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COA NO. 52792-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

KALOB KINDT,

Appellant.

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

The Honorable Jennifer A. Forbes, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to convict appellant of felony harassment of a criminal justice participant.

2. The court erred in imposing a discretionary legal financial obligation in the absence of adequate inquiry into ability to pay.

Issues Pertaining to Assignments of Error

1. Under the criminal justice participant prong of the harassment statute, whether the evidence is insufficient to convict because the State failed to prove the threat was made while the law enforcement officer was performing his official duties?

2. Whether the court erred in failing to make an adequate inquiry into appellant's ability to pay before imposing a discretionary $500 fee for appointed counsel?

B. STATEMENT OF THE CASE

Kalob Kindt appeals from his conviction and sentence for felony harassment of a criminal justice participant. CP 67-78. The following evidence was produced at a jury trial.

On July 23, 2017, Deputy Olvera of the Kitsap County Sheriff's Office was on shift in his patrol vehicle. 1RP[1] 456-58. He tagged a vehicle left on the side of the road at about 7:45 p.m. 1RP 460, 474. He then drove home to have dinner with his family and spend time with them before his kids went to bed. 1RP 461, 474. He lived about four and a half miles away. 1RP 461. He did not do "any other law enforcement stuff" on his way home. 1RP 474.[2]

As Olvera drove home and neared the Maui Lane intersection, he saw someone waving his hands out of a vehicle ahead of him. 1RP 462. He did not recognize the person but recognized the vehicle as belonging to the residence at the end of the driveway. 1RP 463-64. Olvera did not stop the vehicle and continued on his way. 1RP 463. As soon as he pulled into his own driveway, he was informed by dispatch via radio that they received a 911 call "of somebody trying to shoot an officer in the face or put a gun into his mouth and blast him." 1RP 464-65. He later described the call as "somebody was going to shoot an officer in the face the next time they see them" or something about "getting an AK-47 and blasting an

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[1] The verbatim report of proceedings is cited as follows: 1RP - four consecutively paginated volumes consisting of 10/22/18, 10/23/18, 10/24/18, 10/29/18, 10/30/18; 2RP - 10/31/18; 3RP - 11/30/18.

[2] Quoting the words used in the cross-examination question, to which Olvera responded in the affirmative.

officer." 1RP 477-78. The 911 call was made at about 7:50 p.m. 1RP 430.

Olvera was just about to walk into his residence when the call came out. 1RP 465. He was not in his patrol car at the time. 1RP 465. He asked where the call originated from and told dispatch that he had seen the vehicle on Maui Lane. 1RP 466. Knowing that he was the only one in the area, Olvera believed the call was directed towards him, although the caller did not mention Olvera by name. 1RP 468, 485. Olvera requested extra units. 1RP 466. He told his wife that he could not be with them because he had to respond to the call. 1RP 466. He went and sat in his patrol car for a minute, then drove to Deputy Baker's nearby residence and told Baker what happened. 1RP 466-67. He saw the notes of the call on his computer aided dispatch. 1RP 476.

After the two deputies parked about a block away from Maui Lane, Baker retrieved the voice call. 1RP 467. At some point Baker told Olvera that Kindt was the caller, having recognized his voice. 1RP 470-71. In the 911 call, Kindt reported a cop had followed him and stopped at the end of his driveway. Ex. 2 (transcript of 911 call); Ex. 3 (911 call recording). Kindt requested "you can send 'em down here." Id. He said, "I'm so getting ready to get a fuckin' AK and blast him." Id. He later said, "Next time I talk to 'em they're gonna have a fuckin' gun in their mouth." Id.

Olvera did not listen to the complete call. 1RP 468, 476. Olvera had never contacted Kindt before. 1RP 471. After other units arrived, Olvera and Baker approached the residence and contacted Kindt. 1RP 468-71. Baker placed Kindt under arrest for harassment. 1RP 429.

Deputy Baker had known Kindt for many years, beginning when the latter was a young child and a friend to Baker's daughter. 1RP 424-26. Baker knew his mother and father and many of his family members. 1RP 427. Baker felt torn about responding because he had known Kindt since he was a kid. 1RP 438. Kindt had never made any threats to law enforcement in the past. 1RP 440, 449-50. Baker had previously stopped Kindt for driving-related violations but never taken enforcement action. 1RP 426, 440, 444. A few days before, Baker made a "traffic stop" on Kindt. 1RP 441. Kindt was emotional, upset and crying. 1RP 441. He felt like he was being harassed by the police. 1RP 442.

At trial, Olvera described being "a little bit shaken" by the call. 1RP 468. His wife noticed he was bothered. 1RP 472. He subsequently changed his behavior. 1RP 473. He now carried a backup gun and went to a different store instead of the one down the street. 1RP 473. He lost his appetite. 1RP 477. After the incident, Olvera had seen Kindt around town multiple times. 1RP 486. At the WinCo, Kindt said "Oh, I see we see each other around all the time." 1RP 486. Olvera acknowledged who

he was and went about his business. 1RP 486. Other times at the mall, Kindt and Olvera saw one another when they were with their respective families. 1RP 487. Olvera also encountered Kindt when the latter stopped to help a driver pull his car out of the ditch. 1RP 489-90. Olvera kept his guard up. 1RP 489.

Kindt testified in his own defense. On the day at issue, he was in a car driven by his girlfriend Brittney Beasley. 1RP 516. He was upset when an officer pulled out behind them, as it was not the first time "something like that's happened." 1RP 517. He had not done anything wrong and was stressed. 1RP 517. The officer followed him until his girlfriend turned into Kindt's driveway. 1RP 523. The officer stopped at the end of the driveway. 1RP 534. Kindt denied waving his arms out the passenger window. 1RP 535. He threw his arms up after the car was parked in the driveway and he stepped out. 1RP 535. He did not know Deputy Olvera. 1RP 523.

Kindt called 911 to report being followed and requested someone come see him. 1RP 524, 535. He thought he hung up after stating his address. 1RP 524. He put his phone in his pocket. 1RP 525. The comment about shooting was made after the phone was in his pocket, after he thought he'd hung up. 1RP 525. He was ranting to his girlfriend and a few other people who were present at the time. 1RP 526, 536. He was

mad and, regarding the AK-47, said the first thing that came to mind. 1RP 527-28. He thought the only people who heard him were his friends. 1RP 544-45. When the police showed up at his house, he thought they were there because he had asked police to come. 1RP 529. He was shocked when so many officers arrived with rifles drawn. 1RP 529, 539. After being arrested for making the gun threat, he realized the phone was not hung up when he spoke to those with him. 1RP 530.

Kindt explained he was mad about the officer stopping at the end of his road, but it wasn't about this one incident, but rather a culmination of incidents.[3] 1RP 525-26. Kindt had been stopped multiple times before with no resulting arrest. 1RP 517, 542. He wondered why he was getting stopped more than other people. 1RP 517-18, 534, 542. He remembered being pulled over by Deputy Baker a few days before. 1RP 519. Baker talked to him for an hour about making better choices, moving out of his parent's house, and getting a job. 1RP 519. Kindt was frustrated by being talked to in that manner, "almost talking down to me" and telling him how to live his life. 1RP 519-20. Someone had to come get his car because his license was suspended. 1RP 520.

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[3] Police had been out to the address multiple times in response to service calls. 1RP 592-94. Kindt was not a suspect in any of these incidents. 1RP 595.

Kindt's girlfriend, Beasley: testified that an officer pulled out behind them, followed them up the hill, and stopped at the end of the driveway. 1RP 547. Beasley was nervous that the officer followed them for such a long time. 1RP 548. She heard Kindt's 911 call. 1RP 549-50. After hanging up and putting the phone in his pocket, they went outside. 1RP 549. Kindt was upset and "We were all venting to each other." 1RP 549.

The jury returned a guilty verdict. CP 54. The court sentenced Kindt to 60 days in jail. CP 56. Defense counsel asked the court to waive discretionary legal financial obligations, including the court-appointed attorney fee. 3RP 5. The court imposed the attorney fee. 3RP 9-10; CP 61. Kindt appeals. CP 67-78.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT BECAUSE THE STATE DID NOT PROVE THE OFFICER WAS PERFORMING AN OFFICIAL DUTY AT THE TIME THE THREAT WAS MADE.

The State needed to prove beyond a reasonable doubt that Deputy Olvera was "performing his official duties" at the time the threat was made. CP 97. Deputy Olvera was visiting his family at the time the threat was made. He was not performing an official duty. The conviction must therefore be reversed due to insufficient evidence.

a. Framework for the sufficiency of evidence analysis.

Due process requires the State to prove all elements of a criminal offense 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.

b. The meaning of "performing his or her official duties" in the harassment statute.

"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, the reviewing court looks first to its plain language. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "To ascertain the plain language, we examine the statute's language, other provisions of the same act, and related statutes." State v. Wilcox, 196 Wn. App. 206, 210, 383 P.3d 549, 551 (2016).

A person is guilty of harassment if: "Without lawful authority, the person knowingly threatens . . . To cause bodily injury immediately or in the future to the person threatened or to any other person. . . and . . .The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1).

A person is guilty of felony harassment if "the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made." RCW 9A.46.020(2)(b)(iii). The to-convict instruction given to the jury in Kindt's case sets forth this element. CP 51. Under the law of the case doctrine, "jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal" and are used to delineate the State's burden of proof. State v. Johnson, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (quoting Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). The law of the case doctrine "serves to avoid prejudice to the parties and ensure that the appellate courts review

a case under the same law considered by the jury." State v. Calvin, 176 Wn. App. 1, 22, 316 P.3d 496 (2013), review granted in part, remanded on other grounds, 183 Wn.2d 1013, 353 P.3d 640 (2015).

It is also a felony offense if "the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties." RCW 9A.46.020(2)(b)(iv). The State did not propose a to-convict instruction containing this manner of committing the crime. CP 84-102. Instead, it proposed a to-convict instruction for the element of "performing his official duties at the time the threat is made." CP 98. The State therefore needed to prove this particular means of committing the crime to secure a guilty verdict. Johnson, 188 Wn.2d at 762.

The statutory provision criminalizing harassment against criminal justice participants is relatively new and there is not much case law addressing it. Laws of 2011, ch. 64 § 1. The statute does not define the phrase "performing his or her official duties." RCW 9A.46.020(2)(b)(iii). The jury was not instructed on the meaning of "performing his official duty."[4]

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[4] Defense counsel withdrew her proposed instruction on when a person is on duty after the court expressed its belief that it could not legally define the term. 1RP 617-19. The court noted there was a factual dispute about whether Olvera was on duty and thought the term should be defined by the

There is no case law interpreting this phrase under RCW 9A.46.020. There is, however, a long-standing antecedent that guides statutory interpretation. The statute defining assault against a police officer uses the same operative language: "Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g). "Official duties" as used in the assault statute "encompass all aspects of a law enforcement officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own." State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1995) (quoting State v. Hoffman, 116 Wn.2d 51, 100, 804 P.2d 577 (1991)).

"Similar interpretation should result where the language and subject matter of two statutes are similar." Spokane Cty. Health Dist. v. Brockett, 120 Wn.2d 140, 150, 839 P.2d 324 (1992). And courts "presume the legislature is aware of judicial interpretation and construction of prior statutes." State v. P.M.P., 7 Wn. App. 2d 633, 638, 434 P.3d 1083 (2019). It is therefore reasonable to believe the legislature,

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employer on a department-by-department basis. 1RP 617. The Kitsap County Sheriff's policy manual does not define what it means to be on duty. 1RP 617-18. Kindt does not assign error on appeal to the court's refusal to instruct the jury regarding the meaning of duty because counsel's proposed instruction does not accurately define the term. CP 34.

in using the same language of "performing his or her official duties" in the harassment statute as it did in the assault statute, intended for the two phrases to have the same meaning. The subject matter is similar. Both offenses encompass crimes against officers. The temporal aspect is identical. The assault statute criminalizes an assault against an officer "performing his or her official duties *at the time of the assault*," while the harassment statute criminalizes harassment against an officer "performing his or her official duties *at the time the threat is made*." RCW 9A.36.031(1)(g), RCW 9A.46.020(2)(b).

The word "performing," as used in RCW 9A.46.020(2)(b)(iii) is not defined by statute. The plain meaning of nontechnical statutory terms may be discerned from their dictionary definitions. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). To "perform" something means to "carry out or bring about" or "do in line of duty." Webster's Third New Int'l Dictionary 1678 (1993). The harassment statute does not define "duties." "Duty" means "obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation or profession." Id. at 705.

c. Application of the law to the facts shows the State failed to prove the officer was performing his official duties at the time the threat was made.

The prong of the statute relied on by the State to convict is an awkward fit for a situation where the target of the threat is not present when the threat is made and then is subsequently informed of the threat through a third party. RCW 9A.46.020(2)(b)(iii) naturally encompasses a situation where an officer personally contacts a person and the person being contacted threatens the officer right then and there. An officer, for example, conducts a traffic stop and the angry driver threatens to kill the officer. In that scenario, it makes sense to link the timing of the threat to the performance of an official duty. When an officer only learns of the threat after the fact, at a time when the officer is not engaging the threatening party, it makes little sense to tie the timing of the threat to what the officer happened to be doing at the time the threat was made. Generally, the alternate prong of RCW 9A.46.020(2)(b)(iv) is a better fit for that scenario: "the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties."

The State nonetheless chose to rely exclusively on RCW 9A.46.020(2)(b)(iii) as the means to convict. The facts, therefore, are applied to that legal standard. The question, then, is whether Deputy Olvera was performing an official duty when the threat was made.

Evidence shows the 911 call was made at about 7:50 p.m. 1RP 430. Deputy Olvera's shift on July 23, 2017 was from 1:00 p.m. to 11:40 p.m. 1RP 456-57. He does not clock out during a shift. 1RP 457. If he gets a call during his shift, he must immediately respond, even if he's having lunch with a coworker or family member. 1RP 457-58.

Olvera has a take-home patrol car. 1RP 458. Deputy Baker testified that for officers with a take-home patrol car, "when you sign in from your driveway, you're in service" and "you don't sign out of service until you're in your driveway." 1RP 409-10. Once an officer signs in for shift, the officer remains in service throughout the shift. 1RP 410-11. "[I]f we're in our patrol car, then we are on duty. We are expected to stop and help if help is needed on something." 1RP 431. Thus, for example, if an officer is eating while on shift, and a call comes in, the officer stops eating and responds to the call. 1RP 410-11.

On the night in question, Olvera tagged a vehicle on the side of the road. 1RP 460, 474. That was unquestionably the performance of an official police duty. But that is not when the 911 call containing the threat was made. After tagging the vehicle, Olvera drove home to have dinner with his family and spend personal time with them. 1RP 461, 474. By his own admission, he did not do any law enforcement related activity on his

way home. 1RP 474. Olvera was just about to walk into his residence when the call came out. 1RP 464-65.

The threat was made when Olvera was in the process of visiting his family. Visiting with family is not performing an official duty. Olvera was on duty because he was still on his shift. But his visit with his family, a personal matter, is not a "job-related" duty. Mierz, 127 Wn.2d at 479. A family visit is not an obligatory task that rises from the status of being a law enforcement officer. The evidence is therefore insufficient to show Olvera was performing an official duty when the threat was made.

In closing argument, the State argued Olvera was performing his official duties at the time the threat was made because the call came in during his shift. 1RP 645, 671. The State contended that Olvera, although he was stopping home to visit his family at the time, had to be ready to respond if he received a call. 1RP 645. The court, meanwhile, denied the Knapstad[5] motion as to Officer Olvera based on its understanding that "Olvera would have been on duty until he basically got out of his car." 1RP 124.[6]

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[5] State v. Knapstad, 107 Wn.2d 346, 347, 729 P.2d 48 (1986) (pre-trial motion to dismiss charge for lack of probable cause).

[6] The denial of the Knapstad motion is not at issue on appeal because "after proceeding to trial, a defendant cannot appeal the denial of a Knapstad motion, which is a pretrial challenge to the sufficiency of the evidence." State v. Cannon, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

The legal fallacy employed by the court and the prosecutor is equating being on duty with performing an official duty. They are not one and the same. A law enforcement officer can be on duty but not be performing an official duty at the time something happens. A police officer must always be ready to respond to a call for service or if the officer comes across a situation calling for police intervention. Officers are expected to drop whatever they are doing and respond in their official capacity as an officer. The response, then, constitutes the performance of an official duty. But what the officer was doing before the response does not necessarily so qualify. It depends on whether the facts show the officer was performing a job-related duty at the time.

"Courts should assume the Legislature means exactly what it says." State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If the legislature meant to criminalize harassment of a police officer while on duty, the legislature would have used the phrase "on duty at the time the threat is made" as opposed to the phrase it does use: "performing his or her official duties at the time the threat is made." Performance indicates activity. It is not a passive state of being. The focus is on what the officer is doing at the time the threat is made. If the officer is not carrying out a job-related function at the time, then no official duty is being performed. Courts "cannot add words or clauses to an unambiguous statute when the

legislature has chosen not to include that language." State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004) (quoting State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

Elementary principles of statutory construction buttress Kindt's argument. "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). "Strict construction requires that, 'given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.'" In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)). A strict construction of the harassment statute requires the phrase "performing his or her official duties" to mean something more definite and specific than simply being on duty but not performing any job-related functions at the time.

Further, in criminal cases, "courts should refrain from using possible but strained interpretations." State v. Garcia, 179 Wn.2d 828, 837, 318 P.3d 266 (2014). It cannot plausibly be maintained that an officer on shift is always performing an official duty during the shift. The

State's conflation of being on duty with performing an official duty would mean an on-shift officer playing poker with co-workers during a break is performing an official duty in playing poker. Under the State's interpretation, an officer could be sitting on the toilet to answer nature's call during shift and still be considered performing an official duty in so doing. In interpreting statutes, "'we presume the legislature did not intend absurd results' and thus avoid them where possible." State v. Weatherwax, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017) (quoting State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010)).

Commonsense informs statutory interpretation. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008). The legislature intended to criminalize threats made when an officer is carrying out what common sense recognizes as an official duty. Thus, when an officer arrests a person and the arrestee threatens the officer, the harassment statute is triggered. When an officer is threatened while carrying out a job-related activity, such as questioning a witness as part of a criminal investigation, the statute is triggered. Officers perform many job-related duties. Visiting with family, as Deputy Olvera did here, is not one of them.

Even if there is some ambiguity in the statute, "in criminal cases the rule of lenity is a basic and required limitation on a court's power of statutory interpretation whenever the meaning of a criminal statute is not

plain." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). The rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). "The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). The rule of lenity requires the statute be interpreted in Kindt's favor.

Kindt's conviction must be reversed and the charge dismissed with prejudice because the State failed to prove its case. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. THE DISCRETIONARY LEGAL FINANCIAL OBLIGATION MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO MAKE THE REQUISITE INQUIRY INTO ABILITY TO PAY.

The trial court erred when it imposed a discretionary legal financial obligation (LFO) without making an adequate determination of Kindt's

ability to pay it. The $500 fee for court-appointed counsel should be vacated and the case remanded for a sufficient inquiry.

At sentencing, the State recommended what it called "the standard fines" consisting of the $500 victim assessment, $500 court-appointed attorney fee, $200 filing fee, and $100 DNA fee. 3RP 3. The State interpreted a letter from Kindt's employer as indicating that Kindt will remain employed. 3RP 3; see CP 103 (the letter).

Defense counsel requested that the court-appointed attorney fee not be imposed. 3RP 5. Kindt currently had a full-time job paying $17 an hour, but counsel believed Kindt would not be able to keep his job if he received a custodial sentence. 3RP 5. The court questioned whether the employer's letter suggested Kindt would not have a job. 3RP 5. Counsel pointed out the employer wrote in the letter that "he will surely be missed," indicating the employer did not guarantee continued employment. 3RP 5.

The trial court imposed the $500 court-appointed attorney fee in addition to the mandatory $500 victim assessment and $100 DNA collection fee. 3RP 9-10; CP 61. The court stated its expectation that Kindt would continue to be employed and be able to make payments. 3RP 10. It deferred payment for six months, explaining "If you lost your job, if that happens, you can come back to court to readdress the financial

situation." 3RP 10. The court asked whether Kindt had paid off other pending fines. 3RP 10. Kindt said he had. 3RP 10.

The trial court's ultimate decision whether to impose discretionary LFOs is discretionary. State v. Ramirez, 191 Wn.2d 732, 741, 426 P.3d 714 (2018). "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. On the other hand, the adequacy of inquiry into a defendant's ability to pay is a question of law reviewed de novo. Id. at 741-42. Kindt challenges the adequacy of the trial court's inquiry into his ability to pay the attorney fee. Review is de novo in that respect. And because the court failed to conduct an adequate inquiry into Kindt's financial circumstances, it per se abused its discretion when it imposed the discretionary LFO.

Court-appointed counsel fees are discretionary. State v. Malone, 193 Wn. App. 762, 764, 376 P.3d 443 (2016). Before imposing discretionary LFOs, the trial court must make an individualized inquiry into the defendant's present and future ability to pay. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The record must reflect this inquiry. Id. at 837-38. "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." Ramirez, 191 Wn.2d at 735 (citing Blazina, 182 Wn.2d at 838). "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.

Here, the record does not reflect that the trial court adequately inquired into Kindt's ability to pay the discretionary LFO. Including boilerplate language in the judgment and sentence stating that the defendant has an ability to pay, as was done here, does not satisfy the inquiry requirement. Blazina, 182 Wn.2d at 838; see CP 61. The trial court considered Kindt's employment once out of custody. 3RP 5, 10. Even assuming Kindt would still have employment, an inquiry limited to employment and ability to work is not good enough. State v. Glover, 4 Wn. App. 2d 690, 695, 423 P.3d 290 (2018).

The trial court failed to consider other factors set forth in Ramirez and Blazina. "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." Ramirez, 191 Wn.2d at 744. Defense counsel told the court about Kindt's hourly wage and full-

time status (3RP 5), but the court did not consider whether Kindt had any assets and other financial resources. Nor did it consider Kindt's past work experience. As of a few days before the incident at issue, Kindt had been jobless for a couple of months. 1RP 519. The pre-trial bail study shows Kindt was unemployed as of July 2017. CP 83.

Furthermore, "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." Ramirez, 191 Wn.2d at 744. The trial court determined Kindt did not have other pending fines. 3RP 10. But it did not inquire into Kindt's monthly living expenses and whether Kindt had any other debts. The record shows Kindt has a young daughter who is his dependent. 1RP 447, 487, 518; CP 83. No inquiry was made as to expenses associated with caring for his daughter.

Finally, the trial court must inquire into whether the defendant meets the GR 34 standard for indigency. Ramirez, 191 Wn.2d at 743. The court here did not consider whether Kindt meets the GR 34 standard. The court did enter an order of indigency for appeal. CP 79-80. "[A] sentencing court should 'seriously question' an indigent defendant's ability to pay LFOs." Glover, 4 Wn. App. 2d at 695-96 (quoting Blazina, 182 Wn.2d at 839).

The court told Kindt he could come back to court to readdress his financial situation if he lost his job. 3RP 10. That option, which puts the onus on the defendant to return to court to fix the problem, does not absolve the trial court's failure to follow the law in imposing the discretionary LFO in the first place. The record must reflect that the trial court made the requisite inquired "before deciding to impose discretionary costs." Ramirez, 191 Wn.2d at 744. Accordingly, this Court should vacate the imposition of the discretionary LFO and remand to the trial court for a sufficient inquiry into Kindt's ability to pay it. Remand will also give the trial court an opportunity to assess whether Kindt qualified as indigent under RCW 10.101.010(3)(a)-(c) at the time of sentencing, in which case the discretionary cost is flatly prohibited. Ramirez, 191 Wn.2d at 747; RCW 10.01.160(3).

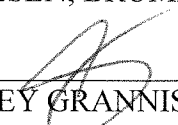
D. CONCLUSION

For the reasons stated, Kindt requests reversal of the conviction and dismissal of the charge with prejudice. If this Court declines to reverse the conviction, then the challenged LFO should be vacated and the case remanded for proper inquiry into ability to pay.

DATED this 28th day of June 2019

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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