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Court of Appeals
Division II
State of Washington
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NO. 53130-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GARY ARVIDSON,

Appellant.

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

The Honorable Amber Finlay, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.. 1

C. STATEMENT OF THE CASE..... 2

 1. **Procedural facts..... 2**

 2. **Trial testimony 4**

 a. *Verdict and sentencing.* 6

D. ARGUMENT 7

 1. **THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT MR. ARVIDSON WAS GUILTY OF CUSTODIAL ASSAULT..... 7**

 a. *The State was required to produce sufficient evidence to prove beyond a reasonable doubt every essential element of the crime of custodial assault..... 7*

 b. *The proper remedy is reversal of the conviction..... 11*

 2. **THE MENTAL HEALTH EVALUATION CONDITION MUST BE STRICKEN..... 11**

 3. **THE COURT ERRED IN IMPOSING INTEREST ACCRUAL AND COMMUNITY SUPERVISION FEE..... 13**

 a. *Recent statutory amendments prohibit discretionary costs for indigent defendants 13*

 b. *The court did not inquire into Mr. Arvidson's financial situation..... 15*

 c. *Mr. Arvidson was indigent 16*

 d. *The trial court erred by imposing discretionary community supervision and interest accrual LFOs 16*

E. CONCLUSION 18

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Anderson</i> , 96 Wn.2d 739, 638 P.2d 1205 (1982).....	11
<i>State v. Aumick</i> , 73 Wn.App. 379, 869 P.2d 421 (1994).....	8
<i>State v. Bartholomew</i> , 104 Wn.2d 844, 710 P.2d 196 (1985).....	15
<i>State v. Bland</i> , 71 Wn. App. 345, 860 P.2d 1046 (1993).....	9
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	15
<i>State v. Brooks</i> , 142 Wn. App. 842, 176 P.3d 549 (2008).....	11, 12
<i>State v. Bunker</i> , 169 Wn.2d 571, 238 P.3d 487 (2010).....	7
<i>State v. Catling</i> , 193 Wash.2d 252, 438 P.3d 1174 (2019).....	14
<i>State v. Craven</i> , 67 Wn. App. 921, 841 P.2d 774 (1992).....	8
<i>State v. Daniels</i> , 87 Wn.App. 149, 940 P.2d 690 (1997), review denied, 133 Wn.2d 1031 (1998).....	9
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	8
<i>State v. DeVries</i> , 149 Wn.2d 842, 72 P.3d 748 (2003).....	7, 11
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	11
<i>State v. Hall</i> , 104 Wn.App. 56, 14 P.3d 884 (2000), review denied, Wn.2d 1023 (2001).....	9
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	12
<i>State v. Julian</i> , 102 Wn. App. 296, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001).....	12
<i>State v. Lundstrom</i> , 6 Wn.App.2d 388, 429 P.3d 1116 (2018).....	16
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	1, 2, 13, 14
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7, 8
<i>State v. Shelley</i> , 85 Wn. App. 24, 929 P.2d 489 (1997).....	9
<i>State v. Stevens</i> , 158 Wn.2d 304, 143 P.3d 817 (2006).....	9
<i>State v. Wilson</i> , 125 Wn .2d 212, 883 P.2d 320 (1994).....	8, 9
 <u>UNITED STATES CASES</u>	
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970).7	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970).....	7
 <u>REVISED CODE OF WASHINGTON</u>	
RCW 7.68.035(1)(a).....	14
RCW 9A.36.100(1).....	2, 8
RCW 9A.36.100(1)(b).....	8

RCW 9.94A.703(2)(d).....	16
RCW 9.94A.760(1)	13
RCW 9.94B.080.....	12
RCW 10.01.160.....	14
RCW 10.01.160(1)	13
RCW 10.01.160(2)	13
RCW 10.01.160(3)	16
RCW 10.64.015	14
RCW 10.82.090	6, 17
RCW 10.101.010(3)	15, 16
RCW 10.101.010(3) (a).....	14, 15
RCW 10.101.010(3) (b).....	14, 15
RCW 10.101.010(3) (c).....	14, 15
RCW 10.101.010(3) (d).....	15
RCW 36.18.020(2)(h)	14
RCW 71.24.025	12

OTHER AUTHORITIES

Page

Second Substitute House Bill (SSHB) 1783	1, 2, 13, 14
LAWS OF 2018, ch. 269	13, 17

CONSTITUTIONAL PROVISIONS

Page

U.S. Const. Amend XIV	1, 7
Wash. Const. art. I, § 3.....	1, 7

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict Mr. Arvidson of custodial assault, where the evidence was insufficient to prove that Mr. Arvidson intentionally committed a harmful or offensive touching of a Mason County Jail corrections officer.

2. The trial court erred in entering its order requiring appellant to obtain a mental health evaluation and follow any treatment recommendations as a condition of community custody.

3. The sentencing court erred by imposing legal financial obligations [LFOs] including an interest accrual provision in the judgment and sentence following the Supreme Court's decision in *State v. Ramirez*¹ and after enactment of House Bill 1783.

4. The sentencing court erred by imposing the discretionary cost of Department of Corrections (DOC) community supervision in the judgment and sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict a defendant of assault, the State is required to prove beyond a reasonable doubt that the accused intentionally committed a harmful or offensive touching, meaning, that he acted with the objective or purpose to accomplish a result that constitutes a crime. Here, the evidence showed that

Mr. Arvidson hit a corrections officer, but did so unintentionally. Was Mr. Arvidson's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove all essential elements of custodial assault? Assignment of Error 1.

2. Did the trial court exceed its sentencing authority when it ordered a mental health evaluation and treatment as a condition of community custody? Assignment of Error 2.

3. Under the Supreme Court's decision in *Ramirez*, and after enactment of *House Bill 1783*, should the interest accrual provision and community supervision fees be stricken? Assignments of Error 3 and 4.

C. STATEMENT OF THE CASE

1. Procedural facts:

Gary Arvidson was booked into the Mason County Jail on April 27, 2018 for first degree assault in cause no. 18-1-133-23 for allegedly assaulting a Community Services officer. Report of Proceedings (RP) at 12.² Clerk's Papers (CP) 4. (Motion and Declaration for Order Determining Existence of Probable Cause, filed June 4, 2018, at 4).

¹191 Wn.2d 732, 426 P.3d 714 (2018).

²The record of proceedings consists of the following transcribed proceedings:

July 2, 2018 (arraignment), September 4, 2018, September 18, 2018, September 24, 2018 (arraignment), October 8, 2018 (omnibus), October 29, 2018, November 19, 2018, December 3, 2018, December 10, 2018, December 18, 2018, December 19, 2018 (jury trial, voir dire); January 14,

Mr. Arvidson remained in the Mason County Jail following his arrest on April 27, 2018. Following an incident involving jail staff Deputy Aaron Britton in the Mason County Jail on May 24, 2018, Mr. Arvidson was charged by information filed on June 14, 2018 with one count of custodial assault. RCW 9A.36.100(1). CP 8-10, 72-73. After the incident in the jail on May 24, Mr. Arvidson was transferred to Western State Hospital (WSH) and the case was stayed pending resolution of the issue of competency restoration. RP at 2-5. On June 14, 2018, the State charged Mr. Arvidson with custodial assault and the case was stayed on July 2, 2018 pending determination of his competency to stand trial. RP at 1-2; CP 15.

The court heard several status review hearings while he was at WSH. RP at 1-2, 3-5. Mr. Arvidson was returned to Mason County in mid-September 2018, following a determination that his competency had been restored. RP at 6-7; CP 24-25. Mr. Arvidson was arraigned regarding the custodial assault charge on September 24, 2018. RP at 6-10. Counsel gave notice of intent to seek a diminished capacity defense and the court entered an order authorizing public funds for a diminished capacity evaluation. RP at 12, 14.

Defense counsel asked for a continuance of the trial date over Mr. Arvidson's objection in order to schedule the diminished capacity evaluation. RP at 14-16. The court granted the request for continuance and

2019; and January 15, 2019 (sentencing).

set trial for early December, 2018. RP at 17. The trial date was later continued to mid-December. RP at 21.

On November 26, 2018, counsel notified the court that Mr. Arvidson did not cooperate with the evaluator who went to the jail and that counsel was going to proceed without pursuing a diminished capacity defense. RP at 23, 31.

The case came on for trial on December 19, 2018, the Honorable Amber Finlay presiding. RP at 36-161.

2. Trial testimony:

On May 24, Mason County Deputy Sheriff Aaron Britton, a full-time staff member at the Mason County Jail, performed a “coverall exchange” with Mr. Arvidson, who was in Holding Cell 2. RP at 126. A coverall exchange is a procedure in which inmates are offered a new change of jail clothing. RP at 126. The holding cell contains a sink and Deputy Britton noticed there was water on the floor of the cell, which he said could have come from the sink. RP at 127.

While performing the coverall exchange, Deputy Britton offered to escort Mr. Arvidson to the shower area of the jail and started to walk him in the direction of the showers. RP at 127. Deputy Brittan testified that as he was walking Mr. Arvidson toward the showers, “there must have been some water still on the floor and he slipped in front of the Holding 2 cell.” RP at 127.

When Mr. Arvidson slipped, Deputy Britton “tried to embrace—like help him a bit, just to make sure he doesn’t fall to the ground, and he supported his body weight too on the door of Holding 2.” RP at 127. Deputy Britton stated that this action stopped him from slipping. RP at 127. Deputy Britton stated that Mr. Arvidson grabbed his right arm and squeezed and that he then used an “escort hold” and reversed their direction of travel and started to return Mr. Arvidson to the holding cell. RP at 127-28. He testified that Mr. Arvidson was

kind of smiling and looking at me, then he grabbed his—he used his right hand to grab my right arm and applied a lot of pressure. And at that point I figured it wasn’t going to work for him going to take a shower, so I decided to perform like an escort hold and help him back to his cell, and by that point he used his left hand and struck my face on my right side[.]

RP at 127-28.

Deputy Britton stated that it was an “aggressive action and I felt like my safety was going to be at risk unless I got him back into his cell.” RP at 128.

Deputy Britton stated that he believed that Mr. Arvidson thought he was still going to the showers when the deputy changed his direction of travel and stated that he “did not indicate we were going to put him back in the cell.” RP at 131.

A video of the incident was admitted as Exhibit 1 and played to the

jury. RP at 122-23,129.

The defense rested without calling witnesses. RP at 132.

Defense counsel argued to the jury that Mr. Arvidson slipped while being transported by the deputy and that the deputy reversed his direction of travel to take him back to the holding cell. RP at 157. Counsel argued that

[t]hey ended up spun around and you heard the deputy testify that he was going to take Mr. Arvidson back into his cell. Well, Mr. Arvidson wasn't aware of those directions. Nobody told him those directions. And he was responding to what the officer was directing him, moving him to do without verbal instructions. So, Mr. Arvidson, you saw it on the video, he was confused and struck out, but did he assault the officer and was it intentional?

RP at 157- 58. The State argued that Mr. Arvidson's expression at the time when he was turned around by the officer showed that he "wasn't confused; he was mad[,]" and that he grabbed Deputy Britton's arm and "squeezed really hard" even before being turned around. RP at 158-59.

b. Verdict and Sentencing:

The jury found Mr. Arvidson guilty of custodial assault as charged. RP at 160-61; CP 106.

The court granted a first-time offender waiver and imposed 45 days followed by twelve months of community custody. RP at 166; CP 124, 125. The court ordered a mental health evaluation and to follow through with treatment. RP at 166-67. The judgment and sentence provides that Mr. Arvidson "shall participate in mental health counselling or treatment at the

direction of the CCO.” CP 134.

The court imposed a \$500.00 crime victim assessment “as the only monetary sanction.” RP at 168; CP 126.

The judgment and sentence states that “[t]he 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 127. The judgment and sentence also provides that the defendant “shall pay a community placement fee as determined by the Department of Corrections.” CP 133.

Timely notice of appeal was filed January 15, 2019. CP 141. This appeal follows.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT MR. ARVIDSON WAS GUILTY OF CUSTODIAL ASSAULT

a. The State was required to produce sufficient evidence to prove beyond a reasonable doubt every essential element of the crime of custodial assault.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Bunker*, 169 Wn.2d 571, 585, 238 P.3d 487 (2010).

A criminal defendant's fundamental right to due process is violated when a verdict is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970). See also *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. *Salinas*, at 201; *Craven*, at 928.

Mr. Arvidson was charged and convicted of custodial assault. In order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that Mr. Arvidson intentionally assaulted Deputy

Britton. The State's evidence consisted of a video of the incident and the deputy's testimony.

A person is guilty of custodial assault where the person assaults a staff member at any adult corrections institution who was performing official duties at the time of the assault. RCW 9A.36.100(1)(b).

RCW 9A.36.100(1) does not define "assault," so Washington courts rely on a common law definition. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (citing *State v. Aumick*, 73 Wn.App. 379, 382, 869 P.2d 421 (1994)). Washington recognizes three definitions of "assault": (1) assault by actual battery, (2) assault by attempting to inflict bodily injury upon another, and (3) putting another in apprehension of harm. *Wilson*, 125 Wn.2d at 218.

"Actual battery" is "an unlawful touching with criminal intent." *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (quoting *State v. Bland*, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993)). Under the common law, a touching is unlawful when the person touched did not consent to be touched, and the touch was either harmful or offensive. *State v. Shelley*, 85 Wn. App. 24, 28-29, 929 P.2d 489 (1997). Assault by battery does not require proof of specific intent to cause apprehension or to inflict substantial bodily harm. *State v. Stevens*, 158 Wn.2d 304, 314, 143 P.3d 817 (2006) (citing *State v. Daniels*, 87 Wn.App. 149, 155, 940 P.2d 690 (1997), review denied,

133 Wn.2d 1031 (1998)). Instead, battery requires intent to do the physical act constituting assault. *Stevens*, 158 Wn.2d at 314 (citing *State v. Hall*, 104 Wn.App. 56, 62, 14 P.3d 884 (2000), review denied, 143 Wn.2d 1023 (2001)).

The court instructed the jury that Mr. Arvidson could be guilty only if he acted intentionally. CP 101, 102, 103. Instruction No. 7 provides:

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

An assault is also an act, done with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

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

CP 102.

The evidence presented equally supports the conclusion that Mr. Arvidson did not intentionally hit the deputy in a harmful or offensive manner. Rather the evidence supports the defense theory that while Deputy Britton was escorting him to the showers, Mr. Arvidson slipped on the water on the floor and Deputy Britton, without warning to Mr. Arvidson, physically turned him

around and changed the direction in which they were walking, and that Mr. Arvidson flailed his arm and hit the deputy on the face without the intent to cause bodily injury or the apprehension of bodily injury. There was no testimony that Mr. Arvidson verbally expressed anger toward the deputy or that he was uncooperative when being escorted; only the deputy's opinion that Mr. Arvidson's expression at the time when he was turned around was that he "was kind of smiling and looking at [him]" and the deputy's testimony that Mr. Arvidson "applied a lot of pressure" to the deputy's arm when being escorted to the showers. RP at 127-28

b. The proper remedy is reversal of the conviction

The conviction was based on insufficient evidence. Even in the light most favorable to the State, a rational trier of fact could not have found beyond a reasonable doubt that Mr. Arvidson committed custodial assault. The absence of proof beyond a reasonable doubt requires dismissal of the convictions. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). The conviction must therefore be reversed and the charge dismissed with prejudice. *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 conviction is reversed for insufficient evidence. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE MENTAL HEALTH EVALUATION CONDITION MUST BE STRICKEN

The sentencing court erred when it ordered Mr. Arvidson, as a condition of community custody, to “participate in mental health counselling or treatment at the direction of the CCO.” CP 134.

Crime-related community custody conditions are reviewed for an abuse of discretion. *State v. Brooks*, 142 Wn. App. 842, 850, 176 P.3d 549 (2008). A sentencing court abuses its discretion when its decision is based on untenable grounds, including those that are contrary to law. *Id.* Sentencing errors derived from the court’s failure to follow statutorily mandated procedures can be raised for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001) (“sentence imposed without statutory authority can be addressed for the first time on appeal”).

A court may impose only a sentence court may order an offender to undergo a mental health evaluation and treatment as a condition of community custody only if it complies with certain procedures. *Brooks*, 142 Wn. App. at 851. First, the court must find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. RCW 9.94B.080; *Brooks*, 142 Wn.App. at 851. Second, the court must find that this mental health condition was likely to have influenced the

offense. RCW 9.94B.080; *Brooks*, 142 Wn.App. at 851. Under the statute, the findings must be based on a presentence report. RCW 9.94B.080. RCW 9.94B.080 states:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

Here, although an order finding Mr. Arvidson's competency was restored, a presentence report was not filed and the trial court did not make a finding that Mr. Arvidson was a "mentally ill person." RP at 166-67. Therefore, the court erred in imposing a mental health evaluation and treatment as a condition of Mr. Arvidson's community custody. The condition must be stricken from the judgment and sentence.

3. THE COURT ERRED IN IMPOSING INTEREST ACCRUAL AND COMMUNITY SUPERVISION FEE

a. Recent statutory amendments prohibit discretionary costs for indigent defendants

A court may order a defendant to pay legal financial obligations

(LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in *Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess.* (Wash. 2018) (HB 1783) and as of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee, former RCW 36.18.020(2)(h), on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 739, 746-50.

House Bill 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” *Ramirez*, 191 Wn.2d at 746 (citing Laws of 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“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).”). HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. The Supreme Court in *Ramirez* concluded the trial court impermissibly imposed discretionary LFOs and a \$200 criminal filing fee and remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. *Ramirez*, 191 Wn.2d at

750.

In this case, the court imposed a \$500 crime victim fund assessment, which HB 1783 retains as a mandatory LFO. RCW 7.68.035(1)(a). *State v. Catling*, 193 Wn.2d 252, 438 P.3d 1174 (2019) (noting that *House Bill 1783* “specifically and repeatedly” identifies the assessment fee as mandatory).

As amended in 2018, subsection (3) of RCW 10.01.160 now states, “[t]he 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). Subsection .010(3) defines “indigent” as a person who (a) 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).

b. The court did not inquire into Mr. Arvidson’s financial situation

The sentencing court must conduct on the record an individualized inquiry into the defendant's present and future ability to pay before imposing discretionary costs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry requires the court to consider factors such as incarceration and a defendant's other debts, including restitution, when determining his ability to pay. *Id.* Here, the court did not engage in a *Blazina* inquiry, but

imposed a \$500.00 crime victim assessment as “the only monetary sanction[.]” RP at 168. RCW 10.01.160 is mandatory: “it creates a duty rather than confers discretion.” *Blazina*, 182 Wn.2d at 838 (citing *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). “Practically speaking ... the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.” *Id.* “Within this inquiry, the court must also consider important factors ... such as incarceration and a defendant's other debts ... when determining a defendant's ability to pay.” *Id.*

c. Mr. Arvidson was indigent

Mr. Arvidson was represented by court-appointed counsel [CP 14], and shortly after sentencing the court found Mr. Arvidson indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 144-45. Thus, the record indicates that Mr. Arvidson was indigent under RCW 10.101.010(3) at the time of sentencing.

d. The trial court erred by imposing discretionary community supervision and interest accrual LFOs

In the appendix of the judgment and sentence titled Conditions of Community Custody, the court directed Mr. Arvidson to pay a community supervision fee to the Department of Corrections. CP 133. Although the judgment and sentence cites no authority for these costs, a statute allows them

as a discretionary community custody condition. RCW 9.94A.703(2)(d). The community custody supervision fee is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). The trial court found Mr. Arvidson indigent at sentencing. CP 144-45. Therefore, under RCW 10.01.160(3) the community custody supervision fee must be stricken.

Mr. Arvidson also challenges the interest accrual on non-restitution LFOs assessed in Section 4.3 of the judgment and sentence. CP 127. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 127. The 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” As amended, RCW 10.82.090 now provides:

- (1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal financial obligations.

See Laws of 2018, ch. 269.

Under RCW 10.82.090(1) and (2)(a) the interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs must be stricken.

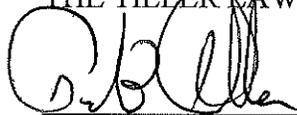
E. CONCLUSION

For the reasons stated, Mr. Arvidson respectfully asks the Court to reverse and dismiss the conviction with prejudice.

In the alternative, Mr. Arvidson respectfully requests this Court remand for resentencing with instructions to strike the discretionary costs of the community supervision fee and the interest accrual provision to the extent it applies to non-restitution LFOs.

DATED: July 31, 2019.

Respectfully submitted,
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Of Attorneys for Gary Arvidson

CERTIFICATE OF SERVICE

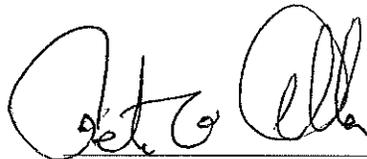
The undersigned certifies that on July 31, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Timothy Whitehead Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

Timothy Whitehead
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Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Gary Arvidson
c/o Mason County Jail
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 31, 2019.



PETER B. TILLER

THE TILLER LAW FIRM

July 31, 2019 - 12:52 PM

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Appellate Court Case Title: State of Washington, Respondent v. Gary D. Arvidson, Appellant
Superior Court Case Number: 18-1-00168-4

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