

Nos. 33836-3-III,  
33812-6-III

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

**FILED**  
**Jul 29, 2016**  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

TAYLOR ROSS LANDRUM,

Appellant.

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

The Honorable Judge Cameron Mitchell

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APPELLANT'S OPENING BRIEF

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## A. ASSIGNMENTS OF ERROR

1. The trial court erred in sentencing Mr. Landrum to 20 months confinement on the solicitation to commit first degree perjury count.

2. Mr. Landrum was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the entry of post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J.

3. The trial court erred by indicating in each judgment and sentence that sentence was imposed under RCW 9.94A.507.

4. The trial court erred in imposing the following terms of community custody:

(10) Have no contact with any minors, unless approved by your therapist. In case of approved contact, it shall be only in the presence of an adult who has received prior approval from the therapist. The sponsor must be aware of the offense behavior.

...

(13) Submit to polygraph testing upon the request of your therapist and/or Community Corrections Officer, at your own expense.

(14) Do not possess or view material that includes images of children wearing only undergarments and/or swimsuits.

(15) Do not possess or view material that includes images of nude women, men, and/or children.

(16) Do not possess or view material that shows women, men and/or children engaging in sexual acts with each other, themselves, with an object, or animal.

...

(20) Do not view or attend X-rated movies, peep shows, or adult book stores.

(21) Avoid places where children congregate, including parks, libraries, playgrounds, schools, daycare centers, and video arcades.

(22) Hold no position of trust or authority involving children.

...

(25) Have no access to computers or the internet.

(CP 309, 315-316, 836, 842-843; RP (Sept. 18, 2015) 120).

5. The trial court erred in imposing discretionary legal financial obligations, a \$60 sheriff's service fee.

6. The judgment and sentence for the cause number with the attempted indecent liberties count contains an error that must be corrected: it imposes more than the \$760 in legal financial obligations ordered by the trial court.

7. An award of costs on appeal against the defendant would be improper.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the trial court erred in sentencing Mr. Landrum to 20 months confinement on the solicitation to commit first degree perjury count.

Issue 2: Mr. Landrum was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the entry of post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J.

Issue 3: Whether each judgment and sentence must be corrected to reflect that Mr. Landrum was sentenced under RCW 9.94A.712, rather than RCW 9.94A.507.

Issue 4: Whether the trial erred in imposing certain conditions of community custody.

Issue 5: Whether the trial court erred in imposing discretionary legal financial obligations and whether the total legal financial obligations must be corrected in each judgment and sentence.

Issue 6: Whether this Court should refuse to impose costs on appeal.

### **C. STATEMENT OF THE CASE**

Taylor Ross Landrum was charged with one count of attempted indecent liberties against C.H., alleged to have occurred on or about October 21, 2006. (CP 1-2). Mr. Landrum was also charged, by a separate information, with one count of second degree rape against C.S., alleged to have occurred on or about October 10, 2008, and four counts of solicitation to commit first degree perjury, alleged to have occurred between October 11, 2008 and September 1, 2009. (CP 404-407). C.H. and C.S. were both adults at the time of the alleged incidents. (CP 846). The two cases were tried together to a jury, and Mr. Landrum was convicted of these charges. (CP 372-377, 408-413; 1 RP<sup>1</sup> 1-877).

The trial court entered a Judgment and Sentence in each case, and an order sealing the juror questionnaires. (CP 3-17, 389-390, 425-441; 1 RP 878-895). Mr. Landrum appealed to this Court. (CP 18, 443).

In an unpublished opinion, this Court affirmed Mr. Landrum's convictions for second degree rape, attempted indecent liberties, and one count of solicitation to commit first degree perjury. (CP 23-60, 447-484).

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<sup>1</sup> The Report of Proceedings consists of the transcripts from Mr. Landrum's first appeal (COA Nos. 28985-1-III and 28986-9-III), and ten separate volumes from hearings held after this Court remanded the cases back to the trial court. The transcripts from Mr. Landrum's first appeal are referred to herein as "1 RP." The ten separate volumes from the hearings held following remand are referred to herein as "RP" followed by the date of the hearing.

This Court dismissed with prejudice the remaining three counts of solicitation to commit first degree perjury, finding the four counts should have been considered one unit of prosecution. (CP 23, 53-55, 59, 447, 477-479, 483). This Court also found the trial court violated the public's right to open court records by sealing the juror questionnaires without conducting a *Bone-Club*<sup>2</sup> analysis. (CP 40-53, 59, 464-477, 483). This Court then remanded the case for a new sentencing hearing and for a *Bone-Club* analysis and reconsideration of the order sealing the juror questionnaires. (CP 23, 43, 51-55, 59, 447, 467, 475-479, 483).

On remand, the trial court entered an order vacating its previous order sealing the juror questionnaires. (RP (Jan. 7, 2014) 11; RP (Feb. 27, 2015) 12-13; RP (June 5, 2015) 6-7; RP (Sept. 18, 2015) 54). The trial court stated "I would indicate I have considered that and I don't think that there is sufficient information that is available to me, in my memory or in this record, for the Court to conduct the proper *Bone-Club* analysis of the need to seal the jury questionnaires." (RP (Feb. 27, 2015) 12).

The trial court held a re-sentencing hearing.<sup>3</sup> (RP (Sept. 18, 2015) 37-131). At this hearing, Mr. Landrum was represented by counsel

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<sup>2</sup> *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

<sup>3</sup> This re-sentencing hearing was held approximately two years and three months after the mandate was issued remanding the cases to the trial court. (CP 20, 444; RP (Sept. 18, 2015) 37-131). Prior to this re-sentencing hearing, there were 23 hearings held on remand, and the matter was continued for various reasons, including many changes in appointed counsel for Mr. Landrum. (RP (Jan. 7, 2014) 3-15, RP (Feb. 2, 2014) 18, RP

appointed at public expense, due to his indigent status. (CP 186-188, 562-564; RP (Sept. 18, 2015) 37-131).

Following this hearing, the trial court entered two separate Judgment and Sentences, one for the cause number with the attempted indecent liberties count, and one for the cause number with the second degree rape and solicitation to commit first degree perjury count. (CP 304-317, 831-844). Each Judgment and Sentence indicates sentence was imposed under RCW 9.94A.507. (CP 304-317, 831-844).

Defense counsel and Mr. Landrum himself requested the trial court impose an exceptional sentence downward. (CP 668-83; RP (Sept. 18, 2015) 55, 58-75, 103). The trial court declined the request and imposed a standard range sentence. (CP 308, 835; RP (Sept. 18, 2015) 117-128).

On the attempted indecent liberties count, the trial court sentenced Mr. Landrum to a minimum term of confinement of 80 months and a maximum term of confinement of life, based on an offender score of six. (CP 305, 308; RP (Sept. 18, 2015) 126). On the second degree rape count, the trial court sentenced him to a minimum term of confinement of 170 months and a maximum term of confinement of life, based on an offender

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score of six. (CP 832, 835; RP (Sept. 18, 2015) 117-118). On the solicitation to commit first degree perjury count, the trial court sentenced him to 20 months confinement, based on an offender score of three. (CP 832, 835; RP (Sept. 18, 2015) 118). The trial court ordered the sentences to run concurrently. (CP 308, 835; RP (Sept. 18, 2015) 126-127).

On both the attempted indecent liberties count and the second degree rape count, the trial court imposed a term of community custody “for any period of time the defendant is released from confinement before the expiration of the statutory maximum.” (CP 308, 835; RP (Sept. 18, 2015) 118, 126). The trial court imposed the community custody conditions, including the following conditions set forth in Appendix H attached to each judgment and sentence:

(10) Have no contact with any minors, unless approved by your therapist. In case of approved contact, it shall be only in the presence of an adult who has received prior approval from the therapist. The sponsor must be aware of the offense behavior.

...

(13) Submit to polygraph testing upon the request of your therapist and/or Community Corrections Officer, at your own expense.

(14) Do not possess or view material that includes images of children wearing only undergarments and/or swimsuits.

(15) Do not possess or view material that includes images of nude women, men, and/or children.

(16) Do not possess or view material that shows women, men and/or children engaging in sexual acts with each other, themselves, with an object, or animal.

...

- (20) Do not view or attend X-rated movies, peep shows, or adult book stores.
- (21) Avoid places where children congregate, including parks, libraries, playgrounds, schools, daycare centers, and video arcades.
- (22) Hold no position of trust or authority involving children.
- ...
- (25) Have no access to computers or the internet.

(CP 309, 315-316, 836, 842-843; RP (Sept. 18, 2015) 120).

Mr. Landrum himself objected to the imposition of all of the community custody conditions, stating:

There is a lot of conditions in there that I didn't do. I don't know, have no contact with any minors. I mean, my case didn't involve minors. I just want to object to all the conditions.

(CP 714-716; RP (Sept. 18, 2015) 110, 120).

The trial court began to ask Mr. Landrum whether he has the ability to pay legal financial obligations (LFOs). (RP (Sept. 18, 2015) 110-111). The State then waived imposition of LFOs, except for mandatory fees. (RP (Sept. 18, 2015) 110-112). The trial court imposed the following LFOs:

So the court would not be imposing anything other than the mandatory fees.

...

So the \$500 crime victims assessment, the court is imposing the \$260 filing fee, the clerk's fee, and that is all.

...

The court is only going to be imposing the crime victims assessment, which is \$500, which is mandatory, and \$260 clerk's filing fee. The court is waiving attorney fees, the

other special costs and reimbursements which were \$2700, \$1964 in special costs and reimbursement. The court is not imposing those, nor is it imposing the \$500 fine. So the total is \$760.

(RP (Sept. 18, 2015) 111-113).

Mr. Landrum informed the trial court “I have no means to pay currently and probably will not in the future. It depends on if somebody gives me a job or not.” (RP (Sept. 18, 2015) 112).

The judgment and sentence for the cause number with the second degree rape and solicitation to commit first degree perjury count imposes \$760 in LFOs, comprised of the following: \$500 victim assessment; \$200 filing fee; and \$60 sheriff’s service fee. (CP 833, 844).

The judgment and sentence for the cause number with the attempted indecent liberties count imposes \$2,452.01 in LFOs, comprised of the following: \$500 victim assessment; \$200 filing fee; \$60 sheriff’s service fee; \$250 jury demand fee; \$564.51 witness fees; \$700 attorney’s fees; \$77.50 special costs reimbursement; and \$100 DNA collection fee. (CP 306-307, 317).

Each Judgment and Sentence includes the following language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 307, 834).

The trial court imposed post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J. and victims C.H. and C.S. (CP 1,

318-319, 404, 845-846; 1 RP 156-220, 237-261, 375-390, 538-552, 588-602, 678-703; RP (Sept. 18, 2015) 119-120, 126-127). The orders are effective for the remainder of Mr. Landrum's life. (CP 318-319, 845-846; RP (Sept. 18, 2015) 119). Defense counsel did not object to the imposition of these orders. (RP (Sept. 18, 2015) 119-120, 126-127).

Mr. Landrum timely appealed. (CP 345, 862). The trial court entered an Order of Indigency, granting Mr. Landrum a right to review at public expense. (CP 352-353, 877-878). Subsequently<sup>4</sup>, Mr. Landrum filed a Report as to Continued Indigency with this Court.

#### **D. ARGUMENT**

##### **Issue 1: Whether the trial court erred in sentencing Mr. Landrum to 20 months confinement on the solicitation to commit first degree perjury count.**

Mr. Landrum was convicted of solicitation to commit first degree perjury, alleged to have occurred between October 11, 2008 and September 1, 2009. (CP 373-376, 409-412, 831-833). On the solicitation to commit first degree perjury count, the trial court sentenced him to 20 months confinement, based on an offender score of three. (CP 832, 835; RP (Sept. 18, 2015) 118).

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<sup>4</sup> The undersigned counsel filed, with service on the State, Mr. Landrum's Report as to Continued Indigency, dated July 11, 2016, on the same day this opening brief was filed.

Under the Sentencing Reform Act of 1981 (SRA), “[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345. At the time this count was committed, the SRA provided:

For persons convicted of the anticipatory offenses of criminal attempt, *solicitation*, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent.

RCW 9.94A.595 (emphasis added).

The seriousness level of the crime of first degree perjury was V. RCW 9.94A.515 (2008). The standard range sentence for a crime with a seriousness level of V and an offender score of three is 15-20 months. RCW 9.94A.510 (2002). Multiplying the range by 75 percent results in a presumptive sentence of 11.25 – 15 months. *See* RCW 9.94A.595 (setting forth the presumptive sentence for persons convicted of the anticipatory offense of solicitation). Therefore, Mr. Landrum’s sentence of 20 months on the solicitation to commit first degree perjury count exceeded the permissible standard range sentence. A sentence above the standard range was not authorized under the record here. *See* RCW 9.94A.535 (setting forth the requirements for departure from the sentencing guidelines).

This Court should reverse Mr. Landrum’s sentence on the solicitation to commit first degree perjury count and remand for resentencing within the standard range.<sup>5</sup>

**Issue 2: Mr. Landrum was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the entry of post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J.**

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

- (1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for

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<sup>5</sup> Mr. Landrum requests this Court decide this issue and grant the requested relief, despite the fact that his sentence on the solicitation to commit first degree perjury count runs concurrent with two longer sentences, 170 months to life on the second degree rape count and 80 months to life on the attempted indecent liberties count. (CP 308, 835; RP (Sept. 18, 2015) 126-127). If these longer sentences were ever reversed, for example, as a result of an issue raised in this appeal in a Statement of Additional Grounds, or as a result of a personal restraint petition or other collateral relief, then this sentencing error would have a prejudicial impact on Mr. Landrum.

counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

RCW 7.90.150 authorizes the trial court to issue a sexual assault protection order following a criminal conviction under the following circumstances:

When a defendant is found guilty of a sex offense as defined in RCW 9.94A.030, any violation of RCW 9A.44.096, or any violation of RCW 9.68A.090, or any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030, and a condition of the sentence restricts the defendant's ability to have contact with the victim, the condition shall be recorded as a sexual assault protection order.

RCW 7.90.150(6)(a).

The statute took effect on June 6, 2006. Laws of 2006, ch. 138, § 16.

Here, the trial court imposed post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J. (CP 1, 318-319, 404, 845-846; 1 RP 156-191, 237-261, 588-602; RP (Sept. 18, 2015) 119-120, 126-127). The orders are effective for the remainder of Mr. Landrum's life.

(CP 318-319, 845-846; RP (Sept. 18, 2015) 119). Defense counsel did not object to the imposition of these orders. (RP (Sept. 18, 2015) 119-120, 126-127).

The trial court was not authorized to enter the sexual assault protection orders for witnesses J.R., A.M., M.J., because these witnesses were not victims of any of the crimes for which the court could issue a sexual assault protection order. *See* RCW 7.90.150(6)(a); *see also* *State v. Navarro*, 188 Wn. App. 550, 554, 354 P.3d 22 (2015), *review denied*, 184 Wn.2d 1031, 364 P.3d 119 (2016) (stating “[w]hen a criminal prosecution results in a conviction for a sex offense and a condition of the sentence restricts the defendant's ability to have contact with the victim, the condition must be recorded as a sexual assault protection order.”). Mr. Landrum was not charged with, or convicted of, a crime against J.R., A.M., or M.J. (CP 1-2, 372-377, 404-413). Under the plain language of the statute, post-conviction sexual assault protection orders are only authorized for the victims of a sex offense conviction, not witnesses. *See* RCW 7.90.150(6)(a); *see also* *State v. Bostrom*, 127 Wn.2d 580, 586–87, 902 P.2d 157 (1995) (“[w]hen the language of a statute is unambiguous, courts may not alter the statute's plain meaning by construction.”).

“Trial counsel owe several responsibilities to their clients, including the duty to research relevant law.” *State v. Brown*, 159 Wn.

App. 366, 371, 245 P.3d 776 (2011) (citing *Kyllo*, 166 Wn.2d at 862). Here, the sexual assault protection order statute at issue took effect on June 6, 2006. See RCW 7.90.150(6)(a); Laws of 2006, ch. 138, § 16. The re-sentencing did not take place until September 18, 2015. (RP (Sept. 18, 2015) 37-131). Therefore, the sexual assault protection order statute was relevant law at the time of sentencing. Cf. *Brown*, 159 Wn. App. at 373-74 (defense counsel had no responsibility to seek out a pending United States Supreme Court decision). Thus, defense counsel's failure to object to the entry of post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J. was deficient performance. See *McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26) (setting forth the two-part test for ineffective assistance of counsel).

Furthermore, defense counsel's failure to object to the entry of post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J. prejudiced Mr. Landrum. Had trial counsel objected to the entry of these orders, the request would have been granted. See *McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26). As argued above, post-conviction sexual assault protection orders are only authorized for the victims of a sex offense conviction, not witnesses. See RCW 7.90.150(6)(a).

Defense counsel's failure to object to the entry of post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J. was not tactical. *See Grier*, 171 Wn.2d at 33. It was detrimental to Mr. Landrum to subject him to post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J. The orders are effective for the remainder of Mr. Landrum's life, and a knowing violation of the orders is a criminal offense. *See RCW 7.90.150(7)*; *see also CP 318-319, 845-846*; RP (Sept. 18, 2015) 119.

Mr. Landrum has proved the two-prong test for ineffective assistance of counsel. The case should be remanded to the trial court to vacate the post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J.

**Issue 3: Whether each judgment and sentence must be corrected to reflect that Mr. Landrum was sentenced under RCW 9.94A.712, rather than RCW 9.94A.507.**

Each Judgment and Sentence indicates sentence was imposed under RCW 9.94A.507. (CP 304-317, 831-844). As recognized above, a sentence imposed under SRA "shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. RCW 9.94A.507, governing sentencing for specified sex offenses, was not effective until August 1, 2009, which was after the date when the sex offense counts at issue here were committed. *See Laws of 2008, ch. 231,*

§ 56; *see also* CP 1, 304, 372, 377, 404, 408, 413, 831. The applicable statute was RCW 9.94A.712. *See* RCW 9.94A.712 (2006) (governing sentencing of non-persistent offenders, including those convicted of second degree rape and attempt to commit indecent liberties by forcible compulsion); *see also* Laws of 2008, ch. 231, § 56 (effective August 1, 2009, RCW 9.94A.712 was recodified as RCW 9.94A.507).

Because RCW 9.94A.712 was the law in effect when the sex offense counts at issue here were committed, this court should remand this case to the trial court for correction of each judgment and sentence to reflect that Mr. Landrum was sentence under RCW 9.94A.712, rather than RCW 9.94A.507. *See, e.g., State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence).

**Issue 4: Whether the trial erred in imposing certain conditions of community custody.**

The trial court imposed the community custody conditions, including the following:

- (10) Have no contact with any minors, unless approved by your therapist. In case of approved contact, it shall be only in the presence of an adult who has received prior approval from the therapist. The sponsor must be aware of the offense behavior.
- ...
- (13) Submit to polygraph testing upon the request of your therapist and/or Community Corrections Officer, at your own expense.
- (14) Do not possess or view material that includes images of children wearing only undergarments and/or swimsuits.
- (15) Do not possess or view material that includes images of nude women, men, and/or children.
- (16) Do not possess or view material that shows women, men and/or children engaging in sexual acts with each other, themselves, with an object, or animal.
- ...
- (20) Do not view or attend X-rated movies, peep shows, or adult book stores.
- (21) Avoid places where children congregate, including parks, libraries, playgrounds, schools, daycare centers, and video arcades.
- (22) Hold no position of trust or authority involving children.
- ...
- (25) Have no access to computers or the internet.

(CP 309, 315-316, 836, 842-843; RP (Sept. 18, 2015) 120).

A defendant may object to community custody conditions for the first time on appeal.<sup>6</sup> See *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

As recognized above, a sentence imposed under SRA “shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345. Here, community custody was imposed on both the attempted indecent liberties count and the second degree rape count. (CP 308, 835; RP (Sept. 18, 2015) 118, 126). The attempted indecent liberties was committed on or about October 21, 2006, and the second degree rape was committed on or about October 10, 2008, (CP 1, 305, 404, 831). Based on these offense dates, the applicable sentencing statute is RCW 9.94A.712 (2006). The following community custody conditions were authorized by that statute:

Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also

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<sup>6</sup> Although defense counsel did not, Mr. Landrum himself objected to the imposition of community custody conditions in the trial court. (CP 714-716; RP (Sept. 18, 2015) 110, 120).

order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

*See* RCW 9.94A.712(6)(a)(i) (2006).

Under RCW 9.94A.700(5), a permissible community custody condition is “[t]he offender shall participate in crime-related treatment or counseling services[.]” RCW 9.94A.700(5)(c) (2003).

Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). The Court of Appeals “has struck crime-related community custody conditions when there is ‘no evidence’ in the record that the circumstances of the crime related to the community custody condition.” *State v. Irwin*, 191 Wn. App. 644, 656–57, 364 P.3d 830 (2015).

In *Jones*, the court found the trial court erred by ordering the defendant to participate in alcohol counseling as a condition of community custody, because there was no evidence that alcohol contributed to his crimes or that the alcohol counseling requirement was crime-related.

*Jones*, 118 Wn. App. at 207-08. The court further found that “alcohol counseling ‘reasonably relates’ to the offender’s risk of reoffending and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.” *Id.* at 208.

Here, there is no evidence in the record that possessing or viewing the materials specified in community custody conditions (14), (15), and (16), and that the conduct specified in community custody condition (20), contributed to Mr. Landrum’s offenses, or that prohibiting the possession or viewing of such material, and attending such events or establishments, was crime-related. (CP 315-316, 842-843).

Further, community custody conditions (10), (21) and (22) prohibit contact with minors and specified places where minors congregate. (CP 315-316, 842-843). However, C.H. and C.S. were both adults at the time of the alleged incidents. (CP 846). Therefore, these conditions are not crime-related.

In addition, community custody condition (25), prohibiting access to computers or the internet, was not crime-related. (CP 316, 843). There is no evidence in the record that the use of computers or the internet contributed to Mr. Landrum’s offenses, or that prohibiting such access was crime-related.

The trial court erred by imposing community custody conditions (10), (14), (15), (16), (20), (21), (22), and (25), because they were not crime-related. *See Jones*, 118 Wn. App. at 207-08; *see also* RCW 9.94A.700(5)(c) (2003); *Irwin*, 191 Wn. App. at 656–57. In addition, these community custody conditions do not “reasonably relate” to Mr. Landrum’s risk of reoffending or the safety of the community, because there is no evidence that the conduct or materials specified in the conditions contributed to the offenses. *Jones*, 118 Wn. App. at 208; *see also* RCW 9.94A.712(6)(a)(i) (2006).

In addition, also under RCW 9.94A.700(5), a permissible community custody condition is “[t]he offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.700(5)(b) (2003).

In *State v. Riles*, the defendant, convicted of first degree rape of a 19-year-old woman, challenged a sentencing condition prohibiting him from having contact with minor children. *State v. Riles*, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). The court struck the sentencing condition, reasoning that the condition was not related to his crime. *Id.* at 350. The court stated that while the applicable statutory provision, former RCW 9.94A.120(9)(c)(ii), “gives courts authority to

order offenders to have no contact with victims or a ‘specified class of individuals[,]’” the term “ ‘specified class of individuals’ seems in context to require some relationship to the crime.” *Id.* The court further reasoned “the defendant’s freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and the public order[,]” and here, “there has been no showing that children are at risk and thus require special protection from him.” *Id.*; *see also State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (stating that “[c]onditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order.”).

The applicable statute in *Riles*, former RCW 9.94A.120(9)(c)(ii), mirrors the applicable statute here, former RCW 9.94A.700(5)(b), “[t]he offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.700(5)(b) (2003); *Riles*, 135 Wn.2d at 350. Thus, the term “specified class of individuals” at issue here requires some relationship to the crime itself. *See* RCW 9.94A.700(5)(b) (2003); *Riles*, 135 Wn.2d at 350.

The trial court lacked statutory authority to prohibit Mr. Landrum from having contact with minors, as specified in community custody conditions (10), (21) and (22), because the conditions have no

relationship to his offenses against adult victims. (CP 846); RCW 9.94A.700(5)(b) (2003); *Riles*, 135 Wn.2d at 349-50.

In addition, because Mr. Landrum's offenses did not involve minors, there is no showing that restricting his freedom of association in this manner "is reasonably necessary to accomplish the essential needs of the state and the public order." *Riles*, 135 Wn.2d at 350; *see also Warren*, 165 Wn.2d at 32.

Finally, the trial court erred in imposing community custody condition (13), requiring Mr. Landrum to "[s]ubmit to polygraph testing upon the request of your therapist and/or Community Corrections Officer, at your own expense[,]" because the condition is overbroad. (CP 315, 842). Our Supreme Court has expressly held that polygraph testing is a valid community custody monitoring condition. *See Riles*, 135 Wn.2d at 342, *abrogated on other grounds by Valencia*, 169 Wn.2d at 792. However, condition (13) is overly broad because it gives the Community Corrections Officer unfettered discretion to include any subject in the polygraph; it does not limit the polygraph testing to monitor compliance with community custody. (CP 315, 842). Thus, this condition should be rewritten to specify a more narrow application, limiting the polygraph testing to monitor compliance with community custody.

Accordingly, this court should remand this case with an order that the trial court strike community custody conditions (10), (14), (15), (16), (20), (21), (22) and (25), and revise community custody condition (13) to specify a more narrow application for polygraph testing. (CP 315-316, 842-843); *see also State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (where the trial court lacked authority to impose a community custody condition, the appropriate remedy was remand to strike the condition).

**Issue 5: Whether the trial court erred in imposing discretionary legal financial obligations and whether the total legal financial obligations must be corrected in each judgment and sentence.**

A court may order a defendant to pay LFOs, including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). “Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay.” *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). The applicable statute states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant's current or future ability to pay based on the particular facts of the defendant's case. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). “[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Id.* at 838 (quoting RCW 10.01.160(3)). “[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)).

Here, the trial court imposed \$760 in LFOs, comprised of “the \$500 crime victims assessment . . . [and] the \$260 filing fee, the clerk's fee, and that is all.” (RP (Sept. 18, 2015) 111-113). Each judgment and sentence reflects that this \$260 filing fee is comprised of two costs, a \$200 filing fee and a \$60 sheriff's service fee. (CP 317, 844).

The \$200 filing fee is a mandatory cost. *See* RCW 36.18.020(2)(h). However, the \$60 sheriff's service fee is a discretionary cost. *See* RCW 10.01.160(2) (stating “[c]osts shall be limited to expenses specially incurred by the state in prosecuting the defendant . . .”). The record from the re-sentencing hearing demonstrated that Mr. Landrum does not have an ability to pay discretionary costs. (RP (Sept. 18, 2015) 111-113). The State waived imposition of LFOs, except for mandatory

fees, and the trial court intended to impose only the mandatory fees. (RP (Sept. 18, 2015) 111). Thus, the trial court erred in imposing discretionary costs, the \$60 sheriff's service fee. *See Blazina*, 182 Wn.2d at 838 (stating “the court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.”) (quoting RCW 10.01.160(3)). The case should be remanded for the trial court to strike the \$60 sheriff's service fee, and to correct the total LFO amount to \$700 in each Judgment and Sentence.

In the alternative, should this Court disagree, then the case should be remanded for correction of the judgment and sentence for the cause number with the attempted indecent liberties count, to reflect the \$760 LFOs imposed by the trial court. The judgment and sentence for the cause number with the second degree rape and solicitation to commit first degree perjury count correctly reflects this amount of \$760 in LFOs ordered. (CP 833, 844). However, the judgment and sentence for the cause number with the attempted indecent liberties count does not correctly reflect the \$760 in LFOs ordered, instead imposing \$2,452.01 in legal financial obligations. (CP 306-307, 317). Therefore, this court should remand this case to the trial court for correction of the judgment and sentence for the cause number with the attempted indecent liberties count, to reflect the \$760 LFOs imposed by the trial court. *See, e.g., Healy*, 157 Wn. App. at

516 (setting forth this remedy); *Naillieux*, 158 Wn. App. at 646 (also setting forth this remedy).

The case should be remanded for the trial court to strike the \$60 sheriff's service fee, and to correct the total LFO amount to \$700 in each Judgment and Sentence. In the alternative, the case should be remanded for correction of the judgment and sentence for the cause number with the attempted indecent liberties count, to reflect the \$760 LFOs imposed by the trial court.

**Issue 6: Whether this Court should refuse to impose costs on appeal.**

Mr. Landrum preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

Mr. Landrum was found indigent by the trial court and was represented by appointed counsel for purposes of the trial court proceedings. (CP 186-188, 562-564; RP (Sept. 18, 2015) 37-131). The trial court also entered an Order of Indigency, granting Mr. Landrum a right to review at public expense. (CP 352-353, 877-878). According to his Report as to Continued Indigency, filed on the same day this opening brief was filed, Mr. Landrum remains indigent and unable to pay costs that

may be imposed on appeal. The imposition of costs would be inconsistent with those principles enumerated in *Blazina*. See *Blazina*, 182 Wn.2d at 835-37.

In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, this Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3); see also CP 307, 834. Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the *Blazina* court identified.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene its reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that *Blazina* held was essential before including monetary obligations in the judgment and sentence. This is particularly true where, as here, the trial court imposed only mandatory costs and Mr. Landrum's Report as to Continued Indigency demonstrates a continued inability to pay costs. (RP (Sept. 18, 2015) 110-113). Mr. Landrum qualified for indigent appellate counsel upon filing the underlying notice of appeal and remains indigent at this time. (CP 352-353, 877-878).

In addition, the prior rationale in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of *Blazina*. The *Blank* court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. *Blank*, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for *Blazina's* recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. *Blazina*,

344 P.3d at 684; *see also* RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The *Blazina* Court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” *Blazina*, 182 Wn.2d at 832, n.1.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts

should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the "supreme court . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, acknowledged appellate courts have discretion to deny the State's requests for costs. *Blank*, 131 Wn.2d at 252-53.

The record demonstrates Mr. Landrum does not have the ability to pay costs on appeal. He was found indigent by the trial court and remains indigent. Mr. Landrum respectfully requests this Court exercise its discretion by denying an award of appellate costs in this case, in the event that the State substantially prevails on appeal.

## **E. CONCLUSION**

This Court should reverse Mr. Landrum's sentence on the solicitation to commit first degree perjury count and remand for resentencing within the standard range.

The case should also be remanded for the trial court to take the following action: (1) vacate the post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J.; (2) strike community custody conditions (10), (14), (15), (16), (20), (21), (22) and (25) and revise community custody condition (13) to limit the polygraph testing to monitor compliance with community custody; (3) strike the \$60 sheriff's service fee, and correct the total LFO amount to \$700 in each Judgment and Sentence, or in the alternative, correct the judgment and sentence for the cause number with the attempted indecent liberties count, to reflect the \$760 LFOs imposed by the trial court; and (4) correct each judgment and sentence to reflect that Mr. Landrum was sentence under RCW 9.94A.712, rather than RCW 9.94A.507.

Mr. Landrum also objects to any appellate costs should the State prevail on appeal. The record does not reflect that Mr. Landrum has the ability to pay.

Respectfully submitted this 29th day of July, 2016.

  
Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols  
Kristina M. Nichols, WSBA #35918  
Attorney for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA Nos. 33836-3-III,  
 ) 33812-6-III  
vs. )  
 )  
TAYLOR ROSS LANDRUM )  
 ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on July 29, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Taylor Ross Landrum, DOC #889074  
Coyote Ridge Correction Center  
PO Box 769  
Connell, WA 99326

Having obtained prior permission from the Benton County Prosecutor's Office, I also served the Respondent State of Washington by e-mail at prosecuting@co.benton.wa.us using Division III's e-service feature.

Dated this 29th day of July, 2016.



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