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NO. 54095-9-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

JAMEZ EDWARD BROWN,

Appellant.

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Appeal from the Superior Court of Pierce County  
The Honorable Jack Nevin

No. 19-1-02100-6

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

For the first time on appeal, Defendant Jamez Brown challenges supervision fees and collections costs as improperly authorized following a finding of indigency. Because neither have been imposed at this time, the Defendant is not an aggrieved party with a right of review under RAP 3.1. Because the Defendant does not demonstrate manifest constitutional error, the court should decline review under RAP 2.5(a)(3).

Neither supervision fees nor collections costs are “costs” within the meaning of RCW 10.01.160(2). Both are authorized by law regardless of indigency.

The record does not reflect that the court included these standard provisions inadvertently or unintentionally. The prohibition against imposing the costs of prosecution on an indigent defendant protects the constitutional right to counsel. But supervision fees and collections costs are unrelated to the exercise of the right to counsel. Therefore, there is no inconsistency in the court’s orders which waive the costs of prosecution and permit the later imposition of supervision fees and collection costs. From this record, a reviewing court may not interpret that the trial judge did not intend what he signed.

The Defendant claims that the misdemeanor sentences may be misinterpreted. Because the terms have not been misinterpreted and because any ambiguity must be interpreted in favor of the Defendant under the rule of lenity, he cannot show that he is aggrieved.

The court should dismiss the appeal and affirm the convictions and sentence.

## **II. RESTATEMENT OF THE ISSUES**

1. Where supervision fees and collections costs have only been authorized, but not imposed at this point, i.e. they are hypothetical only, is the Defendant aggrieved so as to have a right of review under RAP 3.1?
2. Should the court deny review of unpreserved error where there is no manifest constitutional error, where the defendant has a remedy under RCW 10.01.160(4) if the challenged fees are ever imposed, and where consideration is contrary to RAP 2.5's goal of judicial economy?
3. Is the authorization of supervision fees and collections costs, which are specifically approved by RCW 9.94A.780 and RCW 36.18.190 and not "costs" of prosecution under RCW 10.01.160, an abuse of discretion?
4. Where the rationale for prohibiting the imposition of the costs of prosecution on indigent defendants is the protection of the constitutional right to counsel, and where supervision and collections are unrelated to the right to counsel, does a court tenably waive the former while permitting the latter? Is there any basis in the record to find that the trial court entered the challenged LFO provisions inadvertently where the written order is considered the court's "ultimate understanding" of the issue; where the oral record may only be considered insofar as it is consistent with the written ruling; and where the oral record is not inconsistent with the judgment?

5. Is the Defendant aggrieved where the misdemeanor sentencing provisions have been correctly entered into the Judicial Information System and where any ambiguity must be interpreted in the Defendant's favor?

### **III. STATEMENT OF THE CASE**

The Defendant Jamez Brown has been convicted of felony violation of a domestic violence court order-DV, fourth-degree assault-DV, and obstructing a law enforcement officer. CP 3-4, 47-67, 73-77; RP (9/17/19-verdict) 2-3.

An existing court order restrains the Defendant from causing, attempting, or threatening bodily injury to M.R.R., from contacting her by any means, or from knowingly coming within 1,000 feet of M.R.R.'s residence, school, or workplace. RP (9/16/19) 272; Exh. 1. On June 7, 2019, Brittany Hemphill observed the Defendant in a Walmart parking lot in Tacoma pushing M.R.R. and restraining her from entering her car. RP (9/12/19) 222, 224. When M.R.R. finally entered her vehicle, the Defendant entered through the passenger side and began hitting and punching her. RP (9/12/19) 224-25. M.R.R. escaped into the store, while the Defendant paced the parking lot but did not leave the area. RP (9/12/19) 226-27. Mrs. Hemphill called the police twice, fearful for the victim's safety. RP (9/12/19) 222, 227.

When the Tacoma police officers arrived, they observed the Defendant yell toward M.R.R. RP (9/16/19) 263. He claimed he was buying shoes with a friend, indicating M.R.R.. RP (9/16/19) 263.

During the search incident to arrest, the Defendant refused police directives to keep back, had to be restrained, and attempted to kick an officer. RP (9/12/19) 204-05; RP (9/16/19) 266-67, 294-95. En route to jail, the Defendant thrashed around and threatened the officers, saying he had slipped his cuffs and was going to “go gangster” on them when they arrived at the jail. CP 69-70; RP (9/12/19) 158-59, 209-11, RP (9/16/19) 285-86. Upon arrival, the Defendant’s behavior interfered with the normal proper booking process. RP (9/16/19) 286-87.

The Defendant represented himself with the help of standby counsel. RP (9/4/19) 3. He stipulated to the admission of the Milton Municipal Court domestic violence no-contact order. RP (9/16/2019) 250, 274-75.

At sentencing, the court found the Defendant was indigent based solely upon his incarceration status. CP 56; RP (9/27/19) 451 (“I am satisfied that, given the sentence the defendant is going to serve, that he, if he has not already done so, does now qualify for indigency.”). The court imposed only the mandatory crime victim assessment fee, waiving the DNA sample fee “as he’s provided one recently.” CP 57; RP (9/27/19) 451. The order specified:

All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ per clerk per month commencing per clerk. RCW 9.94.700. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of judgment and sentence to set up a payment plan.

CP 58 (underlined portion is handwritten).

The order also contained the following regarding collection costs:

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

CP 58.

The judgment and sentence specified that because the Defendant was sentenced for violation of a felony no contact order, "the offender shall pay community placement fees as determined by DOC" among other relevant requirements. *See* CP 66.

The Defendant requested a downward departure for having a nine-year gap between restraining orders. RP (9/27/19) 447-48. The court followed the prosecutor's recommendation, imposing a standard range sentence of 60 months for the felony and community custody of earned early release up to twelve months. CP 61; RP (9/27/19) 444, 450.

The prosecutor recommended the court impose all the time on the misdemeanors, suspending none of it, and running all sentences concurrently. RP (9/27/19) 445.

THE COURT: ... As to the gross misdemeanor offenses for which the defendant was convicted, each will be 364 days, with 364 days suspended. Was that the recommendation?

MR. HALSTROM: The recommendation was no time suspended.

THE COURT: That's what I thought. It's 360 -- because they'll run concurrent with everything else. So each will be 364, with zero suspended, concurrent to themselves and also concurrent with the 60-month period. I'm not going to impose any financial obligations associated with the gross misdemeanor. And, in fact, as I said a moment ago, the only financial obligation imposed with the other offense is going to be the crime victim penalty assessment.

RP (9/27/19) 451 (emphasis added).

The judgment reflects the court's decision to impose all the time. CP 76 ("All time imposed so conditions only on felony J&S for count I"). But it also includes the court's initial misapprehension that incarceration time would be suspended. CP 73 ("0 days suspended"); CP 75 ("364 days suspended"). The judgment indicates that the \$500 crime victim assessment is not in addition to that imposed in the felony judgment. CP 73 (indicating this assessment will be "Concurrent to Count I").

The Defendant appeals. CP 86.

#### IV. ARGUMENT

**A. The court did not abuse its discretion in authorizing other agencies to impose supervision fees or collection costs at a later date.**

For the first time on appeal, the Defendant challenges language in the judgment which authorizes the Department of Corrections to impose community placement fees (CP 66) and the clerk to impose collection costs (CP 58). Brief of Appellant at 4. A decision to impose legal financial obligations is reviewed for an abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State v. Walters*, 162 Wn. App. 74, 82, 255 P.3d 835, 839 (2011) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The judgment's recitation of the relevant law does not constitute an abuse of discretion.

**1. The Court must deny review under RAP 3.1 where the Defendant is not an aggrieved party.**

“Only an aggrieved party may seek review by the appellate court.” RAP 3.1. “ ‘An aggrieved party is one who has a present, substantial interest, as distinguished from a mere expectancy, or ... contingent interest in the subject matter.’ ” *State v. Mahone*, 98 Wash.App. 342, 347, 989 P.2d 583 (1999) (quoting *Tinker v. Kent Gypsum Supply, Inc.*, 95 Wash.App. 761, 764, 977 P.2d 627, review denied, 139 Wash.2d 1008, 989 P.2d 1143 (1999)).

*State v. Shirts*, 195 Wn. App. 849, 854, 381 P.3d 1223, 1226 (2016).

In the *Shirts* case, the defendant made a motion to remit LFOs while he was yet incarcerated. The Legislature intends that motions to remit be limited to persons out of custody. RCW 10.01.160(4); RCW 10.82.090(2). Prior to 2018, inmates could not meet the “manifest hardship” requirement. Former RCW 10.01.160(4). As revised, the subsection makes clear that petitions may only be made “after release from total confinement.” Consistent with this intent, the court in *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999) held that a party was not aggrieved by an LFO until the state began to collect.

However, *Shirts* misrepresented that he was aggrieved by something other than collection. He claimed he was being denied access to transitional classes and classification advances due to outstanding LFOs. *Shirts*, 195 Wn. App. at 852, 857. The court should have been skeptical of this claim. There is no rationale for conditioning transitional classes upon the satisfaction of LFOs. Every prison inmate will have a judgment of at least \$500. RCW 7.68.035. And until recently, interest would have accrued on LFOs during incarceration. Laws of 2018, ch. 269, §1. Therefore, such an eligibility requirement would render transitional programs out of reach for most. The Department of Corrections is a heavily regulated agency, which spells out eligibility criteria in its administrative code. The satisfaction of LFOs is not a criterion. WAC 137-56-040. However, accepting this

allegation to be true, the court held that the defendant was aggrieved. *Shirts*, 195 Wn. App. at 856-57.

In our own case, the Defendant's total balance is \$500, i.e. the crime victim assessment. CP 57. He is not challenging the \$500 imposed. He challenges hypothetical fees that may be imposed at a later date. No supervision fees or collection costs have been imposed at this time, and it is possible they never will. Therefore, the Defendant is not aggrieved and has no right to review of his claims.

A supervision fee is imposed only if the Defendant is supervised, i.e. if the Defendant serves community custody. RCW 9.94A.780(1) (whenever there is supervision, the offender "shall" pay an intake fee); RCW 72.04A.120. Because his sentence is the statutory maximum (RCW 9A.20.021), the Defendant Brown will only serve community custody if he receives earned early release. If that comes to pass, at that time, the Department of Corrections "shall" set the amount for supervision fees. RCW 9.94A.760(1); RCW 9.94A.780(1); RCW 72.04A.120. However, the Department has discretion to defer/exempt the fee for any number of reasons. RCW 9.94A.780(1); RCW 72.04A.120(1).

While he is incarcerated, the Department will make deductions from the Defendant's inmate account toward his obligation of \$500. RCW 72.09.110; RCW 72.09.111; RCW 72.09.480(2)(a). With the change in

law, no interest will accrue. Laws of 2018, ch. 269, §1. In other words, it is possible that after the Defendant serves his 60-month term, his \$500 debt will be fully paid. If it is not, he is required to contact the clerk and make efforts toward paying. If the Defendant fails to communicate and cooperate with the clerk, the clerk will assign his case to collections. But at the present time, collection costs are entirely hypothetical. The Defendant is not aggrieved.

Where the Defendant's concerns are entirely hypothetical, the equities do not lie with him. RAP 3.1 must be enforced.

**2. This Court should decline to review unpreserved challenges under RAP 2.5.**

A claim of error must be preserved below to be raised above. RAP 2.5(a). This rule is one of judicial economy and efficiency. *State v. Sublett*, 176 Wn.2d 58, 154, 292 P.3d 715, 762 (2012). When parties are required to raise and preserve error below, trial courts have an opportunity to correct errors thereby making effective use of judicial resources.

There is an exception for claims which raise a manifest constitutional error. RAP 2.5(a)(3). Challenges to legal financial obligations will never satisfy this provision. *State v. Blazina*, 182 Wn.2d 827, 833-34, 344 P.3d 680 (2015) (the court of appeals properly exercises its right to decline review of unpreserved LFO matters, which do not command review as a matter of right). The Defendant's challenge under

RCW 10.01.160 is statutory in nature, not constitutional. And no manifest error is apparent where the judgment only authorizes parties to do, at a later time, what the legislature permits under RCW 36.18.190 and requires under RCW 9.94A.780.

If supervision fees and collection costs were true concerns of the Defendant, it stands to reason that he would have challenged these standard provisions in a timely fashion. *State v. Duncan*, 180 Wn. App. 245, 250-52, 327 P.3d 699 (2014), *aff'd and remanded*, 185 Wn.2d 430, 374 P.3d 83 (2016) (explaining the many reasons defendants may choose to waive objection below). If supervision fees and/or collection costs are imposed at a later date, the Defendant will have a remedy. For as long as the state is collecting on the Defendant's judgment, he may petition the court for remission under RCW 10.01.160(4). *Duncan*, 180 Wn. App. at 250 However, to hear this challenge before LFOs have even been imposed undermines the judicial economy goal of the court rule.

The dismissal of this challenge does not prejudice the Defendant. RAP 2.5 should be enforced.

**3. Supervision fees and collection costs are not “costs” within the meaning of RCW 10.01.160 and, therefore, are not limited by a defendant’s indigency**

The Defendant claims the lower court lacked statutory authority to authorize supervision fees and collection costs where it found him to be

indigent. Brief of Appellant at 9, 13. The relevant statute is RCW 10.01.160(3), which *Blazina* interpreted. It mandates that costs as defined under RCW 10.01.160(2) “shall not” be imposed on indigent defendants. Because supervision fees and collection costs are not costs as defined under RCW 10.01.160(2), there is no statutory violation. The court is not prohibited from imposing these assessments upon indigent defendants.

The Defendant argues that supervision fees and collection costs are “discretionary” costs. But the issue is not whether particular LFOs are mandatory or discretionary – terms which are not referenced in RCW 10.01.160. The question is whether they are “costs” as defined under RCW 10.01.160(2).

Earlier opinions mistakenly focused on the discretionary nature of an LFO. And the Defendant urges this Court to repeat those errors. Brief of Appellant at 12-13 (citing dicta in *State v. Catling*, 193 Wn.2d 252, 438 P.3d 1174 (2019) and *City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016)). Dicta in inapposite remission cases do not prevent this Court from recognizing both the structure and historical background of RCW 10.01.160. “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600, 69 S.Ct. 290, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting). As Justice Benjamin Cardozo is reputed to

have said in a lecture, “Justice is not to be taken by storm. She is to be wooed by slow advances.” Those earlier opinions not only misread the statute, they also failed to consider the rationale for the indigency rule which was drafted to protect a specific constitutional right.

RCW 10.01.160 prohibits imposing the “costs of prosecution” upon indigent defendants. The indigency or ability-to-pay provision in RCW 10.01.160(3) has its roots in the right to counsel. Criminal defendants have a constitutional right to the assistance of counsel without cost. U.S. CONST. amend. 14; *State v. Barklind*, 87 Wn.2d 814, 815, 557 P.2d 314 (1976). Defendants “cannot be influenced to surrender that right by the imposition of a penalty on the exercise thereof.” *Barklind*, 87 Wn.2d at 815. A reimbursement requirement may chill that exercise. *Fuller v. Oregon*, 417 U.S. 40, 51, 94 S. Ct. 2115, 2123, 40 L. Ed. 2d 642 (1974). Therefore, the recoupment procedure must pass constitutional muster. Washington’s does, because the costs of prosecution (i.e. fees for appointed counsel and associated defense costs prior to conviction) may not be imposed upon indigent defendants who lack the ability to pay. RCW 10.01.160(4).

In *Fuller v. Oregon*, the court reviewed an Oregon recoupment statute identical to Washington’s. *State v. Barklind*, 87 Wn.2d 814, 818, 557 P.2d 314 (1976). Fuller was represented by appointed counsel who hired an investigator. *Fuller*, 417 U.S. at 41. And the state assumed both

fees. *Id.* The defendant eventually pled guilty and the fees were transferred to his judgment. *Id.* at 41-42. Fuller challenged the constitutionality of OR. REV. STAT. § 161.665 which required him to repay the state for the costs of his counsel and investigator.

The United States Supreme Court held the statute was constitutional because it contained safeguards against oppressive application. *Fuller*, 417 U.S. at 44-47.

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

*State v. Blank*, 131 Wn.2d 230, 237-38, 930 P.2d 1213 (1997).

The only relevant question under the statute and constitution is: Is the legal financial obligation (LFO) a "cost" within the context of the recoupment statute? If it is, then it cannot be imposed upon defendants who are indigent or who lack the ability to pay. RCW 10.01.160(3).

In the context of the recoupment statute, “costs” are “limited to expenses incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). The costs of prosecution include attorney fees, investigator fees, and fees to obtain witnesses and jurors. Not every LFO is a cost. *See e.g., State v. Clark*, 191 Wn. App. 360, 376, 362 P.3d 309, 312 (2015) (the definition of “cost” in RCW 10.01.160(2) does not include “fines”). Costs do not include post-conviction punishment or penalties, e.g. the discretionary fine under RCW 9A.20.021, the mandatory crime victim penalty assessment, and supervision fees.

They do not include reparative or restorative consequences like restitution or supervision fees. And they do not include collection costs which are an alternative means to criminal contempt for enforcing a judgment.

- a. Supervision fees are not “costs” within the meaning of 10.01.160.

The judgment authorizes a supervision fee “as determined by the DOC.” CP 66. The assessment is mandatory unless the Department finds reason to defer or exempt it. RCW 9.94A.780(1); RCW 72.04A.120(1).

A community custody supervision assessment clearly does not meet the definition of a cost under RCW 10.01.160(2) because it is not an expense specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. Because the community custody supervision assessment is not a cost, the trial court was not required to conduct an

inquiry into Abarca's ability to pay under RCW 10.01.160(2). *See State v. Clark*, 191 Wn. App. 369, 374-75, 362 P.3d 309 (2015) (distinguishing fines from costs).

*State v. Abarca*, 11 Wn. App. 2d 1012, 2019 WL 5709517 at \*10-11 (2019), *review denied*, 195 Wn.2d 1006, 458 P.3d 776 (2020) (unpublished)<sup>1</sup>; *see State v. Estavillo*, 10 Wn. App. 2d 1044, 2019 WL 5188618 at \*5-6 (2019) (unpublished) (declining to accept state's concession because "the supervision assessment is not a discretionary 'cost' merely because it is a discretionary LFO").

The Defendant misrepresents that there is authority holding that the term "costs" under RCW 10.01.160 encompasses the supervision fee. Brief of Appellant at 7-8. Neither case makes any such assertion. In the first case, the court held that the court abused its discretion by failing to acknowledge and exercise its discretion to impose supervision fees. *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020). The second case, an unpublished case, struck the supervision fee under the faulty analysis that the fee is discretionary, without any consideration of whether it is a cost under RCW 10.01.160. *State v. Reamer*, 9 Wn. App. 2d 1077, 2019 WL 3416868, \*5 (Div. I.2019) (unpublished).

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<sup>1</sup> Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

The trial court had the authority to impose the cost of supervision upon the Defendant without regard for his ability to pay, because it is not a cost of prosecution related to the exercise of his constitutional right to counsel.

- b. Collection costs are not “costs” within the meaning of RCW 10.01.160.

The judgment authorizes collection costs if the clerk decides to send the case to collections. CP 58, 61, 66. The Defendant’s case has not been sent to collection. This language only gives notice of the clerk’s discretion and statutory authority to do so.

After a defendant’s total release from incarceration (including supervision, if any), if LFOs remain, the county clerk assumes legal responsibility for collections. RCW 9.94A.780(7). The clerk’s office may act as the collector and may assess upon the debtor the collection costs the office incurs. *Id.* Alternatively, the clerk’s office may contract with collection agencies to collect unpaid LFOs. RCW 36.18.190.

In practice, the Pierce County clerk only resorts to a collections agency if the debtor is uncooperative – failing to make payments or to communicate with the clerk’s office. The clerk’s office lacks the resources and budget to investigate and enforce the court order. The collection agent is not a public agency, but a private for-profit business that will not perform

unless paid. The Legislature has allocated the costs of collection to the debtor. RCW 19.16.500; RCW 36.18.190.

Collection costs have no relation to the costs of prosecution. They simply are a mechanism for enforcing the court's judgment on a recalcitrant party (in a civil or criminal case) without resorting to arrest warrants and incarceration. A party's indigency as broadly defined in RCW 10.101.010(3) does not prohibit the clerk from sending a case to collection. The clerk will, however, consider all extenuating circumstances when considering an exemption or deferral of all LFOs. RCW 9.94A.780(7).

The Defendant argues hypothetical collections costs violate RCW 10.01.160. Because they are not costs within the meaning of the statute, the statute is not violated.

**4. The court does not abuse its discretion or act inadvertently merely because the oral record does not address every written provision in the judgment.**

Recent decisions from the court of appeals have remanded on the theory that the absence of an oral record addressing small provisions in the judgment indicates the entry of those provisions was inadvertent or unintended. *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020) (where the trial court waived DNA and filing fees "it appears that the trial court intended to waive all discretionary LFOs, but inadvertently imposed supervision fees because of its location in the judgment and sentence");

*State v. Tucker*, No. 53014-7-II, 2020 WL 2857612 (Wash. Ct. App. June 2, 2020) (Unpublished) (where the trial court had waived the DNA fee, its failure to strike “boilerplate language in the judgment and sentence imposing discretionary collection costs” was “perhaps inadvertent”). The drawing of such a conclusion is contrary to the law and demonstrates a misunderstanding of the different rationales behind the different LFOs.

There are 13 pages of provisions in the felony judgment. It should come as no surprise that the Honorable Judge Nevin did not make an oral record as to every provision in those pages. For example, he did not discuss the clerk’s role in setting a payment schedule or the clerk’s income withholding authority. CP 58, 63. He did not discuss the exoneration of the bond or credit for time served. CP 59-60. He did not discuss any of the seven standard community custody provisions (of which supervision fees is one) or any provision in Appendix F. CP 61, 63. He did not inform the Defendant of the no-contact order, although the order was passed to the Defendant for his signature. CP 61; RP (9/26/19) at 452. And the judge made no oral record that he was agreeing to the prosecutor’s recommendation for domestic violence treatment. CP 61; RP (9/26/19) at 445. The lack of an oral record does not affect the validity or intentionality of each provision.

“The written decision of a trial court is considered the court’s ‘ultimate understanding’ of the issue presented.” *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980). It is not presumed to be inadvertent merely because every provision therein was not repeated aloud. In fact, where there are differences between the oral and written ruling, the writing will control. *State v. Sims*, 193 Wn.2d 86, 99-100, 441 P.3d 262, 269 (2019); *Dailey*, 93 Wn.2d at 458-59. An appellate court may only consider a trial court’s oral decision insofar as it is consistent with the trial court’s written order. *State v. Kull*, 155 Wn.2d 80, 88, 118 P.3d 307, 311 (2005) (citing *State v. Bryant*, 78 Wn. App. 805, 812-12, 901 P.2d 1046 (1995)). “[A] trial court’s oral statements are ‘no more than a verbal expression of (its) informal opinion at that time ... necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.’” *Dailey*, 92 Wn.2d at 458 (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900, 904 (1963)). See also *In re Det. of Smith*, 117 Wn. App. 611, 615, 72 P.3d 189 (2003) (“[t]his court need not consider the trial court’s oral ruling because it is not necessary to understanding its written one.”).

In a recent unpublished case, the court held that it was not a reasonable exercise of discretion to impose collection costs and supervision fees when the court was not mandated to do so. *State v. Richard*, No. 81046-4-I, 2020 WL 2026106 (Wash. Ct. App. April 27, 2020) (Unpublished).

The decision is not persuasive. The court of appeals lacked the background to reach such a conclusion. In declining to decide whether supervision fees and collection costs were “costs” within the meaning of the statute, it side-stepped consideration of the rationale behind the indigency rule. The indigency rule protects the right to counsel. The supervision fee and collection costs do not touch on the right to counsel. The supervision fee encourages buy-in into an offender’s rehabilitation program. The DNA fee, also not a cost of prosecution, supports the collection and maintenance of the felon database. It may be waived where one purpose (collection) was not necessary in the instant case, because the defendant’s DNA had been collected in an earlier case. RCW 43.43.7541. And collection costs allocate the fee to the contumacious party who does not abide by the court’s order. Therefore, the fact of a defendant’s indigency cannot mandate a waiver of these fees. The rationale behind each assessment is different.

The Legislature intends that the supervision fee be mandatory unless the Department assesses, at a more meaningful time, that exemption or deferral is the better course toward the offender’s rehabilitation. *See e.g.* RCW 9.94A.780(1)(b) (permitting an exemption where repayment interferes with the offender’s education). The Forms Committee has acknowledged this intent, incorporating the supervision fee into the standard court judgment form:

While on community custody, the defendant shall: ...  
(7) pay supervision fees as determined by DOC...

WPF CR 84.0400 P at page 5, ¶4.2(B). The form does not provide a checkbox, thereby indicating that these provisions are mandatory.

The unpublished *Richard* case is wrongly decided. It is tenable for a trial court to leave intact language drafted by the Forms Committee to reflect the legislative intent. It is tenable for a trial court to recognize that these assessments are treated differently than those which reflect the exercise of the right to counsel. And the *Richard* opinion is inconsistent with the standard of review, because it substitutes the higher court's judgment for that of the lower court on a discretionary matter.

The oral record in our own case is not inconsistent with the judgment. It simply provides no insight. The fact that the court waived one cost of prosecution (i.e. the court filing fee) and a fee that was not a cost of prosecution (the DNA fee) does not speak to the court's intent to waive other fees which have different purposes.

Where community custody is contingent on the Defendant's earned early release, it was reasonable for the court to authorize supervision fees which would be determined at a later date by the Department. *See* CP 60-61, 66. And it was reasonable to warn the Defendant about the possibility of collection costs in the same writing which directs him to contact the clerk

immediately. The clerk's decision to assign a case to a collection agency is directly related to the defendant's failure to communicate with the office.

The lower court's decisions are tenable and may not be disturbed. This Court may not assume that the superior court judge did not intend what he signed.

**B. This Court may, but need not, remand for correction of inconsistent language in the misdemeanor judgment.**

The Defendant challenges language related to the misdemeanor sentences. Because the challenged language does not affect the Defendant, he is not aggrieved. RAP 3.1.

The Defendant observes that the misdemeanor judgment indicates inconsistently that the misdemeanor sentences are imposed in their entirety and that they are fully suspended. Brief of Appellant at 18-19. The State concedes that the inconsistency is error. However, there is no risk that the inconsistency may result in imposition of "suspended" time at a later date. Under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant. *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912, 914 (1993). Here that rule mandates that the judgment be interpreted to fully expend any available incarceration time concurrently with the felony sentence.

The court only imposed \$500 in crime victim assessments for the entire case. The Defendant quibbles over how this is expressed in the

judgment, claiming that it “creates the opportunity for confusion and error” and suggesting that the order might be misinterpreted to impose \$500 twice. Brief of Appellant at 21. However, the clerk’s records in the Judicial Information System (JIS) reflects a total legal financial obligation of \$500. There has been no confusion. Moreover, the statute is perfectly clear that the crime victim penalty assessment “shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor.” RCW 7.68.035(1)(a) (emphasis added). The State disagrees that the language in the judgment creates confusion or requires clarification.

A defendant may challenge an erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A scrivener’s error is a clerical mistake that, when amended, would correctly convey the trial court’s intention. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011) (*superseded by statute on other grounds as recognized in In re Postsentence Review of Combs*, 176 Wn. App. 112, 119, 308 P.3d 763 (2013)). Clerical mistakes in judgments and orders may be corrected by the court at any time on the motion of any party prior to acceptance of review by the Court of Appeals. CrR 7.8(a); RAP 7.2(e). An appellate court may remand to correct a scrivener’s error. *See State v. Calhoun*, 163 Wn. App. 153, 170, 257 P.3d 693 (2011).

This Court may remand to correct inconsistent language regarding the imposition versus suspension of the misdemeanor sentences. However, it need not. A remand on superficial matters, which could have been addressed at the time of the entry of the order and which do not prejudice the Defendant, does not align with judicial economy.

#### **V. CONCLUSION**

For the above stated reasons, the State respectfully requests this Court to dismiss the appeal under RAP 3.1 and RAP 2.5(a) and to affirm the judgment.

RESPECTFULLY SUBMITTED this 27th day of July, 2020.

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Malena Boome  
Rule 9  
ID #9880321

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

07/27/20      s/Aeriele Johnson  
Date                      Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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