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NO. 52265-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM RICHARD,

Appellant.

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

The Honorable Stanley J. Rumbaugh, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant of his right to a fair trial.

2. The condition prohibiting appellant from entering areas where children's activities regularly occur or are occurring is unconstitutionally vague (Condition 19 of Appendix H).

3. The sentencing court erred by imposing the costs of collections and community custody, and imposing interest on legal financial obligations (LFOs) other than restitution.

Issues Pertaining to Assignments of Error

1. Was appellant deprived of his right to a fair trial, where the prosecutor: (1) in cross-examining appellant suggested appellant had a duty to present exculpatory evidence on his behalf; and (2) in closing commented on appellant's failure to do so?

2. Must Condition 19, which prohibits appellant from entering "areas where children's activities regularly occur or are occurring," including "parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor and outdoor), sports fields being used for youth sports, arcades, and any specific location identified in

advance by DOC or CCO” be stricken or modified because it is unconstitutionally vague?

3. The sentencing court found appellant indigent, and orally waived all fees and costs excepting the mandatory victim penalty assessment, the DNA fee and restitution (to be determined). However, the court’s judgment and sentence imposes costs of collection and community custody, and interest on all LFOs. Must these costs and fees be stricken in light of State v. Ramirez¹ and recent statutory amendments?

B. STATEMENT OF THE CASE²

Following a jury trial in May 2018 in Pierce county superior court, appellant William Richard was convicted of one count of first degree child molestation, allegedly committed against his step-daughter A.R. sometime between August 2014 and August 2015 when A.R. was seven years old. CP 1-3, 20, 40. The charge was based primarily on A.R.’s allegation, which came “out of nowhere” in 2016, after A.R.’s friend made a similar allegation against her mother’s boyfriend. CP 1-3; 2RP 55; 6RP 99-100, 114, 134; 7RP 28, 48, 104.

¹ State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

Richard met A.R.'s mother Courtney Richard³ in 2010 when A.R. was about three years old. 6RP 156. They moved in together after six months and married in 2014. 6RP 157. A.R.'s biological father was out of the picture and Richard soon became A.R.'s primary father-figure. 6RP 154; 7RP 18. By all accounts, they had a loving father-daughter relationship. 6RP 92-93, 141-42; 7RP 17-18; 8RP 101.

On the evening of October 16, 2016, Richard left the house to get snacks from McDonald's. 7RP 25; 8RP 102. When he returned, A.R. and Courtney were in A.R.'s bedroom and looked upset. 8RP 102. When Richard asked what was wrong, A.R. said she woke up from a bad dream. 8RP 102. Richard told A.R. he loved her and retired to his and Courtney's bedroom with the snacks to wait for Courtney. 8RP 103.

But A.R. did not in fact have a bad dream. 6RP 152. Rather, she told her mother Richard inappropriately touched her. A.R. testified she was prompted to tell after overhearing Courtney's telephone conversation with her friend, Holly Jo Ethington that

² This brief refers to the transcript as follows: 1RP – 5/9/18; 2RP 5/10/18; 3RP – 5/14/18; 4RP – 5/15/18; 5RP – 5/16/18; 6RP – 5/17/18; 7RP – 5/22/18; 8RP – 5/23/18; 9RP – 5/24/18; and 10RP – 7/13/18.

³ Because appellant and Courtney Richard share the same last name, the latter will be referred to by her first name. No disrespect is intended.

night. A.R. was aware something “bad” had happened between Etherington’s daughter “J.” and her Etherington’s boyfriend. 6RP 99. In fact, A.R.’s family and the Etheringtons were camping together when J. made the disclosure. 6RP 99, 110, 134; 7RP 23-24. Etherington and her boyfriend had a huge fight at the campground. 7RP 69. That camping trip occurred just a couple months prior to A.R.’s disclosure. 7RP 76.

A.R. decided she would write what purportedly happened in her journal and leave it out for her mother to see. 6RP 101. The plan was stymied, however, when Courtney just returned the journal to A.R. without reading it. 6RP 103-104. A.R. subsequently asked her mother to read what she wrote, but the writing was a little sloppy. Eventually, A.R. read the entry aloud, which alleged: “This is my private information. Dad made me touch his private when I was like 7. I was scared to tell you, but now, I’m not scared.” 6RP 107. A.R. testified the alleged incident occurred 1-2 years earlier than the night she told her mother. 6RP 146.

Courtney testified she thought A.R. knew about the situation with J. and that maybe A.R. was influenced by it. 7RP 28, 48. Courtney pushed A.R. as to whether it really happened and A.R. said yes. 7RP 28.

It was shortly thereafter that Richard returned from McDonald's. 6RP 107. Courtney went out to confront him. 7RP 29. Richard said he did not know what Courtney was talking about. 7RP 30, 93; 8RP 103. According to Courtney, Richard also said he did not know and that he did not remember. 7RP 30. Courtney packed up the kids and left.⁴ 7RP 31.

Courtney texted Richard throughout the rest of the evening, however, repeatedly asking how he could do such a thing. 7RP 32, 97. The next day, Richard admitted to the allegation. 7RP 33. He texted: "I think I led her to the room and asked her to touch it. And then I realized it was fucked up. What am I – what am I doing, and that was it. I'm trying to jog my memory." 9RP 18-19.

At trial, however, Richard explained he caved in because Courtney had been badgering him all night with approximately 60-100 texts and he finally had enough and just told her what she wanted to hear. 8RP 105-107, 122. A.R.'s allegation was not true. 8RP 107.

Although Courtney provided the police with several screenshots of the texts between her and Richard, there were texts missing as well. 6RP 74; 7RP 37-38. Courtney only provided the

⁴ Richard and Courtney also had a one-year old daughter together. 6RP 154.

texts she believed were inculpatory. She did not provide the texts that occurred in between. In other words, there were noticeable gaps in the communication.⁵ 6RP 74; 7RP 98.

On cross-examination, the prosecutor asked why Richard did not have these missing texts to show how he had been badgered into making the false confession. Defense counsel objected the prosecutor was shifting the burden but was overruled:

Q Is it your testimony that you didn't think – you weren't sure whether or not this would become a police matter on October 16, 2016?

A I wasn't sure where the evening was going. It was very brief.

Q But on October 17th, you knew it was probably going to be a police matter, right?

A Yes.

Q You didn't start saving a bunch of hundreds of text messages, right?

MR. CURRIE [defense counsel]: Objection. Burden shifting, Your Honor.

MR. CUMMINGS [prosecutor]: It's not burden shifting. It responds exactly to his direct.

THE COURT: The question is did he start saving text messages. That is not burden shifting, but don't go there.

⁵ Despite this, the detective made no effort to obtain Courtney's phone until shortly before trial in April 2018. 6RP 60-62, 64-65. Courtney no longer had the phone or a means to access the texts. RP 61.

MR. CUMMINGS: And I'm not.

Q You didn't start on October 17th saving and screenshotting those hundreds of text messages you just claimed, correct?

A I actually did have screenshots of those that I do not have anymore.

Q What happened to those?

A They were in my storage unit, and I lost it.

Q When did you lose the storage unit?

A Last fall, I believe.

Q So in the fall of 2017?

A Yes.

Q In what format were they?

A They were screenshotted and printed out.

Q They were printed out?

A Yes.

Q Did you print them directly from your phone?

A Yes.

Q And when did you print them?

MR. CURRIE: Your Honor, same objection. I don't see how it's not burden shifting.

THE COURT: I think you better stop there, Mr. Cummings.

8RP 111-13.

In closing, the prosecutor again brought up the fact Richard no longer had his phone or proof of the texts.

But even assuming he got 40 plus conversations that night, he didn't get those 40 plus conversations in the hour or hour and a half between the time she left and the time he confessed via text messages at 11:36 p.m. And even if he did, that's not going to [be] coercive, right? That doesn't coerce him. We'll talk about that in a minute.

That's unreasonable. It doesn't create reasonable doubt. It's unreasonable for him to claim that 30 to 60 text messages were sent in that one night but that they conveniently went missing along with the phone and –

MR. CURRIE: Objection. Burden shifting, Your Honor.

THE COURT: The testimony –

MR. CURRIE: That they occurred –

THE COURT: It is clear that the State bears the burden of proof as indicated in the bottom of the slide or as was indicated on the prior slide. The Defendant has no burden to prove anything. This is a recapitulation of the way the State sees the evidence. Go ahead, Mr. Cummings.

9RP 72.

As indicated, Richard was convicted as charged. At sentencing, the court imposed a standard range sentence of 66

months with a lifetime of community custody. CP 57; 10RP 14. As a condition of community custody, the court ordered Richard to “[p]ay supervision fees as determined by the Department of Corrections[.]” Appendix H, filed 7/13/18. The court also imposed the condition that Richard: “[s]tay out of areas where children’s activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO.” Id.

The state requested legal financial obligations of: “\$100 DNA fee, \$200 costs, \$1,500 DAC recoupment, restitution per later Court order[.]” 10RP 4. Based on the new legislation relating to LFOs, the court imposed only the \$500 VPA and \$100 DNA fee. 10RP 15. Based on defense counsel’s representation that Richard’s indigency was unlikely to change and based on what the court “was able to glean at the time of trial,” the court found Richard indigent for purposes of the appeal. 10RP 17.

Despite the court’s indigency finding, the judgment and sentence contains the following provisions:

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST 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. RCW 10.82.090.

CP 55.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

The state and federal constitutions guarantee an accused the right to a fair trial. U.S. Const. amend. 6, 14; Const. art. 1, §§ 3, 22. "Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial." State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Where there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict, the accused is deprived of a fair trial. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Reed, 102 Wn.2d 140, 145, 684 P. 2d 699 (1984).

The State bears the burden of proving each element of its case beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. at 364. The prosecutor cannot

make arguments that shift the state's burden to the defense. State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990), cert. denied, 499 U.S. 948 (1991). The defense has no duty to present evidence and a prosecutor may not imply that the defense has a duty to present exculpatory evidence. State v Barrow, 60 Wn. App. 869, 872, 809 P.2d 209 (1991), rev. denied, 118 Wn.2d 1007 (1991).

When a criminal defendant testifies, the prosecutor is entitled to cross-examine the defendant. United States v. Demarest, 570 F.3d 1232, 1242 (11th Cir.2009). “[A] cross-examination necessarily entails testing the plausibility of a defendant's account.” Id. For example, a prosecutor does not commit misconduct simply by asking a testifying defendant whether someone “could corroborate her testimony” when the defendant's testimony contradicted the government's evidence. See United States v. Schmitz, 634 F.3d 1247, 1267 (11th Cir.2011).

However, during cross-examination of the defendant, or during arguments to the jury, the prosecutor “may not make comments that would shift the burden of proof to the defendant.” United States v. Bernal–Benitez, 594 F.3d 1303, 1315 (11th Cir.2010). Burden-shifting comments are those that “suggest that

the defendant has an obligation to produce any evidence or to prove innocence.” United States v. Simon, 964 F.2d 1082, 1086 (11th Cir.1992).

A trial court’s ruling on a claim of prosecutorial misconduct is reviewed under an abuse of discretion standard. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). The defendant bears the burden of proving misconduct, and that the conduct was prejudicial.

The trial court abused its discretion in overruling defense counsel’s burden-shifting objections during cross-examination of Richard and in closing argument. The prosecutor committed misconduct when he (1) suggested in cross-examining Richard that he had a duty to produce Courtney’s numerous texts that badgered him into making a false confession and (2) argued in closing that Richard’s failure to do so reflected upon his guilt.

The misconduct was prejudicial. There was ample reason to doubt A.R.’s allegation/testimony about inappropriate touching. When she disclosed, it had been two years since the alleged touching. Her accusation “came out of nowhere” as Courtney never saw any signs of abuse. Moreover, the timing of the disclosure weakened its credibility – as it came on the heels of J.’s

similar allegation of abuse by a step-father figure. Thus, to prove its case, the state needed the jury to believe appellant's text "confession" was not false.

But Richard gave a plausible explanation for how he was badgered into saying what he did. He caved in and told Courtney what she apparently wanted to hear so that her badgering would stop.

As a result, the prosecutor's cross-examination and closing argument designed to put the onus on Richard to produce evidence of his innocence – in the form of Courtney's badgering texts – likely caused jurors to doubt his explanation and therefore convict. In other words, the prosecutor's misconduct likely affected the outcome of the trial. This Court should reverse.

In response, the state may argue the prosecutor did not commit misconduct analogizing to the "missing witness" doctrine. Under this doctrine, where a party fails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991).

But the inference only arises where the witness is peculiarly available to the party, i.e. within the party's power to produce. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Moreover, the inference does not apply if the witness' absence is satisfactorily explained. Id. at 653.

Here, the missing witness doctrine does not apply because the evidence the state suggested Richard should produce was not peculiarly available to him. Rather, it was equally available to the police and prosecution in that they received what they knew to be only partial text messages in 2016 from Courtney (one of their key witnesses) but did nothing to follow up to get the remainder of the texts until right before trial in 2018.

Moreover, Richard's failure to offer the evidence was adequately explained. The texts occurred over two years earlier and although he saved them for a while, he lost his storage unit where they were stored in 2017. Thus, this Court should reject any argument that the prosecutor properly invoked the missing witness doctrine in his cross examination of Richard and in closing argument. Because the prosecutor's burden-shifting caused prejudice under the facts and circumstances of the case, this Court should reverse.

2. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED RICHARD'S CONSTITUTIONAL RIGHTS IN REQUIRING HIM TO STAY OUT OF AREAS WHERE CHILDREN'S ACTIVITIES OCCUR.

The trial court's authority to impose sentence in a criminal case is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Whether the court had statutory authority to impose a given condition is reviewed de novo on appeal. Id. The trial court's decision is reviewed for abuse of discretion only if it had statutory authorization. Id. at 326.

A sentencing condition that limits an offender's fundamental rights must be more than just crime-related. State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008). A condition that touches upon constitutional rights "must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation."⁶ Id. Put another way, the condition "must be clear and must be reasonably necessary to accomplish essential state needs and public order." Id. at 758.

⁶ See, e.g., In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010) (fundamental right to parent); Bahl, 164 Wn.2d at 757-58 (freedom of speech); State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008) (fundamental right to marriage); State v. Moultrie, 143 Wn. App. 387, 398-99, 177 P.3d 776 (2008) (freedom of speech and association).

A trial court abuses its discretion if it imposes an unconstitutional condition. State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

A community custody condition is unconstitutionally vague if (1) it is not sufficiently definite such that ordinary people can understand what conduct is proscribed; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Id.

The condition pertaining to areas where children's activities regularly occur or are occurring is unconstitutionally vague. Condition 19 states: "Stay out of areas where children's activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO." Appendix H, filed July 13, 2018 (emphasis added).

In Irwin, the trial court imposed a condition similar to the one here: "Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO." State v. Irwin, 191 Wn. App. 644, 649, 364 P.3d 830 (2015). The court struck the

condition as being void for vagueness and remanded to the trial court for resentencing. Id. at 652-55.

The Irwin court explained, “Without some clarifying language or an illustrative list of prohibited locations[,] . . . the condition does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” Id. at 655 (quoting Bahl, 164 Wn.2d at 753). The court acknowledged “[i]t may be true that, once the CCO sets locations where ‘children are known to congregate’ for Irwin, Irwin will have sufficient notice of what conduct is proscribed.” Id. However, this “would leave the condition vulnerable to arbitrary enforcement,” rendering it unconstitutional under the second prong of the vagueness analysis. Id.

The condition here is slightly improved from the one in Irwin because it specifies some locations where children congregate. However, it is still constitutionally infirm because it includes “any specific location identified in advance by DOC or CCO.” Appendix H. Given this open-ended caveat, Richard still cannot be sure of the condition’s bounds and is still exposed to arbitrary enforcement by DOC or his CCO.

Recent decisions by the court of appeals demonstrate the condition remains vague despite the clarifying language. In Norris,

the court imposed the following condition: “Do not enter any parks/playgrounds/schools and or any places where minors congregate.” State v. Norris, 1 Wn. App.2d 87, 95, 404 P.3d 83 (2017), reversed in part, affirmed in part, State v. Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018) (addressing conditions other than the one prohibiting entry to any places where minors congregate). The State conceded the “any places where minors congregate” portion of the condition was unconstitutionally vague and should be stricken. Id. The court held, however, “imposition of a condition that states, ‘Do not enter any parks, playgrounds, or schools where minors congregate’ is not unconstitutionally vague or void for vagueness.” Id. at 96. Such a condition “gives notice to ordinary persons of what is prohibited.” Id.

This Court followed the reasoning of Norris in State v. Wallmuller, 4 Wn. App. 2d 698, 423 P.3d 282 (2018). The trial court imposed a condition very similar to the one here: “The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.” Id. at 283. This Court explained “the condition contains the phrase ‘such as’ before its list of prohibited places, indicating that frequenting more places than just those listed would violate the condition.” Id. at 285.

Thus, the provided list did not cure “the inherent vagueness of the phrase ‘places where children congregate.’” Id. This Court accordingly held the condition to be unconstitutionally vague. Id.

The Wallmuller court explained a modified condition stating, “The defendant shall not loiter in nor frequent parks, video arcades, campgrounds, and shopping malls,” would not be unconstitutionally vague. Id. But the condition in Richard’s case does not so state. Rather, like the infirm condition in Wallmuller, Condition 19 includes a short list of prohibited places where children’s activities occur, including “parks used for youth activities, schools, daycare, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades[.]” Appendix H. But it is expressly not limited to those locations. The DOC or CCO may still select any number of random locations where children’s activities “regularly occur or are occurring” inviting a “completely subjective standard for interpreting the phrase, similar to the condition in Wallmuller.”

Consistent with Norris and Wallmuller, this Court should remand for the trial court to strike or modify the unconstitutionally vague condition.

3. THE COURT MAY NOT IMPOSE DISCRETIONARY COSTS OR INTEREST ON NON-RESTITUTION LFOs BECAUSE RICHARD WAS INDIGENT.

The recently amended statute on LFOs prohibits the imposition of non-restitution interest and of discretionary costs on indigent defendants. Here, the court imposed multiple discretionary LFOs, including collection costs and community custody supervision costs, and imposed interest on all LFOs. CP 225, 228, 232. Because Richard is indigent, the discretionary LFOs must be stricken and the interest must be modified to exclude non-restitution LFOs.

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary; the statute states the court “may require the defendant to pay costs.” RCW 10.01.160(1) (emphasis added). Recent amendments to the LFO statute prohibit the imposition of discretionary costs on indigent defendants. “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).” RCW 10.01.160(3). This language became effective on June 7, 2018, more than a month before Richard was sentenced. Ramirez, 191 Wn.2d at 738; RP 36 (sentenced on July 13, 2018).

The statute defines “indigent” as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3). This definition is contrasted with “[i]ndigent and able to contribute” under subsection (4), defined as a person who “at any stage of the proceeding” has available funds sufficient to contribute to some but not all of the anticipated costs of counsel. RCW 10.101.010(4).

Here, the record established that Richard was indigent at the time of sentencing. The sentencing court expressly found Richard was indigent. Richard moved for an order of indigency to proceed with his appeal. He and his attorney anticipated his financial circumstances would not improve in the foreseeable future. Thus, Richard meets the statutory definition of “indigent” under RCW 10.101.010(3) because he lacked the funds to pay for his own defense at trial or on appeal.

Despite finding Richard indigent, the sentencing court imposed discretionary costs in its written order, including collection costs and supervision fees. The court also imposed interest on all

LFOs. These costs must be stricken because they violate recent statutory amendments limiting discretionary fees and interest. RCW 10.82.090(1) (interest); RCW 10.101.010(3) (discretionary fees); Ramirez, 191 Wn.2d at 750 (remedy is remand to strike fees).

(i) Non-restitution interest is prohibited.

The court's written order imposed interest on Richard as follows: "INTEREST 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 55 (citing RCW 10.82.090). This language imposes interest on all LFOs imposed by the judgment and sentence.

RCW 10.82.090 requires the court to impose interest on restitution costs. RCW 10.82.090(1). However, the statute also states, "As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(1). The non-restitution portion of the court's written order violates this provision of the statute. This Court should remand with instructions to modify the judgment and sentence to impose interest only on restitution.

- (ii) Collection costs are discretionary, and therefore prohibited.

The court imposed collection costs, requiring Richard to “pay the costs of services to collect unpaid legal financial obligations per contract or statute.” CP 55 (citing RCW 36.18.190; RCW 9.94A.780; RCW 19.16.500). As discussed below, each of the three statutory sources of authority cited by the sentencing court provide, at best, discretionary authority.

First, RCW 36.18.190 provides only discretionary authority for the superior court to impose collection costs. “The superior court may, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services.” RCW 36.18.190 (emphasis added).

Second, RCW 9.94A.780 also provides only discretionary authority to the Department of Corrections to assess a community corrections intake fee, and for the Department and county clerk to assess associated collection costs. However, as discussed below, none of this authority is expressly granted to the court and all of the costs are discretionary.

Subsection (1) of the statute states an offender who is sentenced to community supervision “shall pay to the department of corrections the supervision intake fee... which shall be considered as payment or part of payment of the costs of establishing supervision to the offender.” RCW 9.94A.780(1). However, the statute also provides, “The department may exempt or defer a person from the payment of all or any part of the intake fee based upon any of the following factors:” including (a) inability to obtain sufficient employment income, (b) student status, (c) employment handicap, (d) age, (e) existence of dependents makes payment an “undue hardship”, or (f) “Other extenuating circumstances as determined by the department.” RCW 9.94A.780(1) (emphasis added). The statute further provides that “[t]he department of corrections shall adopt a rule prescribing the amount of the assessment.” RCW 9.94A.780(2).

Thus, this section addresses the authority of the Department of Corrections to impose, waive or defer community custody intake fees; the section does not grant any authority to the court to impose these fees at the time of sentencing. Even if it were interpreted to provide court authority, the fees are discretionary because the

statute allows for the fees to be waived or deferred on the basis of factors affecting inability to pay. RCW 9.94A.780(1).

Subsection (7) of the statute further states that if a county clerk assumes responsibility for community custody fees assessed by the Department of Correction, “the clerk may impose a monthly or annual assessment for the cost of collections.” (Emphasis added). Again, this subsection provides authority to another party, here a county clerk, to assess collection costs. Nothing in this section addresses authority of the court. Regardless, the authority is discretionary because the statute uses the word “may.” RCW 9.94A.780(7).

The third statute cited by the sentencing court’s order, RCW 19.16.500(1), provides general authority to government entities, including counties, to retain private collection agencies. RCW 19.16.500(1)(a). Under the statute, government entities “may add a reasonable fee” for collections. RCW 19.16.500(1)(b) (emphasis added). Thus, this statute also provides only discretionary authority to impose collection costs.

The court’s general authority to impose costs, and the specific authority cited by the written order, all provide, at best, discretionary authority to impose collection costs. RCW

9.94A.780(1), (2), (7); RCW 10.01.160(1); RCW 19.16.500; RCW 36.18.190. This court should find the costs of collection are discretionary, and are therefore prohibited by RCW 10.01.160(3).

(iii) Community placement fees are discretionary, and therefore prohibited.

The court required Richard to pay “supervision fees as determined by DOC” as a condition of community custody. Appendix H, filed 7/13/18. The judgment and sentence does not cite to any legal authority for the imposition of these “supervision fees. The cost appears to be authorized by the statute discussing allowable community custody conditions. RCW 9.94A.703(2)(d).

Examination of the statutory language, and recent case law, establishes that these costs are discretionary. Subsection .703(2) states, “Unless waived by the court, ... the court shall order an offender to: ... (d) Pay supervision fees as determined by the Department.” RCW 9.94A.703(2) (emphasis added). Given this language authorizing the court to waive the cost, this Court recently noted the cost is discretionary. State v. Lundstrom, 6 Wn. App. 2d 388, 429 P.3d 1116, 1121 n.3 (2018) (quoting RCW 9.94A.703(2)(d)). This Court should find the cost is discretionary and thus prohibited.

- (iv) The proper remedy is to remand to strike the prohibited costs.

As discussed above, the imposition of discretionary LFOs and of interest on non-restitution LFOs violates the amended LFO statute. The Washington Supreme Court recently concluded that where LFOs violate the recently amended statute, the appropriate remedy is to remand to the sentencing court to strike the unauthorized fees. Ramirez, 191 Wn.2d at 750. Resentencing is unnecessary. Id. Accordingly, this Court should remand to strike the community custody and collection costs, and strike the interest for all non-restitution LFOs.

D. CONCLUSION

Because prosecutorial misconduct deprived Richard of his right to a fair trial, this Court should reverse and remand for a new trial. Alternatively, this Court should remand to strike the improperly imposed discretionary LFOs.

Dated this 13th day of May, 2019.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson", written over a horizontal line.

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