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COA NO. 51623-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

TRACEY BAILEY,

Appellant.

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

The Honorable Christine Schaller, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	4
1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CRIMINAL IMPERSONATION CONVICTION BECAUSE THE STATE DID NOT PROVE BAILEY COMMITTED AN ACT IN HER ASSUMED CHARACTER	4
2. DISCRETIONARY COSTS MUST BE STRICKEN BASED ON INDIGENCY	10
a. The new statutory regime applicable to cases pending on appeal prohibits imposition of discretionary costs against indigent defendants	11
b. Alternatively, the discretionary costs could not be imposed without adequate inquiry into ability to pay them	15
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Heidari</u> , 159 Wn. App. 601, 248 P.3d 550 (2011), <u>aff'd</u> , 174 Wn.2d 288, 274 P.3d 366 (2012).....	9
<u>State ex rel. Clark v. Hogan</u> , 49 Wn.2d 457, 303 P.2d 290 (1956).....	15
<u>State ex rel. McDonald v. Whatcom Cty. Dist. Court</u> , 19 Wn. App. 429, 575 P.2d 1094 (1978), <u>aff'd</u> , 92 Wn.2d 35, 593 P.2d 546 (1979).....	8
<u>State v. Barnes</u> , 189 Wn.2d 492, 403 P.3d 72 (2017).....	6
<u>State v. Blazina</u> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	15, 17-18
<u>State v. Budik</u> , 173 Wn.2d 727, 272 P.3d 816 (2012).....	4
<u>State v. Cantabrana</u> , 83 Wn. App. 204, 921 P.2d 572 (1996).....	15
<u>State v. DeVries</u> , 149 Wn.2d 842, 72 P.3d 748 (2003).....	9
<u>State v. Flores</u> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	8
<u>State v. Forrester</u> , 21 Wn. App. 855, 587 P.2d 179 (1978), <u>review denied</u> , 92 Wn.2d 1006 (1979)	7
<u>State v. Garcia</u> , 179 Wn.2d 828, 318 P.3d 266 (2014).....	8

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Glover</u> , 423 P.3d 290 (2018).....	17-18
<u>State v. Gore</u> , 101 Wn.2d 481, 681 P.2d 227 (1984).....	8
<u>State v. Graham</u> , 153 Wn.2d 400, 103 P.3d 1238 (2005).....	7
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	4
<u>State v. Hundley</u> , 126 Wn.2d 418, 895 P.2d 403 (1995).....	4
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	5
<u>State v. Malone</u> , 193 Wn. App. 762, 376 P.3d 443 (2016).....	14, 17
<u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	15
<u>State v. Mohamed</u> , 175 Wn. App. 45, 301 P.3d 504, <u>review denied</u> , 178 Wn.2d 1019, 312 P.3d 651 (2013)	6
<u>State v. Ramirez</u> , __ Wn.2d __, __ P.3d __, 2018 WL 4499761 (slip op. filed Sept. 20, 2018)	11, 13-14, 16-17
<u>State v. Rich</u> , 184 Wn.2d 897, 365 P.3d 746 (2016).....	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Roggenkamp,
153 Wn.2d 614, 106 P.3d 196 (2005)..... 6

State v. Smith,
155 Wn.2d 496, 120 P.3d 559 (2005)..... 5

State v. Shipp,
93 Wn.2d 510, 610 P.2d 1322 (1980)..... 5

State v. Weatherwax,
188 Wn.2d 139, 392 P.3d 1054 (2017)..... 8

State v. Wilson,
125 Wn.2d 212, 883 P.2d 320 (1994).....5

Stone v. Chelan County Sheriff's Dep't,
110 Wn.2d 806, 756 P.2d 736 (1988)..... 6

FEDERAL CASES

In re Winship,
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 4

OTHER AUTHORITIES

American Heritage Dictionary of the English Language (1969)..... 7

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess.
(Wash. 2018)..... 11-15

GR 34..... 17

RAP 2.5(a) 15, 17

RCW 9A.60.040(1)(a) 4-5, 7

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

RCW 9.94A.760(1).....	13-14
RCW 10.01.160	13-14
RCW 10.01.160(2).....	14, 16
RCW 10.01.160(3).....	15-16
RCW 10.64.015	13-14
RCW 10.101.010(3).....	12
RCW 10.101.010(3)(a)-(c)	11
RCW 10.101.010(3)(c)	14
RCW 10.101.020(1).....	12
RCW 36.18.020(2)(h).....	11
RCW 43.43.754(1)(a)	12
RCW 43.43.7541	12-13
U.S. Const. amend. XIV	4
Wash. Const. art. I, § 3	4
Webster's Third New Int'l Dictionary (1993)	7

A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain the criminal impersonation conviction.

2. The \$200 criminal filing fee imposed as part of the sentence is unauthorized by statute. CP 38.

3. The \$100 DNA fee imposed as part of the sentence is unauthorized by statute. CP 39.

4. The \$100 warrant service fee is unauthorized by statute. CP 47.

Issues Pertaining to Assignments of Error

1. Where appellant gave officers a false name and assumed a false identity during a traffic stop, whether the conviction for criminal impersonation must be reversed due to insufficient evidence because the State failed to prove she did an act in her assumed character with intent to defraud or for any other unlawful purpose?

2. Where the new statute prohibiting imposition of a criminal filing fee against indigent defendants applies to cases pending on direct appeal, whether the \$200 criminal filing fee must be vacated?

3. Where the new statutory provisions governing imposition of a DNA fee against those who have already provided a DNA sample apply to cases pending on direct appeal, whether the \$100 DNA fee must

be vacated because appellant is indigent and her DNA was previously collected?

4. Where the new statute prohibiting imposition of discretionary costs against indigent defendants applies to cases pending on direct appeal, whether the \$100 warrant service fee must be vacated?

B. STATEMENT OF THE CASE

Tracey Bailey appeals from her conviction for first degree criminal impersonation. CP 44. The State charged Bailey with second degree identity theft. CP 1. The court instructed the jury on first degree criminal impersonation as a lesser offense. CP 22-23.

Washington State Patrol trooper Jason Roe was driving on Interstate 5 at about 9 p.m. when he noticed a vehicle's middle brake light was inoperative. 2RP¹ 32, 36, 38-39. Roe stopped the vehicle and contacted the driver, Tracey Bailey. 2RP 39, 47. Roe asked for a driver's license, which Bailey was unable to provide. 2RP 63-64. Bailey presented a vehicle registration in a man's name and an insurance card, both of which were expired. 2RP 64-65. Bailey gave her name as "Stracey Jones" and a date of birth. 2RP 47. Roe looked up the information for "Stracey Jones" in the Department of Licensing (DOL)

¹ This brief cites to the verbatim report of proceedings as follows: 1RP - 3/7/18; 2RP - one volume consisting of 3/12/18, 3/13/18, 3/20/18.

database, which he accessed from his on-board computer. 2RP 47-48. The DOL photograph for Stracey Jones did not seem to match Bailey. 2RP 48. Roe went back to Bailey to confirm her identity and asked for the last four digits of her social security number. 2RP 48-49. The number she gave did not match the number for Jones. 2RP 49. Roe asked for the address on her driver's license. 2RP 49. Bailey gave two or three street addresses, which did not match the address for Jones. 2RP 49-50.

Trooper Tricia Krantz arrived to assist. 2RP 50-51. While consuming Dairy Queen Blizzards, for which Krantz had a two-for-one coupon, the two troopers tried to figure out who the driver was. 2RP 51, 71-72, 90. Krantz did not think the driver and the person in the DOL photo were the same person. 2RP 51, 93, 97. They talked to Bailey again. 2RP 52. Roe told Bailey that there were warrants out for Jones. 2RP 52, 55-56. Roe again asked for her name and birthday to confirm her identity. 2RP 56. Bailey said her name was Stracey Jones. 2RP 56, 94. Bailey told the troopers that she had a sister named "Tracey Bailey" who had used her identity. 2RP 56; Ex. 3 at 25:40-25:50, 26:00-26:40.² After comparing the driver to the DOL photo for Stracey Jones, Rose

² Portions of the out-of-car and in-car video recordings were admitted into evidence and played for the jury. Ex. 3; 2RP 39-44. The timeframes for the out-of-car video published to jury are 0:00 to 2:30; 4:55 to 9:33; 23:58 to 27:25; and 35:53 to 36:28. 2RP 39-40, 42-43. The timeframe for the in-car video is 10:15 to 11:00. 2RP 40, 43.

determined the driver was actually Tracey Bailey. 2RP 56-57. Bailey's driving status was suspended. 2RP 63. The troopers confirmed the validity of the warrants. 2RP 56. Roe asked a final time if she was who she said she was, and Bailey maintained she was Stracey Jones. 2RP 61-62. Roe then placed Bailey under arrest for the warrants and put her in the back of the patrol vehicle. 2RP 56, 62. While in the backseat, Bailey admitted that she was indeed Tracey Bailey. 2RP 95. Stracey Jones was Bailey's sister. 2RP 85.

The jury found Bailey guilty of the lesser offense of first degree criminal impersonation. CP 26. The court sentenced Bailey to nine months confinement. CP 36. The court also imposed legal financial obligations, including a \$200 criminal filing fee and \$100 DNA fee. CP 38-39. The court previously ordered Bailey to pay a \$100 warrant service fee. CP 47. Bailey moved to appeal at public expense and the court found her indigent for appeal. CP 31-32, 50-52. This appeal follows. CP 44.

C. **ARGUMENT**

1. **THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CRIMINAL IMPERSONATION CONVICTION BECAUSE THE STATE DID NOT PROVE BAILEY COMMITTED AN ACT IN HER ASSUMED CHARACTER.**

The statute defining the offense of criminal impersonation requires the assumption of a false identity as well as the commission of an act in

the assumed character with intent to defraud another or for any other unlawful purpose. RCW 9A.60.040(1)(a). The State proved Bailey assumed a false identity but did not prove she did an act in her assumed character. Because the State did not prove each element of the offense, Bailey's conviction must be reversed.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). "To determine whether the State has produced sufficient evidence to prove each element of the offense, we must begin by interpreting the underlying criminal statute." State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). Statutory interpretation is also a question of law reviewed de novo. Id.

"The purpose of statutory construction is to give content and force to the language used by the Legislature." State v. Wilson, 125 Wn.2d 212, 216, 883 P.2d 320 (1994). In interpreting a statute, courts look first to its plain language. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). "In determining the elements of a statutorily defined crime, principles of statutory construction require the court to give effect to all statutory language if possible." State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). "Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process." State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980).

A person is guilty of first degree criminal impersonation if he or she "[a]ssumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose." RCW 9A.60.040(1)(a). Bailey does not dispute the State proved that she assumed a false identity. She gave a false name and birth date to the trooper and otherwise maintained she was a person she was not throughout the police encounter. 2RP 47.

The State, however, did not prove the additional element that she "[did] an act in . . . her assumed character with intent to defraud another or for any other unlawful purpose." In construing a statute, each word in a

statute must be given meaning. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Nothing is considered superfluous. Id. Under the plain language of the impersonation statute, assumption of false identity alone is not enough. There must be an act done in the assumed character. The act cannot be the assumption of false identity. Otherwise the "and does an act in his or her assumed character" requirement would be superfluous. If assumption of a false identity equaled the doing of an act in the assumed character, then the distinction between the two statutory requirements collapses. The plain language of the statute separates the two phrases. And in construing legislative intent in defining the elements of the crime, "[s]tatutes should not be construed so as to render any portion meaningless or superfluous." State v. Mohamed, 175 Wn. App. 45, 52, 301 P.3d 504, review denied, 178 Wn.2d 1019, 312 P.3d 651 (2013) (quoting Stone v. Chelan County Sheriff's Dep't, 110 Wn.2d 806, 810, 756 P.2d 736 (1988)).

The phrase "an act" is not defined by statute. An undefined statutory term is given plain and ordinary meaning as ascertained from a standard English dictionary. State v. Barnes, 189 Wn.2d 492, 496, 403 P.3d 72 (2017). The "indefinite article 'an' means 'a,' the letter *n* being an addition before a following vowel sound." State v. Graham, 153 Wn.2d 400, 406 n.2, 103 P.3d 1238 (2005) (citing Webster's Third New Int'l

Dictionary 89, 75 (1993)). The word "a" is "used as a function word before most singular nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified." Webster's Third New Int'l Dictionary 1 (1993). The word "act" means "the process of doing or performing something; an action . . . a deed . . . something that is done or performed." State v. Forrester, 21 Wn. App. 855, 867, 587 P.2d 179 (1978), review denied, 92 Wn.2d 1006 (1979) (citing American Heritage Dictionary of the English Language (1969)).

The question then, is what did Bailey do or what action did she perform in "her assumed character with intent to defraud another or for any other unlawful purpose," aside from assuming a false identity? RCW 9A.60.040(1)(a). The answer is nothing. She assumed a false identity by giving a false name and birth date to the police and maintaining she was Tracey Jones when in fact she was Tracey Bailey. Under the plain language of the statute, she needed to perform an action with the requisite criminal intent in addition to assuming the false identity. The criminal act is missing here.

"In criminal cases, fairness dictates that statutes should be literally and strictly construed and that courts should refrain from using possible but strained interpretations." State v. Garcia, 179 Wn.2d 828, 837, 318 P.3d 266 (2014). "To strictly construe a statute means that given a choice

between a narrow, restrictive construction, and a broad, more liberal interpretation, the first option must be chosen." State ex rel. McDonald v. Whatcom Cty. Dist. Court, 19 Wn. App. 429, 431, 575 P.2d 1094 (1978), aff'd, 92 Wn.2d 35, 593 P.2d 546 (1979).

Even assuming the meaning of the criminal impersonation statute, is susceptible to more than one reasonable interpretation, the rule of lenity requires the court "to adopt the interpretation most favorable to the defendant." State v. Flores, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008). Any ambiguity must be strictly construed against the State. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). "The underlying rationale for the rule of lenity is to place the burden on the legislature to be clear and definite in criminalizing conduct and establishing criminal penalties." State v. Weatherwax, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017). Bailey has at minimum advanced a reasonable interpretation of the statute that results in the conclusion that she did not commit the crime. She therefore receives the benefit of the rule of lenity.

On these facts, Bailey committed an offense under RCW 46.61.020(1), which makes it "unlawful for any person while operating or in charge of any vehicle to refuse when requested by a police officer to give his or her name and address and the name and address of the owner of such vehicle, or for such person to give a false name and address." The

State, however, chose not to charge Bailey with this crime or seek a jury instruction on it. Now it must live with the consequence. It is not this Court's job to rescue the State from a failed trial strategy. In re Pers. Restraint of Heidari, 159 Wn. App. 601, 615, 248 P.3d 550 (2011), aff'd, 174 Wn.2d 288, 274 P.3d 366 (2012). Where insufficient evidence supports conviction, dismissal with prejudice is the remedy. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

**2. DISCRETIONARY COSTS MUST BE STRICKEN
BASED ON INDIGENCY.**

The court imposed a \$200 criminal filing fee and a \$100 DNA fee. CP 38-39. The filing fee must be stricken because Bailey is indigent and the recently amended statute, which prohibits imposition of the filing fee against indigent defendants, applies to cases pending on appeal. Further, Bailey has already had her DNA sample collected based on prior felony convictions. Under recently amended statutes that apply to cases pending on appeal, imposition of a DNA fee in that circumstance is discretionary, and discretionary fees cannot be imposed against indigent defendants. The \$100 warrant service fee ordered by the court is also discretionary and must be stricken because Bailey is indigent. CP 47. Alternatively, these challenged fees must be vacated because the court did not inquire into Bailey's ability to pay them.

a. The new statutory regime applicable to cases pending on appeal prohibits imposition of discretionary costs against indigent defendants.

The current, amended version of RCW 36.18.020(2)(h), effective June 7, 2018, states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. 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.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), of which the filing fee provision is a part, applies prospectively to cases currently pending on direct appeal. State v. Ramirez, __ Wn.2d __, __ P.3d __, 2018 WL 4499761 at *6-8 (slip op. filed Sept. 20, 2018). The amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Id. at *8. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id.

Bailey's indigency is established in the record. The court found Bailey was eligible for a public defender at no expense. CP 46. Eligibility for appointed counsel is determined by "whether the person is indigent

pursuant to the standards set forth in this chapter." RCW 10.101.020(1). The standards set forth in RCW 10.101.010(3) are the relevant standards.

In moving for appeal at public expense, counsel represented there had been no change in Bailey's financial status. CP 50. In an accompanying affidavit, Bailey averred her bi-polar disorder affected her ability to work and that she did not anticipate her financial condition would improve in the foreseeable future. CP 51. The trial court found Bailey indigent and allowed this appeal at public expense. CP 31-32. Bailey is currently incarcerated and does not have an income at or above 125 percent of the federal poverty level, which is currently \$15,175 (125 percent of the current federal guideline of \$12,140).³ The criminal filing fee must be stricken because Bailey is indigent. Ramirez, 2018 WL 4499761 at *8.

For similar reasons, the \$100 DNA fee must also be stricken. Under RCW 43.43.754(1)(a), a biological sample must be collected for purposes of DNA identification analysis from every adult or juvenile convicted of a felony. Bailey has previous felony convictions. CP 34. She would necessarily have had her DNA sample collected pursuant to RCW 43.43.754(1)(a).

³ See U.S. Dep't Of Health & Human Servs., Office Of The Asst. Sec'y For Planning & Evaluation, Poverty Guidelines (2018), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited Sept. 21, 2018).

RCW 43.43.7541, meanwhile, was amended by HB 1783 to read, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*" Laws of 2018, ch. 269, § 18 (emphasis added). Again, HB 1783 applies to all cases pending on appeal. Ramirez, 2018 WL 4499761 at *6-8. HB 1783 "establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Id. at *6.

Because Bailey's DNA sample was previously collected based on other felony convictions, the DNA fee in the present case is not mandatory under RCW 43.43.7541. The fee is discretionary. RCW 10.01.160 addresses discretionary costs. HB 1783 amended RCW 9.94A.760(1), which now provides "The court may not order an offender to pay costs as described in RCW 10.01.160 if the court finds that the offender at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." See also RCW 10.64.015 (2018) ("The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).").

As argued, Bailey meets the indigency standard under RCW 10.101.010(3)(c). And she has previously had her DNA sample collected. Reading the current, applicable version of RCW 43.43.7541 in conjunction with RCW 9.94A.760(1), the court lacked authority to impose the \$100 DNA fee because Bailey is indigent.

Finally, the court imposed a warrant service fee as part of a bench warrant order: "The defendant shall pay a warrant service fee of \$100.00." CP 47. The warrant service fee is a discretionary cost under RCW 10.01.160. RCW 10.01.160(2) ("Expenses incurred for serving of warrants for failure to appear . . . may be included in costs the court may require a defendant to pay."); State v. Malone, 193 Wn. App. 762, 764, 376 P.3d 443 (2016) (recognizing discretionary nature of fee). Under the new versions of RCW 9.94A.760(1) and RCW 10.64.015, the court is prohibited from ordering an indigent defendant to pay discretionary costs.

When legal financial obligations (LFOs) are impermissibly imposed, the remedy is to strike them. Ramirez, 2018 WL 4499761 at *8. The criminal filing fee and DNA fee must therefore be stricken from the judgment and sentence, and the warrant service fee vacated.

Bailey did not object to these costs below, which is understandable because HB 1783 was not yet in effect at the time they were imposed. The errors became extant only after HB 1783 became law and Bailey's case

remained pending on appeal. Under these circumstances, RAP 2.5(a) is no hurdle to considering the LFO errors for the first time on appeal because "the purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). Here, there was no error to correct at the time these costs were imposed because the new statutory provisions had not yet taken effect. The failure to properly object may be excused where it would have been a useless endeavor. State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996); see also State ex rel. Clark v. Hogan, 49 Wn.2d 457, 461, 303 P.2d 290 (1956) ("A fundamental rule in American jurisprudence is that the law requires no one to do a thing vain and fruitless.").

b. Alternatively, the discretionary costs could not be imposed without adequate inquiry into ability to pay them.

RCW 10.01.160(3) mandates: "In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." Before imposing discretionary LFOs, the trial court must therefore make an individualized inquiry into the defendant's present and future ability to pay. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The record must reflect this inquiry. Id. at 837-38. As

argued above, the criminal filing fee, DNA fee, and warrant service fee are discretionary costs in this case. The trial court did not make an individualized determination of Bailey's ability to pay these costs. The challenged fees should therefore be reversed and the case remanded for inquiry into Bailey's ability to pay.

The adequacy of the trial court's individualized inquiry into a defendant's ability to pay discretionary LFOs is reviewed de novo. Ramirez, 2018 WL 4499761 at *3-4. The trial court's ultimate decision whether to impose discretionary LFOs is reviewed for abuse of discretion. Id. at *4. "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." Id.

Here, there was no inquiry into Bailey's ability to pay the costs at issue. The record shows the court's intent at sentencing to impose only costs that were required by law and could not be waived. 2RP 198. With the new statutory changes, the criminal filing fee and the DNA fee are now discretionary, and Bailey obtains the benefit of the new law because it took effect while her appeal is pending. Ramirez, 2018 WL 4499761 at *6-8. The warrant service fee was always discretionary. RCW

10.01.160(2); Malone, 193 Wn. App. at 764. The fact that it was imposed by earlier court order was overlooked at sentencing.

Before imposing discretionary LFOs, trial courts must consider factors such as whether the defendant meets the GR 34 standard for indigency, incarceration, and the defendant's other debts. Blazina, 182 Wn.2d at 838-39. Trial courts must also consider a defendant's financial circumstances, including employment history, income, assets, other financial resources, and monthly living expenses. Ramirez, 2018 WL 4499761 at *8.

Here, the record does not reflect that the trial court inquired into Bailey's current and future ability to pay discretionary LFOs. The trial court did not consider any of the factors set forth in Blazina and Ramirez. The remedy is reversal of the LFOs and remand for a new hearing on ability to pay. State v. Glover, 423 P.3d 290, 293 (2018).

Because the new statutes making the criminal filing and DNA fees discretionary did not take effect until after sentencing in this case, Bailey was not obligated to object to them below to preserve the issue for appeal. See section C.2.a., supra. And even if and to the extent RAP 2.5(a) were implicated, such as for the warrant service fee, this Court retains the discretion to reach the LFO issues. Appellate courts have the discretion to consider the challenge despite lack of objection below under RAP 2.5(a).

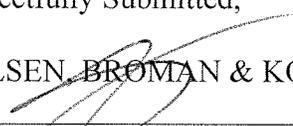
Blazina, 182 Wn.2d at 834-35. "In the wake of Blazina, appellate courts have heeded its message and regularly exercise their discretion to reach the merits of unpreserved LFO arguments." Glover, 423 P.3d at 292. Bailey requests that this Court reverse the imposition of the discretionary LFOs, and remand for an individualized inquiry into his ability to pay.

D. CONCLUSION

For the reasons stated, Bailey requests reversal of the conviction. In the event the conviction is not reversed, Bailey requests the challenged costs be stricken or, if not stricken, remand for inquiry into ability to pay them.

DATED this 27th day of September 2018

Respectfully Submitted,


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