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53390-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BYRON SPEAR,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

- 1. The court failed to instruct the jury it must base each count on a separate and distinct act, and the record demonstrates this requirement was not manifestly apparent to the jury.**

The State charged Mr. Spear with five offenses – three counts of rape of a child and two counts of child molestation – based on the identical time frame with the same victim. CP 3-4. The State offered generalized testimony devoid of date references or other distinguishing events. RP 277-87. The court failed to instruct the jury the State must prove a separate and distinct act formed the basis for each count. CP 87-89, 93-94. Because the record as a whole fails to prove this requirement was manifestly apparent to the jury, the five convictions for potentially the same act violate Mr. Spear’s right against double jeopardy. U.S. Const. amend. V; Const. art. I, § 9; *State v. Mutch*, 171 Wn.2d 646, 662-66, 254 P.3d 803 (2011); *State v. Borsheim*, 140 Wn. App. 357, 366-71, 165 P.3d 417 (2007).

The State concedes the jury instructions “did not include[] an instruction on separate and distinct acts” but argues the information, the court’s opening remarks to the venire, and the prosecutor’s closing argument provided the jury with the necessary information to understand it must base each count on a separate and distinct act. Brief of Respondent at 14. Because the entire record and a question from the jury demonstrate

the jury did not understand the separate and distinct requirement, this Court should reject the State's argument and reverse Mr. Spear's convictions. Brief of Appellant at 18-20.

First, the jury's note asking whether it must base each count on a different act demonstrates it did not understand the separate and distinct requirement. CP 101; RP 570. The State attempts to dismiss the jury's specific question about separate and distinct acts as meaning something other than what it asked. The jury sent a note inquiring:

Do all 3 counts need to be a different act or can they be multiple occur[re]nces of the same type of act.

CP 101. The State suggests the question, "Do all 3 counts need to be a different act" is not a question about whether the counts need to be based on a separate and distinct act but is instead a question about multiple different types of acts. Brief of Respondent at 16. This Court cannot parse the jury's question and assume it meant something other than what it asked. Alternatively, any ambiguity in the meaning of the question proves the need for unanimity was not "manifestly apparent" to the jury.

Second, in closing argument, the prosecutor did tell the jury it must find a separate incident for each count. RP 527-28. However, the prosecutor did not make an explicit and clear election that might save the flawed instructions. *See, e.g., State v. Sage*, 1 Wn. App. 2d 685, 694-98,

407 P.3d 359 (2017). The prosecutor also highlighted the “variety of things” the victim claimed Mr. Spear did to her multiple times without offering any date frame or argument as to which act corresponded to which count. RP 517-18. For example, she discussed oral sex happening between five and ten times, but never suggested which alleged act supported which count. RP 527. The argument did not present the sort of clarity that can correct the instructional error. *Cf. State v. Peña Fuentes*, 179 Wn.2d 808, 826, 318 P.3d 257 (2014). Moreover, the jury’s note asking whether the counts “need to be a different act” demonstrate the prosecutor’s arguments did not clarify the separate and distinct requirement that was absent from the jury instructions. CP 101.

Finally, the separate and distinct act language in the information, which the court read to the venire prior to jury selection, fails to save the State’s argument. RP 30-32; CP 3-4. The State cites no cases in which such initial remarks, prior to swearing in a jury, saves a defect in the court’s instructions to the jury.

The jury’s note demonstrates it did not understand the unanimity requirement. Moreover, this Court must resolve any ambiguity in the verdict in Mr. Spear’s favor. *State v. Kier*, 164 Wn.2d 798, 811, 194 P.3d 212 (2008). In *Kier*, the government charged the defendant with both a robbery and an assault and presented evidence of two possible victims.

164 Wn.2d at 802-03. In response to the defendant's double jeopardy argument on appeal, the prosecution claimed its closing argument cured any ambiguity as to the victims of the crimes because the prosecutor told the jury one person was the victim of robbery and the other person was the victim of the assault. *Id.* at 813.

The Supreme Court rejected the argument that the prosecutor's closing argument cured the double jeopardy violation simply because it told the jury to base the crimes on different acts. *Id.* Because *the instructions* did not unambiguously direct the jury to specifically consider a particular victim for the robbery, and the evidence described both people as victims, the Supreme Court concluded the basis of the robbery conviction was ambiguous. *Id.* It was possible the jury found one person was the victim of both the robbery and assault. *Id.* at 813-14. Given this possibility, the Court concluded, "[I]t is unclear from the jury's verdict whether the assault was used to elevate the robbery to first degree." *Id.* at 813. Where the evidence and instructions allowed the jury to treat the two offenses as based on the same victim, the *Kier* Court held the rule of lenity required the ambiguous verdict be treated as requiring the merger of the overlapping offenses. *Id.* at 814. Therefore, when a jury verdict is ambiguous, the rule of lenity requires interpreting the verdict in the defendant's favor.

Here, as in *Kier*, the instructions failed to inform the jury it must find a separate and distinct act for each count, and the prosecutor's closing argument failed to identify clearly and explicitly the acts that formed the basis of each charge. Unlike *Mutch* and other similar cases, the record as a whole fails to dispel the possibility of multiple punishments created through the vague instructions. The jury's specific question about the need for unanimity proved it was not "manifestly apparent to the jury that each count represented a separate act." *Mutch*, 171 Wn.2d at 665-66. Because the record does not demonstrate the jury convicted Mr. Spear of the five counts based on separate acts, Mr. Spear established a double jeopardy violation. *Id.* at 664. This Court should reverse.

2. The court failed in its duty to make the unanimity requirement manifestly apparent to the jury and erred in failing to answer the jury's question, denying Mr. Spear his right to a unanimous verdict.

The jury asked the court:

Upon reading instruction 7, do we have to be unanimous on all counts? If we do not have a unanimous vote, how is it reported on the verdict form?

CP 74; RP 558. Mr. Spear requested the court answer the jury's question and inform it that yes, any verdict must be unanimous. RP 559-60. The court refused this instruction and instead told the jury to reread the instructions. CP 74. The jury exhibited clear confusion over the

unanimity requirement, and the court failed to make the unanimity requirement manifestly apparent to the jury. Therefore, the court denied Mr. Spear his right to a unanimous verdict, and this Court must reverse the convictions and remand for a new trial. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22.

The State again claims the jury actually meant something other than what it specifically asked and argues the question “do we have to be unanimous on all counts,” was not an inquiry as to whether the jury must reach a unanimous verdict. Brief of Respondent at 17. Instead, the State suggests the note asked what the jury should do if it had a unanimous verdict on some but not all counts.

As discussed in the opening brief and the first section of this reply, the plain language of the jury’s note fails to support the State’s theory. Moreover, the State’s argument that the court’s concern over not violating CrR 6.15 justifies its failure to answer the jury’s question is incorrect.¹ Mr. Spear proposed an answer to the jury’s question that would not run afoul of CrR 6.15.

Mr. Spear first suggested the court answer, “[S]ince there appears to be perhaps confusion about the law, I think it’s appropriate for the

¹ CrR 6.15(f)(2) provides, “After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.”

Court to answer the question. I do think it would be appropriate to make sure the jury understands that any verdict must be unanimous.” RP 559. When the court expressed concern that such an instruction could be construed as informing they jury it had to reach a verdict, in violation of CrR 6.15(f)(ii), defense counsel suggested a simpler, more direct answer to the jury’s question: “In order to reach a verdict on any count, that verdict must be unanimous.” RP 560. The State fails to explain why this answer would have been problematic.

The State’s argument that further clarification was unnecessary because the instructions already informed the jury they must be unanimous misses the point. As Mr. Spear argued in his opening brief, despite receiving a unanimity instruction, the jury sent a note asking if it needed to be unanimous. The court’s confusing and at times contradictory instructions, read as a whole, failed to make the requirement manifestly apparent to the jury. Simply asking the jury to reread the same instructions about which the jury just sent a question failed to offer any clarification and failed to answer the jury’s question.

Finally, the State cites *State v. Bobenhouse*, 166 Wn.2d 881, 214 P.3d 907 (2009), for the proposition that any error was harmless. Brief of Respondent at 19. However, *Bobenhouse* offers no support for the State’s proposition that a jury that fails to understand its requirement to reach a

unanimous verdict on any one count may be harmless. In that case, the issue was whether two sexual acts occurring during the course of a rape necessitated a *Petritch* instruction to ensure that all jurors relied on the same act to convict the defendant of the single count. *Id.* at 879, 891-92. The court concluded that sufficient evidence established both acts and, therefore, any error was harmless. *Bobenhouse* does not hold a non-unanimous verdict may be harmless error.

Here, the court rejected the defense's request to answer the jury's question directly and inform it any verdict had to be unanimous. Instead, the court followed the State's suggestion and unambiguously responded, "Please reread your instructions." CP 74. The court's failure to answer the jury's question and explain that any verdict the jury reached must be unanimous deprived Mr. Spear of his right to a unanimous jury. Const. art. I, §§ 21, 22. This Court should reverse Mr. Spear's convictions and remand for a new trial.

3. The court erred in calculating Mr. Spear's offender score, requiring resentencing.

The court found Mr. Spear's Idaho conviction for lewd conduct with a minor under sixteen was comparable to Washington's child molestation in the third degree. CP 110. It also found his Idaho conviction for enticing a child through the internet was comparable to

Washington's communicating with a child for immoral purposes and included both in Mr. Spear's offender score. CP 110. Because the State failed to prove these offenses are comparable to Washington offenses, the court erred in including them. Resentencing is required.

- a. The State bears the burden of proving the comparability of out of state prior convictions.

The prosecution bears the burden of proving a defendant's criminal history and offender score. *State v. Cate*, 194 Wn.2d 909, 912-13, 453 P.3d 990 (2019); *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012); *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); U.S. Const. amend. XIV; Const. art. I, § 3. This includes proving the existence, validity, and comparability of prior convictions by a preponderance of the evidence. RCW 9.94A.500(1), RCW 9.94A.525(2), (3); *Hunley*, 175 Wn.2d at 909-10.

A court may include out-of-state prior convictions in a defendant's offender score only where the State proves they are comparable to a qualifying Washington offense or where a defendant affirmatively agrees. RCW 9.94A.500(1), 9.94A.525(3); *In re Pers. Restraint Petition of Lavery*, 154 Wn.2d 249, 254-56, 111 P.3d 837 (2005); *State v. Thomas*, 135 Wn. App. 474, 483-87, 144 P.3d 1178 (2006). A defendant's failure to object to a prosecutor's summary of his criminal history does not satisfy

the State's burden of proof. *Cate*, 194 Wn.2d at 913. A defense request for a particular sentence within the same range used by the State constitute an affirmative acknowledgment of an offender score. *Id.*

- b. Mr. Spear did not affirmatively acknowledge his Idaho convictions were comparable to Washington felonies and did not affirmatively agree to their inclusion in his offender score.

The State agrees neither a failure to object nor agreeing with a guideline range calculation constitutes an affirmative acknowledge of an offender score. Brief of Respondent at 20. The State further agrees a defendant cannot waive a challenge to a miscalculated offender score. Brief of Respondent at 21. However, the State then concludes, with no citation to the record, "In this case, Spear affirmatively acknowledged the factual comparability of his Idaho convictions." Brief of Respondent at 21. The State is incorrect.

Mr. Spear did not affirmatively acknowledge either his offender score or the comparability of his Idaho convictions. His signature on the Prosecutor's Statement of Criminal History is an affirmative agreement to neither. CP 102. The Statement declares, "The defendant and the defendant's attorney hereby stipulate that the above is a correct statement of the defendant's *criminal history* relevant to the determination of the defendant's offender score in the above-entitled cause." CP 102 (emphasis added). That is accurate -- Mr. Spear does not dispute he was

convicted of the Idaho offenses or that they are, therefore, part of his criminal history. However, he did not agree the Idaho offenses were comparable or were properly included in his offender score.

The State misunderstands the difference between a defendant's criminal history and his offender score. A defendant's criminal history is defined as "the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere, and any issued certificates of restoration of opportunity." RCW 9.94A.030(11). That history "shall include" every known conviction, as well as the term and length of incarceration or probation. RCW 9.94A.030(11)(a). The Sentencing Reform Act (SRA) provides, "The determination of a defendant's criminal history is distinct from the determination of an offender score." RCW 9.94A.030(11)(c).

The SRA requires the court to determine a defendant's criminal history, as proven by the State, at a sentencing hearing before imposing sentence. RCW 9.94A.500(1). Following a determination of the criminal history, the court must then determine the defendant's offender score. RCW 9.94A.525. Whether prior convictions that are part of a defendant's criminal history count as part of his offender score depends on their classification, how old they are and whether they have washed out, and, for non-Washington offenses, whether they are comparable. RCW

9.94A.525(1)-(3). Thus, a defendant's criminal history contributes to the calculation of his offender score, but is a separate thing from his offender score.

Here, Mr. Spear agreed that the Statement correctly identified his criminal history. CP 102. However, he did not stipulate that the Idaho offense were comparable to a Washington felony, and he did not stipulate to his offender score. CP 102. This Court should reject the State's unsupported arguments to the contrary.

- c. The State failed to prove Mr. Spear's Idaho convictions are comparable to Washington felonies.

In the alternative, the State argues the court properly included the offenses in Mr. Spear's offender score because the offenses are "factually comparable." Brief of Respondent at 21-24. For the reasons in the opening brief and below, the State is incorrect.

As the State concedes, both Idaho statutes are broader than the Washington offenses because both Washington statutes require proof of essential elements that Idaho does not. Brief of Respondent at 21-24. Washington's child molestation in the third degree statute requires proof of a specific age differential and that the victim is not married to the defendant, whereas Idaho's lewd conduct statute has neither requirement. *Compare* RCW 9A.44.089(1) *with* Idaho Code § 18-1508. Similarly,

Washington's communication with a minor for immoral purposes statute requires proof the victim is not married to the defendant, whereas Idaho's enticing a child through use of the internet statute does not. *Compare* RCW 9.68A.005 *and* RCW 9.68A.090 *with* Idaho Code § 18-1509A(1).

The State argues these missing essential elements are irrelevant because trial testimony and the presentence investigation report prove the victim in the Idaho case was not married to Mr. Spear and they had the necessary age differential. Brief of Respondent at 22-23. First, the Idaho victim testified to neither fact. RP 386-92. Second, in assessing comparability, the SRA and due process limit the court's review to facts proven beyond a reasonable doubt or admitted by the defendant *and* facts that are tethered to the essential elements of the crime in the out-of-state offense. *Descamps v. United States*, 570 U.S. 254, 276-78, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); *Lavery*, 154 Wn.2d at 257-58; *State v. Davis*, 3 Wn. App. 2d 763, 781-82, 418 P.3d 199 (2018). This restriction constrains courts to consider only specific documents and to consider only facts directly related to elements of the offense. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). Courts may not assume facts unrelated to elements that were never proven or admitted even where those facts are contained within the indictment or other documents.

Descamps, 570 U.S. at 277-78; *Thomas*, 135 Wn. App. at 486; U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

Here, the State submitted the Idaho charging document and court minutes from the plea. Sentencing Exhibits 1-2. Neither document proves Washington's essential element that the victim and defendant were not married. Sentencing Exhibits 1-2.

It is possible to commit the Idaho offenses but not be guilty of the Washington offense. Because the Idaho statutes criminalize conduct broader than that criminalized by the Washington statutes, the State failed to prove comparability. This Court must remand for resentencing based on an offender score without these offenses. *Lavery*, 154 Wn.2d at 261-62; *Hunley*, 175 Wn.2d at 916.

4. The community custody conditions restricting Mr. Spear's internet access and requiring he submit to testing and searches are unauthorized by the statute and are unconstitutional.

a. The condition restricting Mr. Spear's internet and email access is not crime related and is unconstitutionally overbroad.

As a condition of community custody, the court ordered Mr. Spear "not have access to the internet or e-mail by electronic devices without Community Corrections Officer or Treatment Provider approval." CP 122 ("crime related prohibition 10"). However, this condition is unrelated to

Mr. Spear's crimes and violates his right to free speech. Therefore, it must be stricken.

The State first attempts to justify the internet bar as crime related by arguing it is related to his *Idaho* crimes of conviction. Brief of Respondent at 26. The State misses the point. Whether *the Idaho court* could impose internet restrictions because *the Idaho crime* involved use of the internet is of no moment. The record is devoid of any evidence that Mr. Spear's *Washington crimes* for which the court imposed community custody in any way involved the internet. In the absence of a crime-related purpose for this restriction, the *Washington court* lacks support for imposing an internet restriction as a condition of Mr. Spear's *Washington community custody*. This condition is not related to Mr. Spear's *Washington crime*, therefore, it is not crime-related and is unlawful. *State v. Johnson*, 180 Wn. App. 318, 331, 327 P.3d 704 (2014); *State v. O'Cain*, 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). This Court must strike the impermissible condition.

Second, the State argues the condition is not unconstitutional because it is not a blanket prohibition but instead requires community correction officer approval. Brief of Respondent at 29-31. Contrary to the State's contention, the condition is unconstitutional because it vests unbridled discretion in the community custody officer and prohibits a

much broader swath of First Amendment activity than is necessary. Brief of Appellant at 38-41. This condition infringes on Mr. Spear’s right to communicate without a narrowly tailored limitation, and this Court should strike it. U.S. Const. amend. I; Const. art. I, § 5; *Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 1736, 198 L. Ed. 2d 273 (2017).

- b. The condition requiring Mr. Spear to submit to testing and searches is not crime-related and violates Mr. Spear’s right to privacy.

Mr. Spear also appeals the imposition of the requirement he “submit to testing and reasonable searches of [his] person, residence, and vehicle” as not crime related and a violation of his right to privacy.

The State argues the condition is necessary in order for the State to monitor compliance with conditions and is therefore permissible. Brief of Respondent at 27-28. For the reasons argued in his opening brief, the Court should reject this reasoning. Brief of Appellant at 42-43.

The Court should also reject the State’s argument that the condition does not violate article I, section 7 because RCW 9.94A.631(1) permits searches of probationers with reasonable cause. Brief of Respondent at 28-29. This Court recently rejected the same argument and found a similar but less invasive condition unconstitutionally overbroad in *State v. Franck*, 12 Wn. App. 2d 1008, 2020 WL 554555 (2020)

(unpublished).² In *Franck*, the court ordered the defendant, who was convicted of assault, to “consent to DOC home visits to monitor compliance with supervision . . . includ[ing] access for the purposes of visual inspection of all areas of residence.” *Id.* at *10. This Court found the condition overly broad and unconstitutional. *Id.* at *11. Moreover, the court rejected the State’s interpretation of RCW 9.94A.631 to permit as a means of bypassing the constitution and held it cannot be used to defend forfeiting a defendant’s expectations of privacy in exchange for release on supervision. *Id.* at *10.

Condition 7 permitting searches of Mr. Spear’s person, residence, and vehicle is not crime-related and violated his right to privacy under the state and federal constitutions. U.S. Const. amend. IV; Const. art. I, § 7. This Court should strike the condition. *State v. Olsen*, 189 Wn.2d 118, 127-34, 399 P.3d 1141 (2017); *State v. Jones*, 118 Wn. App. 199, 208, 76 P.3d 258 (2003).

² Cited as nonbinding authority pursuant to GR 14.1 for persuasive value as this Court deems appropriate.

5. This Court should strike the imposition of certain legal financial obligations from Mr. Spear’s judgment and sentence.

- a. The court erred in imposing discretionary community custody supervision fees where the record demonstrates Mr. Spear is indigent.

The court found Mr. Spear indigent and expressed a clear intent to impose only mandatory legal financial obligations (LFOs). CP 114. However, the court erroneously imposed a discretionary supervision fee for community custody by failing to strike it from the standard, pre-printed community custody forms. CP 122. This Court should strike the discretionary LFO. Brief of Appellant at 44-45.

The State acknowledges the trial court found Mr. Spear indigent and admits “This Court has found that community supervision fees are discretionary legal financial obligations.” Brief of Respondent at 31-32 (citing *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 116 (2019), *review denied*, 193 Wn.2d 1007 (2019)). The State nonetheless urges this Court to reject Mr. Spear’s challenge to the imposition of community supervision fees and to decline to follow *Lundstrom* in favor of several unpublished cases without precedential value. Brief of Respondent at 32-33. The Court should reject the State’s arguments.

First, since Mr. Spear filed his opening brief, this Court has again held community supervision fees are a discretionary LFO that courts may

not impose where the defendant is indigent. In *State v. Dillon*, a case the State fails to address, the trial court found the defendant indigent and stated it intended to impose only mandatory LFOs.³ 12 Wn. App. 2d 133, 152, 456 P.3d 1199, *review denied*, ___ Wn.2d ___, 2020 WL 2950649 (2020). However, the court failed to strike the fee from the list of community custody conditions. *Id.* This Court again followed *Lundstrom* and held community custody supervision fees are a discretionary LFO that courts may not impose on indigent defendants. *Id.* at 152-53. This Court should follow the clear holdings in these two published decisions.

Second, the State tries to distinguish between “costs” barred under RCW 10.01.160 and other fees and assessments. Brief of Respondent at 32-33. The State’s reading is too narrow. A legal financial obligation is a “sum of money that is ordered by a superior court” and includes various types of financial assessments. RCW 9.94A.030(31). Statutes imposing LFOs are simply part of a “cost and fee recovery regime” covering “any other financial obligation” imposed due to a criminal case. *State v. Diaz-Farias*, 191 Wn. App. 512, 518-519, 362 P.3d 322 (2015); RCW 9.94A.030(31). The label of a LFO as a cost or fee is not dispositive of when a court may force an indigent person to pay the cost.

³ The Court issued its opinion in *Dillon* on February 3, 2020, the same day Mr. Spear filed his opening brief.

Consistent with the trial court's intent to waive all discretionary costs, and subject to this Court's published decisions in *Dillon* and *Lundstrom*, the Court should strike this condition of community custody. *See State v. Ramirez*, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018) (ordering discretionary LFOs stricken).

- b. The court erred in imposing the DNA fee where the record establishes Mr. Spear suffers from a mental health condition and does not have the ability to pay.

Mr. Spear also challenges the trial court's failure to assess his mental health condition in ascertaining his ability to pay certain LFOs. Brief of Appellant at 45-46. Again, the State acknowledges the record supports Mr. Spear's mental health issues and admits the governing statute and cases prevent the imposition of costs where such issues make the defendant unable to pay, but the State argues the Court should reject this challenge because Mr. Spears failed to raise the issue. Brief of Respondent at 34-36. This Court should reject the State's argument.

This Court may consider the improper imposition of LFOs for the first time on appeal. *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). In *Blazina*, the Court exercised its discretion under RAP 2.5 to consider an unpreserved challenge to imposition of LFOs where the court failed to inquiry into the defendant's ability to pay. 182 Wn.2d at 830. The Court ultimately remanded for a new sentence hearing. *Id.*

Starting with *Blazina*, our Supreme Court has consistently continued to demonstrate the greatest concern for combating the harm caused by imposition of LFOs on indigent defendants. *See, e.g., State v. Schwartz*, 194 Wn.2d 432, 443, 450 P.3d 141 (2019) (holding failure to pay LFOs does not prevent washout because such interpretation would be absurd); *State v. Catling*, 193 Wn.2d 252, 259 n.5, 438 P.3d 1174 (2019) (remanding and directing court to revise judgment and sentence to eliminate prohibited nonrestitution interest on LFOs); *Ramirez*, 191 Wn.2d at 750 (finding trial court failed to conduct adequate inquiry, holding amendments apply retroactively, and striking discretionary LFOs).

Our Supreme Court’s vigilant defense against the imposition of improper costs on indigent defendants stems from its recognition of the barriers LFOs serve to create to defendants reentering society. This is inconsistent with the legislative goal of facilitating reentry. RCW 9.96A.010 (“[I]t is the policy of the state of Washington to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship” as “an essential ingredient to rehabilitation and the assumption of the responsibilities of citizenship”). Burdening indigent defendants with debt does not further that goal. *See Blazina*, 182 Wn.2d at 835 (“problems associated with LFOs imposed against indigent defendants ... include increased difficulty

in reentering society”); U.S. Commission on Civil Rights, *Collateral Consequences: the Crossroads of Punishment, Redemption, and the Effects on Communities*, BRIEFING REPORT, at 1 (2019)⁴ (addressing the collateral consequences individuals face following conviction in regards to employment, housing, and education).

The record is clear Mr. Spear suffered from several mental health issues. CP 50, 138; RP 460. This Court should exercise its discretion to review Mr. Spear’s claim and find the court erred in imposing the \$100 DNA fee and community custody supervision fee without determining whether Mr. Spear had the ability to pay, as required by RCW 9.94A.777. *State v. Houck*, 9 Wn. App. 2d 636, 652, 446 P.3d 646 (2019), *review denied*, 194 Wn.2d 1024 (2020); *State v. Tedder*, 194 Wn. App. 753, 756, 378 P.3d 246 (2016).

⁴ Available at <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>.

B. CONCLUSION

The verdict does not reflect the jury was unanimous and does not demonstrate the jury relied on a separate and distinct act as the basis for each count of conviction. The court violated Mr. Spear's right to a unanimous verdict and to be free from double jeopardy. This Court must reverse Mr. Spear's convictions and remand for a new trial.

In addition, the court erred in calculating Mr. Spear's offender score, in imposing certain conditions of community custody, and in imposing certain LFOs. Resentencing is required.

DATED this 18th day of June, 2020.

Respectfully submitted,

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

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 53390-1-II
v.)	
)	
BYRON SPEAR,)	
)	
Appellant.)	

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