostrander and Lester were both angry when she approached them. She stated that Ostrander began to advance toward her with his fists closed. Kee also testified that Ostrander hit her in the face twice before she hit him.

*2 ¶ 8 The State proposed a first aggressor jury instruction. Kee objected to the instruction, arguing that the instruction was not supported by the evidence presented at trial. The trial court disagreed and gave the following first aggressor jury instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that [the] defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Clerk's Papers (CP) at 77. This instruction is identical to 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04, at 256 (4th ed. 2016) (WPIC 16.04).

¶ 9 The jury found Kee guilty of second degree assault. Kee appeals.

ANALYSIS

¶ 10 Kee argues that the trial court erred in giving a first aggressor jury instruction because the instruction denied her the ability to argue her theory of self-defense. Specifically, Kee argues that there was not sufficient evidence to justify a first aggressor jury instruction because words alone do not constitute sufficient provocation. We hold that, although sufficient evidence supported the first aggressor jury instruction, the trial court nevertheless erred in giving the instruction without also instructing the jury that words alone are not sufficient to make a defendant the first aggressor in an altercation.

I. LEGAL PRINCIPLES

¶ 11 We review de novo whether sufficient evidence justifies a first aggressor jury instruction. State v. Bea, 162 Wash. App. 570, 577, 254 P.3d 948 (2011). In making this determination, we must view the evidence in the light most favorable to the State. Bea, 162 Wash. App. at 577, 254 P.3d 948. There need only be some evidence that the defendant was the first aggressor to justify giving the instruction. Bea, 162 Wash. App. at 577, 254 P.3d 948.

¶ 12 Generally, a defendant cannot invoke a self-defense claim when she is the first aggressor and provokes an altercation. State v. Riley, 137 Wash.2d 904, 909, 976 P.2d 624 (1999). A first aggressor jury instruction is appropriate when there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. Riley, 137 Wash.2d at 909-10, 976 P.2d 624. A first aggressor instruction is also appropriate when “there is conflicting evidence as to whether the defendant’s conduct precipitated a fight.” Riley, 137 Wash.2d at 910, 976 P.2d 624. The provoking act must be intentional, but it cannot be the actual, charged assault. State v. Kidd, 57 Wash. App. 95, 100, 786 P.2d 847 (1990).

¶ 13 In Riley, our Supreme Court held that “the giving of an aggressor instruction where words alone are the asserted provocation” is erroneous. Riley, 137 Wash.2d at 911, 976 P.2d 624. The court reasoned that a first aggressor jury instruction is based on the principle that a defendant cannot claim self-defense when he or she is the initial aggressor because the victim of the aggressive act is entitled to respond with lawful force. Riley, 137 Wash.2d at 912, 976 P.2d 624. A victim cannot, however, lawfully respond with force to a defendant’s use of words alone. Riley, 137 Wash.2d at 912, 976 P.2d 624.

II. SUFFICIENCY OF EVIDENCE FOR FIRST AGGRESSOR INSTRUCTION

*3 ¶ 14 Here, there are conflicting accounts of whether Kee’s or Ostrander’s actions first provoked the second degree assault. Ostrander and Lester both testified that, after their verbal quarrel, Kee hit Ostrander first. On the other hand, Bemis and Kee testified that Ostrander hit Kee first. Regardless of who threw the first punch, both Kee and Ostrander hit each other before Kee finally hit Ostrander and broke his nose.

¶ 15 Viewed in the light most favorable to the State, the evidence supports the State’s position that Kee was the first aggressor when she hit Ostrander. And there is no dispute that the State charged Kee only for the last punch that broke Ostrander’s nose. Therefore, that first punch was not the charged assault.

¶ 16 Because there is conflicting evidence regarding whether Kee was the first aggressor and provoked the need to act in self-defense, sufficient evidence supported giving the first aggressor jury instruction.

III. LANGUAGE OF FIRST AGGRESSOR INSTRUCTION

¶ 17 Kee argues that the trial court erred in giving the jury the first aggressor jury instruction because the language of the instruction was not complete and it permitted the jury to find that she provoked the altercation based on mere words. We agree.

¶ 18 Jury instructions are sufficient when they are supported by substantial evidence, permit the parties to argue their theories of the case, and properly inform the jury of the applicable law. *State v. Woods*, 138 Wash. App. 191, 196, 156 P.3d 309 (2007). Self-defense instructions are subject to heightened scrutiny and “ ‘must make the relevant legal standard manifestly apparent to the average juror.’ ” *Woods*, 138 Wash. App. at 196, 156 P.3d 309 (quoting *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997)).

¶ 19 As discussed above, there is evidence regarding Kee’s and Ostrander’s physical altercation. However, their interaction started with a verbal altercation. Lester testified that Kee said, “[D]o you want me to ‘F’ you[r] little butt up?” before the fight ensued. I VRP at 56. Ostrander also testified that Kee “made a derogatory comment” before she hit him. I VRP at 82-83. Therefore, the evidence supported a finding that Kee’s *words*, rather than her physical acts, first provoked the physical altercation.

¶ 20 The court in *Riley* clearly held that words alone cannot be the provoking conduct that justifies a first aggressor instruction. *Riley*, 137 Wash.2d at 911-12, 976 P.2d 624. However, the jury instruction given here did not convey this rule of law. The trial court’s first aggressor instruction stated that “if you find beyond a reasonable doubt that the defendant was the aggressor, and that [the] defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.” CP at 77. The trial court did not instruct the jury that words are not adequate provocation to negate self-defense.

¶ 21 From the evidence presented at trial, a reasonable juror could have concluded that Kee’s comments to Ostrander provoked the assault. Additionally, the trial court’s instruction allowed the State to argue to the jury that it should focus on Kee’s initiating an argument with her words rather than focusing on her punches.

¶ 22 In fact, the State made such an argument. At the very beginning of its closing argument, the State emphasized that “[t]he Defendant walked up to this situation—the situation that didn’t involve her in any way. She initiated this entire incident. *She was the first person to speak to Adam Ostrander.*” II VRP at 209 (emphasis added). In conclusion, the State argued,

*4 There was no reason for her to walk up there—there was no reasons [sic] for her to become a part of it. And as the court mentioned one of the instructions says if she and—is the aggressor in this situation she can’t claim

self-defense.... And she created this situation—*she created this argument*—she created this conflict and it ended in a broken nose.

II VRP at 220 (emphasis added). In rebuttal, the State argued, “I would argue walking up to someone and saying do you owe him money with a raised tone and saying to someone I should kick your ass is pretty darn aggressive.” II VRP at 243.

¶ 23 By failing to instruct the jury that words alone are insufficient provocation for purposes of the first aggressor jury instruction, the trial court did not ensure that the relevant self-defense legal standards were manifestly apparent to the average juror. Moreover, the trial court’s instructions affected Kee’s ability to argue that she acted in self-defense.

¶ 24 We recognize that WPIC 16.01 does not include an express statement that words alone cannot constitute aggression that negates self-defense. The pattern instruction’s reference to an “intentional *act*” and the “defendant’s *acts*,” could be viewed as requiring some physical conduct. WPIC 16.01 (emphasis added); CP at 77. But verbally abusing someone also constitutes an “act.” When there is evidence that the defendant provoked an altercation with words, particularly when the State suggests that those words constitute first aggression, the language of WPIC 16.01 is inadequate to convey the law established in Riley.

¶ 25 Accordingly, we hold that the trial court erred in giving the first aggressor jury instruction without also instructing the jury that words alone are not adequate provocation to make a defendant the first aggressor in an altercation.

CONCLUSION

¶ 26 We hold that although sufficient evidence supported the first aggressor jury instruction, the trial court erred in giving the instruction without also instructing the jury that words alone are not sufficient to make a defendant the first aggressor in an altercation. Accordingly, we reverse Kee’s conviction and remand for further proceedings consistent with this opinion.

We concur:

Maxa, C.J.

Johanson, J.

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APPENDIX C

2018 WL 4499761

Only the Westlaw citation is currently available.
Supreme Court of Washington.

STATE of Washington, Respondent,
v.
David Angel RAMIREZ, Petitioner.

NO. 95249-3

|
Argued June 26, 2018

|
Filed September 20, 2018

Synopsis

Background: Defendant was convicted in the Superior Court, Lewis County, 15-1-00520-5, Richard Lynn Brosey, J., of third-degree assault with sexual motivation. He appealed. The Court of Appeals, 2017 WL 4791011, affirmed. Defendant petitioned for further review, which petition was granted only on issue of discretionary legal financial obligations (LFOs) imposed at sentencing.

Holdings: The Supreme Court, Stephens, J., held that:

de novo standard of review applied to trial court's alleged error in failing to conduct adequate inquiry prior to imposing discretionary LFOs;

trial court failed to conduct adequate individualized inquiry into defendant's ability to pay prior to imposing discretionary LFOs; and

amendments to discretionary LFO statute, enacted after defendant's petition for review was granted, applied prospectively to defendant's appeal.

Reversed and remanded.

Appeal from Lewis County Superior Court, (No. 15-1-00520-5), Hon. Richard Lynn Brosey, Judge

Attorneys and Law Firms

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Opinion

STEPHENS, J.

*1 ¶ 1 In *State v. Blazina*, 182 Wash.2d 827, 839, 344 P.3d 680 (2015), we held that under former RCW 10.01.160(3) (2015), trial courts have an obligation to conduct an individualized inquiry into a defendant's current and future ability to pay before imposing discretionary legal financial obligations (LFOs) at sentencing. This case provides an opportunity to more fully describe the nature of such an inquiry. An adequate inquiry must include consideration of the mandatory factors set forth in *Blazina*, including the defendant's incarceration and other debts, and the court rule GR 34 criteria for indigency. *Id.* at 838, 344 P.3d 680. The trial court should also address what we described in *Blazina* as other "important factors" relating to the defendant's financial circumstances, including employment history, income, assets and other financial resources, monthly living expenses, and other debts. *Id.*

¶ 2 The trial court in David A. Ramirez's case failed to conduct an adequate individualized inquiry before imposing LFOs on Ramirez. While this *Blazina* error would normally entitle Ramirez to a resentencing hearing on his ability to pay discretionary LFOs, such a limited resentencing is unnecessary in this case. Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), which amended two statutes at issue and now prohibits the imposition of certain LFOs on indigent defendants, applies prospectively to Ramirez's case on appeal. We reverse the Court of Appeals and remand for the trial court to strike the improperly imposed LFOs from Ramirez's judgment and sentence.

FACTS AND PROCEDURAL HISTORY

¶ 3 A jury convicted Ramirez of third degree assault and possession of a controlled substance, and found by special verdict that he committed the assault with sexual motivation and displayed an egregious lack of remorse. Clerk's Papers (CP) at 63-66.

¶ 4 At sentencing, the State sought an exceptional sentence of 10 years based on Ramirez’s prior record and offender score. 2 Verbatim Report of Proceedings (Mar. 7, 2016) (VRP) at 346. Following the State’s argument for imposing an exceptional sentence, Ramirez took the opportunity to directly address the trial court. Ramirez explained to the court that despite the State’s representations, he “was doing everything right” before his arrest. *Id.* at 360. Ramirez shared that prior to his arrest, he was working a minimum wage job at Weyerhaeuser as part of a “temporary service team” and paying all his household bills, including a DirecTV subscription that included Seattle Seahawks games. *Id.* at 359-60, 362-63. Ramirez had opened a bank account for the first time in his life, was planning on getting his driver’s license, and had moved into his own apartment with the help of his wife. *Id.* at 360, 362. Ramirez discussed these favorable aspects of his life in an effort to show that despite his criminal history, he did not deserve an exceptional sentence. Suppl. Br. of Pet’r at 3. He lamented that because of his drug relapse and arrest, “I missed out on all of that.” VRP at 363.¹

¹ Ramirez’s full statement was, “I missed out on all of that because I screwed up before even the first Seahawk game. That was the weekend that I screwed up. It was the Saturday before the first Seahawk game.” VRP at 363.

*2 ¶ 5 The trial court sentenced Ramirez to five years for the third degree assault conviction and two years for possession of a controlled substance, to be served consecutively. *Id.* at 372-73. The trial court also imposed \$2,900 in LFOs, including a \$500 victim assessment fee, a \$100 DNA (deoxyribonucleic acid) collection fee, a \$200 criminal filing fee, and discretionary LFOs of \$2,100 in attorney fees, and set a monthly payment amount of \$25. *Id.* at 375-76. After the court announced the sentence, Ramirez presented a notice of appeal and a motion for an order of indigency, which the court granted. *Id.* at 373; Suppl. CP at 1-4. According to the financial statement in his declaration of indigency, Ramirez had no source of income or assets and no savings, and owed more than \$10,000 at the time of sentencing (apparently previously imposed court costs and fees). Suppl. CP at 2-4.

¶ 6 Prior to imposing LFOs, the trial court asked only two questions relating to Ramirez’s current and future ability to pay, both of which were directed to the State. First, the court asked, “And when he is not in jail, he has the ability to make money to make periodic payments on his LFOs, right?” VRP at 348. The State responded that Ramirez had the ability to pay his LFOs “[w]hen he’s not in jail and when he is in jail,” noting that Ramirez could work while incarcerated. *Id.* The trial court then asked the State to once more confirm that LFOs were appropriate in Ramirez’s case: “But as far as you are concerned, the LFOs should be imposed.” *Id.* The State answered, “Yes.” *Id.*

¶ 7 The trial court did not directly ask Ramirez or his counsel about his ability to pay at any point during sentencing. The only statement made by Ramirez concerning his ability to pay came after the trial court announced its decision to impose discretionary costs. After finding that Ramirez had “the ability to earn money and make small payments on his financial

obligations,” the court listed the specific costs imposed and ordered Ramirez to pay “25 bucks a month starting [in] 60 days.” *Id.* at 375-76. Ramirez then asked, “How am I going to do that from inside?” *Id.* at 376. Ramirez’s counsel responded, “I will explain.” *Id.* The discussion then moved on to a different subject.²

² Ramirez’s counsel made only one mention of LFOs, in correcting the trial court’s original estimate of the amount of attorney fees. The court initially stated that these discretionary costs totaled \$900, but Ramirez’s counsel clarified that \$2,100 was the correct amount. VRP at 375.

¶ 8 On appeal, Ramirez argued that the trial court failed to make an adequate individualized inquiry into his ability to pay before imposing discretionary LFOs, contrary to *Blazina*, 182 Wash.2d at 837-38, 344 P.3d 680.³ In a 2-1 unpublished opinion, Division Two of the Court of Appeals affirmed the trial court, holding that the court “conducted an adequate individualized inquiry and did not err in imposing the discretionary LFOs.” *State v. Ramirez*, No. 48705-5-II, slip op. at 13, 2017 WL 4791011 (Wash. Ct. App. Oct. 24, 2017) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2048705-5-II%20Unpublished%20Opinion.pdf>. In reviewing the trial court’s decision to impose discretionary LFOs on Ramirez, the Court of Appeals majority applied an overall abuse of discretion standard; it cited the information offered by Ramirez in his statement to the trial court as sufficient grounds for finding Ramirez able to pay LFOs. *Id.* at 12-13.

³ Ramirez’s appeal additionally raised several guilt-phase claims of error, which the Court of Appeals rejected. *State v. Ramirez*, No. 48705-5-II, slip op. at 7-11, 13-15, 2017 WL 4791011 (Wash. Ct. App. Oct. 24, 2017) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2048705-5-II%20Unpublished%20Opinion.pdf>. These issues are not before us.

¶ 9 In dissent, Chief Judge Bjorgen argued that the question of whether a trial court made an adequate inquiry into a defendant’s ability to pay discretionary LFOs should be reviewed de novo, not for an abuse of discretion. *Id.* at 16 (Bjorgen, C.J., dissenting). Applying the de novo standard, Chief Judge Bjorgen concluded that the trial court’s inquiry into Ramirez’s financial status fell short of the *Blazina* standards. *Id.* at 19.

*3 ¶ 10 On March 7, 2018, we granted Ramirez’s petition for review “only on the issue of discretionary [LFOs].” Order Granting Review, No. 95249-3 (Wash. Mar. 7, 2018). On March 27, 2018, just weeks after we granted Ramirez’s petition, House Bill 1783 became law. LAWS OF 2018, ch. 269. House Bill 1783’s amendments relate to Washington’s system for imposing and collecting LFOs and are effective as of June 7, 2018. House Bill 1783 is particularly relevant to Ramirez’s case because it amends the discretionary LFO statute to prohibit trial courts from imposing discretionary LFOs on defendants who are indigent at the time of sentencing. *Id.* at § 6(3).

ANALYSIS

¶ 11 This case concerns Washington's system of LFOs, specifically the imposition of discretionary LFOs on individuals who lack the current and future ability to pay them. State law requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay discretionary costs. See RCW 10.01.160(3).

¶ 12 We addressed former RCW 10.01.160(3) in *Blazina* and held that the statute requires trial courts to conduct an individualized inquiry into the financial circumstances of each offender before levying any discretionary LFOs. 182 Wash.2d at 839, 344 P.3d 680. As Ramirez's case demonstrates, however, costs are often imposed with very little discussion. We granted review in this case to articulate specific inquiries trial courts should make in determining whether an individual has the current and future ability to pay discretionary costs.

¶ 13 After we granted review, the legislature enacted House Bill 1783, which amends former RCW 10.01.160(3) to categorically prohibit the imposition of any discretionary costs on indigent defendants. LAWS OF 2018, ch. 269, § 6(3). House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(2)(h) (2015), to prohibit courts from imposing the \$200 filing fee on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h). According to Ramirez's motion for an order of indigency, which the trial court granted, Ramirez unquestionably qualified as indigent at the time of sentencing: Ramirez had no source of income or assets and no savings, and owed more than \$10,000 at the time of sentencing. Suppl. CP at 3-4.

¶ 14 This case presents two issues. The primary issue is whether the trial court conducted an adequate individualized inquiry into Ramirez's ability to pay, as required under *Blazina* and former RCW 10.01.160(3). A separate but related issue is whether House Bill 1783's statutory amendments apply to Ramirez's case on appeal.

I. The Trial Court Did Not Conduct an Adequate Individualized Inquiry into Ramirez's Current and Future Ability To Pay LFOs

¶ 15 The threshold issue in this case is whether the trial court performed an adequate inquiry into Ramirez's present and future ability to pay before imposing discretionary LFOs. In addressing this issue, we must decide what standard of review applies to a trial court's decision to impose discretionary LFOs. The Court of Appeals was seemingly split on this question, with the majority applying an overall abuse of discretion standard and the

dissenting judge applying de novo review. We address the proper standard of review before turning to the merits of Ramirez’s argument.

A. The Adequacy of the Trial Court’s Individualized Inquiry into a Defendant’s Ability To Pay Discretionary LFOs Should Be Reviewed De Novo

¶ 16 As Ramirez correctly points out, the question of whether the trial court adequately inquired into his ability to pay discretionary LFOs involves both a factual and a legal component. Suppl. Br. of Pet’r at 16. On the factual side, the reviewing court determines what evidence the trial court actually considered in making the *Blazina* inquiry. Chief Judge Bjorgen aptly observed that the factual determination can be decided by simply examining the record for supporting evidence.⁴ *Ramirez, slip op. at 17* (Bjorgen, C.J., dissenting). On the legal side, the reviewing court decides whether the trial court’s inquiry complied with the requirements of *Blazina*. Both the majority and dissenting opinions below recognized that this legal inquiry merits de novo review. *See id. at 13 n.4* (“[w]hether or not a trial court makes an individualized inquiry is reviewed de novo”), *17* (Bjorgen, C.J., dissenting) (describing this as “an unalloyed legal question”).

⁴ Ramirez criticizes Chief Judge Bjorgen for embracing a “clearly erroneous” standard of review for factual determinations, based on prior appellate decisions. *See* Suppl. Br. of Pet’r at 17 & n.6. Ramirez insists that “substantial evidence” is the correct Washington standard, while “clear error” applies in federal courts. *Id.* We believe the distinction is semantic in this context. The very case Ramirez cites as identifying different state and federal standards says, “[W]e review [factual findings] for substantial evidence, which is analogous to the ‘clear error’ test applied by the federal courts.” *Steele v. Lundgren*, 85 Wash. App. 845, 850, 935 P.2d 671 (1997).

*4 ¶ 17 Given their shared recognition that de novo review applies to the question of whether the trial court complied with *Blazina*, the split in the Court of Appeals may be more a difference in emphasis than in substance. *Blazina* establishes what constitutes an adequate inquiry into a defendant’s ability to pay under state law, and the standard of review for an issue involving questions of law is de novo. *State v. Hanson*, 151 Wash.2d 783, 784-85, 91 P.3d 888 (2004). Ramirez is correct that the *Blazina* inquiry is similar to other inquiries trial judges make that are subject to de novo review. *See* Suppl. Br. of Pet’r at 16-17 (citing *State v. Vicuna*, 119 Wash. App. 26, 30-31, 79 P.3d 1 (2003) (applying de novo review to determination of whether a conflict exists between attorney and client); *State v. Ramirez-Dominguez*, 140 Wash. App. 233, 239, 165 P.3d 391 (2007) (applying de novo review to determination of whether the defendant knowingly, intelligently, and voluntarily waived his right to a jury trial)).

¶ 18 That said, the trial court’s ultimate decision whether to impose discretionary LFOs is undoubtedly discretionary. The trial court must balance the defendant’s ability to pay against the burden of his obligation, which is an exercise of discretion. *State v. Baldwin*, 63 Wash. App. 303, 312, 818 P.2d 1116 (1991). But, discretion is necessarily abused when it is manifestly

unreasonable or based on untenable grounds or reasons. *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997). If the trial court fails to conduct an individualized inquiry into the defendant's financial circumstances, as RCW 10.01.160(3) requires, and nonetheless imposes discretionary LFOs on the defendant, the trial court has per se abused its discretionary power. Stated differently, the court's exercise of discretion is unreasonable when it is premised on a legal error. The focus of Ramirez's argument for de novo review is squarely on the trial court's legal error in failing to conduct an individualized inquiry. Thus, while the State is correct that the abuse of discretion standard of review is relevant to the broad question of whether discretionary LFOs were validly imposed, de novo review applies to the alleged error in this case: the failure to make an adequate inquiry under *Blazina*.

B. The Trial Court's Inquiry into Ramirez's Ability To Pay Discretionary LFOs Was Inadequate under Blazina

¶ 19 The legal question before us is whether the trial court's inquiry into Ramirez's current and future ability to pay discretionary LFOs was adequate under *Blazina*. In *Blazina*, we held that former RCW 10.01.160(3) requires the trial court to conduct an individualized inquiry on the record concerning a defendant's current and future ability to pay before imposing discretionary LFOs. 182 Wash.2d at 839, 344 P.3d 680. We explained that "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *Id.* at 838, 344 P.3d 680. As part of this inquiry, the trial court is required to consider "important factors," such as incarceration and the defendant's other debts, when determining a defendant's ability to pay. *Id.* Additionally, we specifically instructed courts to look for additional guidance in the comment to court rule GR 34, which lists the ways a person may prove indigent status for the purpose of seeking a waiver of filing fees and surcharges. *Id.*; *City of Richland v. Wakefield*, 186 Wash.2d 596, 606-07, 380 P.3d 459 (2016). As we further clarified, "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wash.2d at 839, 344 P.3d 680.

¶ 20 Here, the record shows that the trial court asked only two questions concerning Ramirez's ability to pay LFOs, both of which were directed to the State. First, the court asked, "And when he is not in jail, he has the ability to make money to make periodic payments on his LFOs, right?" VRP at 348. The State responded, "When he's not in jail and when he is in jail," noting that Ramirez could work while incarcerated. *Id.* The court then asked the State for clarification on the LFO issue: "But as far as you are concerned, the LFOs should be imposed." *Id.* In response, the State simply answered, "Yes." *Id.* The record reflects that these two questions, directed to the State, are the only questions asked by the trial court relating to Ramirez's ability to pay discretionary LFOs before ordering him to pay \$25 per month starting in 60 days. When Ramirez asked, "How am I going to do that

from inside?” *id.* at 376, the trial court said nothing. Ramirez’s counsel said, “I will explain,” and the court moved on. *Id.*

*5 ¶ 21 The court made no inquiry into Ramirez’s debts, which his declaration of indigency listed as exceeding \$10,000 at the time of sentencing (apparently previously imposed court costs and fees). Suppl. CP at 4. Nor does the record reflect that the trial court inquired into whether Ramirez met the GR 34 standard for indigency. Had the court looked to GR 34 for guidance, as required under *Blazina*, it would have confirmed that Ramirez was indigent at the time of sentencing—his income fell below 125 percent of the federal poverty guideline. As we explained in *Blazina*, “if someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.” 182 Wash.2d at 839, 344 P.3d 680; *Wakefield*, 186 Wash.2d at 607, 380 P.3d 459. The record does not reflect that the trial court meaningfully inquired into any of the mandatory *Blazina* factors.

¶ 22 The trial court also failed to consider other “important factors” relating to Ramirez’s current and future ability to pay discretionary LFOs, such as Ramirez’s income, his assets and other financial resources, his monthly living expenses, and his employment history. *Blazina*, 182 Wash.2d at 838, 344 P.3d 680. In *Blazina*, we held that “[t]he record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay,” which requires the court to consider “important factors,” in addition to the mandatory factors discussed above. *Id.* The only information in the record about Ramirez’s financial situation came during Ramirez’s allocution and was offered to show how he had been putting his life in order prior to his arrest. The court made no inquiry.

¶ 23 Consistent with *Blazina*’s instruction that courts use GR 34 as a guide for determining whether someone has an ability to pay discretionary costs, we believe the financial statement section of Ramirez’s motion for indigency would have provided a reliable framework for the individualized inquiry that *Blazina* and RCW 10.01.160(3) require. In determining a defendant’s indigency status, the financial statement section of the motion for indigency asks the defendant to answer questions relating to five broad categories: (1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts. *See* Suppl. CP at 2-4. These categories are equally relevant to determining a defendant’s ability to pay discretionary LFOs.

¶ 24 Regarding employment history, a trial court should inquire into the defendant’s present employment and past work experience. The court should also inquire into the defendant’s income, as well as the defendant’s assets and other financial resources. Finally, the court should ask questions about the defendant’s monthly expenses, and as identified in *Blazina*, the court must ask about the defendant’s other debts, including other LFOs, health care costs, or education loans. To satisfy *Blazina* and RCW 10.01.160(3)’s mandate that the State

cannot collect costs from defendants who are unable to pay, the record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs. That did not happen here.

¶ 25 The State argues, and the Court of Appeals majority agreed, that despite any lack of inquiry by the trial court into Ramirez’s ability to pay, statements by Ramirez during his allocution were adequate to support the imposition of discretionary LFOs. Resp’t’s Br. at 4. In opposing the State’s request for an exceptional sentence, Ramirez told the court he was “doing everything right” prior to his arrest—he was working a minimum wage job at Weyerhaeuser on a “temporary service team,” his wife had helped him get his own apartment, he was paying his household bills, including a DirecTV subscription, and he had opened a bank account for the first time in his life and was hoping to get a driver’s license. VRP at 359-363. Ramirez did not offer this information in the context of assessing his current and future ability to pay LFOs, but rather in an effort to “counter the State’s negative portrayal of him and direct the court’s attention to his accomplishments in order to persuade the court he was deserving of a lesser sentence.” Suppl. Br. of Pet’r at 19.

*6 ¶ 26 Notably, while the Court of Appeals majority viewed Ramirez’s statements as supporting imposition of discretionary costs, there is no indication in the record that the trial court actually relied on any of Ramirez’s statements. *See Ramirez, slip op. at 13.*⁵ Nor would reliance on Ramirez’s statements be reasonable, given that Ramirez was describing his circumstances and the positive strides he had made in the months *prior* to his arrest. As his statements at sentencing and his declaration of indigency make clear, all of that changed. Indeed, Ramirez lamented that after being on the right track, he “screwed up” and lost everything. VRP at 363.

⁵ The Court of Appeals inferred that the trial court’s decision was based on Ramirez’s statements:

Here, the court considered that Ramirez had recently been released from custody, was working in a minimum wage job, and had been paying his household bills. Ramirez also told the court that he had opened a bank account for the first time in his life and “was just getting on track[.]” He added that although he was working a minimum wage job “it was fine because it took care of everything.” Thus, we hold that the court conducted an adequate individualized inquiry and did not err in imposing the discretionary LFOs.

Ramirez, slip op. at 13 (citations omitted).

¶ 27 RCW 10.01.160(3) requires the trial court to inquire into a person’s present and future ability to pay LFOs. This inquiry must be made on the record, and courts should be cautious of any after-the-fact attempt to justify the imposition of LFOs based on information offered by a defendant for an entirely different purpose. Judges understand that defendants want to appear in their best light at sentencing. It is precisely for this reason that the judge’s obligation is to engage in an on-the-record individualized inquiry into the defendant’s ability to pay discretionary LFOs.

¶ 28 We hold that the trial court failed to make an adequate individualized inquiry into Ramirez’s current and future ability to pay prior to imposing discretionary LFOs. Normally, this *Blazina* error would entitle Ramirez to a full resentencing hearing on his ability to pay LFOs. The timing of Ramirez’s appeal, however, makes this case somewhat unusual. After we granted review, the legislature passed House Bill 1783, which amends two LFO statutes at issue. LAWS OF 2018, ch. 269. House Bill 1783 amends the discretionary LFO statute, former ROW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c). LAWS OF 2018, ch. 269, § 6(3). House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(h), to prohibit courts from imposing the \$200 filing fee on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h).

¶ 29 Ramirez argues that House Bill 1783’s amendments apply to his case on appeal because he qualified as indigent at the time of sentencing and his case was not yet final when House Bill 1783 was enacted. Suppl. Br. of Pet’r at 8-10. As for the remedy, Ramirez asks us to strike the discretionary LFOs and the \$200 criminal filing fee from his judgment and sentence rather than remand his case for resentencing. For the reasons discussed below, we agree that House Bill 1783 applies on appeal to invalidate Ramirez’s discretionary LFOs (and the \$200 criminal filing fee) and that resentencing is unnecessary in this case.

II. House Bill 1783 Applies Prospectively to Ramirez’s Case Because the Statutory Amendments Pertain to Costs and His Case on Direct Review Is Not Yet Final

¶ 30 House Bill 1783’s amendments modify Washington’s system of LFOs, addressing some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction. For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, it establishes that the DNA database fee is no longer mandatory if the offender’s DNA has been collected because of a prior conviction, and it provides that a court may not sanction an offender for failure to pay LFOs unless the failure to pay is willful. LAWS OF 2018, ch. 269, §§ 1, 18, 7. Relevant here, House Bill 1783 amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 6(3). It also prohibits imposing the \$200 filing fee on indigent defendants. *Id.* § 17. Because House Bill 1783 was enacted *after* we granted Ramirez’s petition for review, we must decide whether House Bill 1783’s amendments apply to Ramirez’s case on appeal. We hold that House Bill 1783 applies prospectively to Ramirez because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and Ramirez’s case was pending on direct review and thus not final when the amendments were enacted.

*7 ¶ 31 At the time of Ramirez’s sentencing in 2016, the discretionary cost statute provided that “[t]he court shall not order a defendant to pay costs unless the defendant is or will be

able to pay them.” Former RCW 10.01.160(3). In making this determination, the statute instructed the trial court to “take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Id.* The statutory language directs that the trial court must consider a defendant’s current and future ability to pay before deciding to impose discretionary costs on the defendant.

¶ 32 House Bill 1783 amends former RCW 10.01.160(3) to expressly prohibit courts from imposing discretionary costs on defendants who are indigent at the time of sentencing: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” LAWS OF 2018, ch. 269, § 6(3). Under RCW 10.101.010(3)(a) through (c), a person is “indigent” if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level. If the defendant is not indigent, the amendment instructs the court to engage in the same individualized inquiry into the defendant’s ability to pay as previously required under former RCW 10.01.160(3), i.e., to assess “the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Id.* In this case, there is no question that Ramirez satisfied the indigency requirements of RCW 10.101.010(3)(c) at the time of sentencing. Accordingly, if House Bill 1783 applies to Ramirez’s case, the trial court impermissibly imposed discretionary LFOs on Ramirez.

¶ 33 As noted, House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17. Thus, if House Bill 1783’s amendments apply to Ramirez’s case on appeal, the trial court improperly imposed both the discretionary costs of \$2,100 and the criminal filing fee.

¶ 34 This is not our first occasion to consider the prospective application of cost statutes to criminal cases on appeal. In State v. Blank, 131 Wash.2d 230, 249, 930 P.2d 1213 (1997), we held that a statute imposing appellate costs applied prospectively to the defendants’ cases on appeal. In Blank, the defendants’ appeals were pending when the legislature enacted a statute providing for recoupment of appellate defense costs from a convicted defendant. *Id.* at 234, 930 P.2d 1213. In determining whether the statute applied to the defendants’ cases, we clarified that “[a] statute operates prospectively when the precipitating event for [its] application ... occurs after the effective date of the statute.” *Id.* at 248, 930 P.2d 1213 (alterations in original) (quoting Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass’n, 83 Wash.2d 523, 535, 520 P.2d 162 (1974)). We concluded that the “precipitating event” for a statute “concerning attorney fees and costs of litigation” was the termination of the defendant’s case and held that the statute therefore applied prospectively to cases that were pending on appeal when the costs statute was enacted. *Id.* at 249, 930 P.2d 1213

(citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wash.2d 222, 232, 883 P.2d 1370, 915 P.2d 519 (1994) (holding that the right to attorney fees is governed by the statute in force at the termination of the action)).

*8 ¶ 35 Similar to the statute at issue in *Blank*, House Bill 1783's amendments concern the court's ability to impose costs on a criminal defendant following conviction. House Bill 1783 amends former RCW 10.01.160(3) by expressly prohibiting the imposition of discretionary LFOs on defendants like Ramirez who are indigent at the time of sentencing; the amendment conclusively establishes that courts do not have discretion to impose such LFOs. And, like the defendants in *Blank*, Ramirez's case was on appeal as a matter of right and thus was not yet final under RAP 12.7 when House Bill 1783 became effective. Because House Bill 1783's amendments pertain to costs imposed upon conviction and Ramirez's case was not yet final when the amendments were enacted, Ramirez is entitled to benefit from this statutory change.

¶ 36 Applying House Bill 1783 to the facts of this case, we hold that the trial court impermissibly imposed discretionary LFOs of \$2,100, as well as the \$200 criminal filing fee, on Ramirez. We reverse the Court of Appeals and remand for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs.

CONCLUSION

¶ 37 In *Blazina*, we held that under former RCW 10.73.160(3), trial courts have an obligation to conduct an individualized inquiry into a defendant's current and future ability to pay discretionary LFOs before imposing them at sentencing. Today, we articulate specific inquiries trial courts should make in determining whether an individual has the current and future ability to pay discretionary costs. Trial courts must meaningfully inquire into the mandatory factors established by *Blazina*, such as a defendant's incarceration and other debts, or whether a defendant meets the GR 34 standard for indigency. Trial courts must also consider other "important factors" relating to a defendant's financial circumstances, including employment history, income, assets and other financial resources, monthly living expenses, and other debts. Under this framework, trial courts must conduct an on-the-record inquiry into the mandatory *Blazina* factors and other "important factors" before imposing discretionary LFOs.

¶ 38 We reverse the Court of Appeals and hold that the trial court failed to conduct an adequate *Blazina* inquiry into Ramirez's current and future ability to pay. Although this *Blazina* error would normally entitle Ramirez to a resentencing hearing on his ability to pay, resentencing is unnecessary in this case. House Bill 1783, which prohibits the imposition of discretionary LFOs on an indigent defendant, applies on appeal to invalidate Ramirez's

discretionary LFOs (and the \$200 criminal filing fee). We remand for the trial court to strike the \$2,100 discretionary LFOs and the \$200 filing fee from Ramirez's judgment and sentence.

WE CONCUR:

Fairhurst, C.J.

Johnson, J.

Madsen, J.

Owens, J.

Wiggins, J.

González, J.

Gordon McCloud, J.

Yu, J.

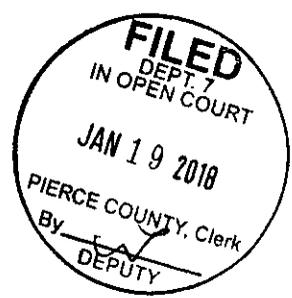
All Citations

--- P.3d ----, 2018 WL 4499761

APPENDIX D

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4003
1/22/2018



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

KENSHON DEVONTE STOKES,

Defendant.

CAUSE NO. 17-1-03436-5

JUDGMENT AND SENTENCE
(Misd. and/or Gross Misd.)
 Plea of Guilty
 Found Guilty by Jury
 Found Guilty by Court
SUSPENDED

DOB: 08/08/94
RACE: BLACK
SEX: MALE
AGENCY: WA02723
INCIDENT #: 1725300180
PCN: 541904093

THIS MATTER coming on regularly for hearing in open court on the 19th day of January, 2018, the defendant KENSHON DEVONTE STOKES and His attorney Eric J Trujillo appearing, and the State of Washington appearing by ZACHARY DILLON Prosecuting Attorney for Pierce County, following a verdict of guilty by jury by the court on the 11 day of January, 2018.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That said Defendant is guilty of the crime(s) of ASSAULT IN THE FOURTH DEGREE/DV, Charge Code: (E37), as charged in the Original Information herein, and that He shall be punished by confinement in the Pierce County Jail for a term of not more than 364 Days.

() The State has pleaded and proved that the crime charged in Court(s) II involve(s) domestic violence.

() Said sentence shall be (suspended) on the attached conditions of (suspended) sentence and that the Defendant pay the prescribed crime victim compensation penalty assessment as per RCW 7.68.035 in the amount of \$ 500⁰⁰.

() The said Defendant is now hereby committed to the custody of the sheriff of aforesaid county to be detained.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

Bail is hereby exonerated.

Signed this 19th day of January, 2018, in the presence of said Defendant.

Jerry Costello

JUDGE/COMMISSIONER

CERTIFICATE JERRY T. COSTELLO

Entered Jour. No. _____ Page No. _____ Department No. _____, this _____ day of _____,

I, _____, County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of Pierce, do hereby certify that the foregoing is a fully, true and correct copy of the judgment, sentence, and commitment in this cause as the name appears of record in my office.

WITNESS my hand and seal of said Superior Court this _____ day of _____,

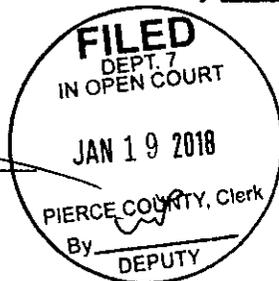
County Clerk and Clerk of Superior Court.

By _____
Deputy Clerk

Presented by:

Zachary DeLon

ZACHARY DELON
Deputy Prosecuting Attorney
WSB # 45593



Approved as to Form:

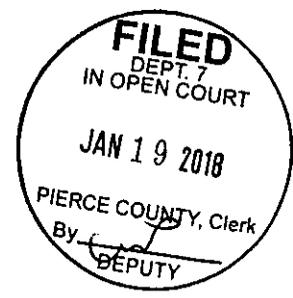
Eric J Trujillo

Eric J Trujillo
Attorney for Defendant
WSB# 40534

Kenshon Stokes

Kenshon Stokes
Defendant

006
1/22/2018 14:003



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, <div style="text-align: center;">Plaintiff,</div> <div style="text-align: center;">vs.</div> KENSHON DEVONTE STOKES, <div style="text-align: center;">Defendant.</div>	CAUSE NO. 17-1-03436-5 CONDITIONS ON SUSPENDED SENTENCE	
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This matter coming on regularly for sentencing before the Honorable Jerry Castello, Judge, on the 19th day of January, 2018, and the Court having sentenced the defendant KENSHON DEVONTE STOKES to the term of (See below) for the crime(s) of ASSAULT IN THE FOURTH DEGREE/DV and the Court having suspended that term, the Court herewith orders the following conditions and provisions:

1. Termination date is to be 2 year(s) after date of sentence.
2. The Defendant shall be under the charge of a probation officer employed by the Department of Corrections and follow implicitly the instructions of said Department, and the rules and regulations promulgated by the Department of Corrections for the conduct of the Defendant during the time of his/her probation herein.
3. That the Defendant be under the supervision of the Court (bench probation).
3. Defendant will pay the following amounts to the Clerk of the Superior Court, Pierce County, Washington.

\$ Waived pursuant to Blaine analysis Attorney fees as reimbursement for a portion of the expense of his/her court appointed counsel provided by the Pierce County Department of Assigned Counsel. The court finds that the defendant is able to pay said fee without undue financial hardship.

- \$ 500⁰⁰ Crime Victim Compensation penalty assessment per RCW 7.68.035;
- \$ 200⁰⁰ Court Costs;
- \$ _____ Fine;

1
2 \$ 100⁰⁰ Other: DNA sample Fee

3 \$ TBD Restitution to be forwarded to: TBD

4
5
6 Restitution hearing set for to be set by the prosecutor

7 \$ 800⁰⁰ TOTAL payable at the rate of \$ Per clerk per month commencing
8 Per clerk

9
10 Revocation of this probation for nonpayment shall occur only if defendant wilfully fails to make the
11 payments having the financial ability to do so or wilfully fails to make a good faith effort to acquire
12 means to make the payment.

13 A notice of payroll deduction may be issued or other income-withholding action may be taken,
14 without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not
15 paid when due and an amount equal to or greater than the amount payable for one month is owed.

16 **RESTITUTION HEARING.**

17 Defendant waives any right to be present at any restitution hearing (sign initials): KJ

18 THE FINANCIAL OBLIGATIONS IMPOSED IN THIS JUDGMENT SHALL BEAR INTEREST FROM THE
19 DATE OF THE JUDGMENT UNTIL PAYMENT IN FULL, AT THE RATE APPLICABLE TO CIVIL
20 JUDGMENTS. RCW 10.82.090. AN AWARD OF COSTS ON APPEAL AGAINST THE DEFENDANT MAY
21 BE ADDED TO THE TOTAL LEGAL FINANCIAL OBLIGATIONS. RCW 10.73.

22 Any period of supervision shall be tolled during any period of time the offender is in confinement for
23 any reason.

24 Further Conditions as follows:

25 364 / 241 ; 123 Days credit for time served

26 Remainder suspended upon the following conditions:

27 Domestic violence evaluation and follow up treatment

28 Law Abiding Behavior

No Contact with Kalita Brown
Hostile

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1722/2018 114003

1 IT IS FURTHER ORDERED that, upon completion of any incarceration imposed the defendant
2 shall be released from the custody of the Sheriff of Pierce County and report to the authorized Probation
3 Officer of this district, to receive his instructions: Bail is hereby exonerated.

4 [] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF THIS
5 OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND
6 DEPORTATION BY THE UNITED STATES IMMIGRATION AND
7 NATURALIZATION SERVICE, SUBJECT TO ARREST AND RE-INCARCERATION
8 IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND
9 PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO
10 THE EXPIRATION OF THE SENTENCE.

11 DONE IN OPEN COURT this 19th day of January, 2018.

12 
13 JUDGE/COMMISSIONER
14 JERRY T. COSTELLO

15 Presented by:

16 
17 ZACHARY DILLON
18 Deputy Prosecuting Attorney
19 WSB # 45593

20 Approved as to Form:

21 
22 Eric J. Trujillo
23 Attorney for Defendant
24 WSB # 40574
25 
26 KENSHON DEVONTE STOKES
27 Defendant

28 

jb

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1/22/2018
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RUSSELL SELK LAW OFFICE

January 28, 2019 - 10:53 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51432-0
Appellate Court Case Title: State of Washington, Respondent v Kenshon Devonte Stokes, Appellant
Superior Court Case Number: 17-1-03436-5

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