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Division III
State of Washington

No. 34054-6-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Seth Ash,
Appellant.

Ferry County Superior Court Cause No. 15-1-00062-4
The Honorable Judge Allen Nielson

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to support a finding that Mr. Ash committed the crime of felony harassment by making death threats.

ISSUE 1: Did the State present sufficient evidence to convict Mr. Ash of felony harassment by making death threats where the State presented insufficient evidence to support a finding that Mr. Mize reasonably thought he would be killed or had a fear of death?

ISSUE 2: Did the State present sufficient evidence to convict Mr. Ash of felony harassment by making death threats where the State presented insufficient evidence to support a finding that a reasonable person in Mr. Ash's position would believe that his statements would be interpreted as a serious expression of intent to kill Mr. Mize?

2. The trial court failed to conduct the requisite inquiry into Mr. Ash's ability to pay legal financial obligations before imposing legal financial obligations as part of Mr. Ash's sentence.

ISSUE 3: Should this court remand this case to the trial court for resentencing regarding the legal financial obligations where the trial court failed to conduct the required *Blazina* inquiry into Mr. Ash's ability to pay legal financial obligations?

3. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 4: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Seth Ash is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. FACTUAL BACKGROUND

Mr. Seth Ash suffers from severe insomnia. RP 304, 339. Several years ago, Mr. Ash stopped to help four people on the side of the road but the people tried to kill Mr. Ash, first by hitting him in the back of the head with an axe handle and then stomping on and crushing the left side of his skull. RP 304. The murder attempt required Mr. Ash to undergo two reconstructive surgeries, leaving him with a scar that runs from ear to ear and the inability to move one eyebrow. RP 304-305.

Mr. Ash was in so much pain from his injuries and the surgeries that he was taking heavy doses of painkillers for years. RP 305. Mr. Ash had to undergo therapy and take replacement drugs to wean himself off the painkillers. RP 305. However, once Mr. Ash got off the drugs, he suffered from insomnia. RP 305.

Mr. Ash moved in with his mother, Doris Ann Ash, while he was working to change his life. RP 334, 344-345, 347. Mr. Ash was in process of getting his own place. RP 345.

Ann Ash met Mr. Michael Mize when Ms. Ash worked as a caregiver for one of her neighbors. RP 336. Ms. Ash had no real encounters with Mr. Mize except for one time when Mr. Mize asked Ms.

Ash to look at some scratches on his motor home that Mr. Mize believed were made by aliens. RP 336.

In September 2015, Ms. Ash allowed Mr. Mize to move his motor home onto her property because he was in crisis where he was living. He had to move his motorhome or he would be homeless. RP 181, 203, 338.

Mr. Mize got along with Mr. Ash most of the time except for an incident that happened on September 27, 2015. RP 213. On September 27, 2015, Mr. Ash had been unable to sleep for three days due to his insomnia. RP 304. Mr. Ash doesn't usually drink due to his head injury, but on September 27 he had to drink one beer and a sleeping pill in order to fall asleep. RP 304, 307-308. Mr. Ash had just barely managed to fall asleep when Mr. Mize began riding his motorcycle around the Ash property. RP 307-308. The noise from the motorcycle woke Mr. Ash up, so Mr. Ash went to Mr. Mize's motor home to talk to him. RP 307-309, 317.

Mr. Ash got within a few feet of Mr. Mize and began yelling at him to stop riding his motorcycle up and down the property. RP 309-310, 329. Mr. Mize responded by leaning back on his motorcycle and "bicycle kicking" at Mr. Ash. RP 310-311. Mr. Mize told Mr. Ash that if Mr. Ash did not stop, Mr. Mize would break Mr. Ash's nose. RP 249. One of Mr. Mize's kicks hit Mr. Ash on the shin. RP 310-311. Mr. Mize's kicking

caused him to fall off his motorcycle and become wedged between his motorcycle and his motor home. RP 311.

When Mr. Ash left, Mr. Mize got in his pickup and began to drive to his cousin's house to use the telephone to call police. RP 254. En route to his cousin's home, Mr. Mize came across Ferry County Sheriff's Deputy Darin Odegaard who was conducting a stop of a third party. RP 136-137, 254. Mr. Mize told Deputy Odegaard that he had just been assaulted by Mr. Ash. RP 137. Mr. Mize was trembling and shaking and claimed he had been struck in the head and that a knife was swung at him but he did not know if he had been stabbed. RP 137-138.

Deputy Odegaard went to Mr. Ash's home and spoke with him. RP 141. Mr. Ash stated that he had an argument with Mr. Mize by Mr. Mize's RV and that kicking was involved. RP 142. Mr. Ash stated that he had told Mr. Mize that if Mr. Mize came back bad things would happen to Mr. Mize. RP 142. Mr. Ash admitted to having consumed 1-1.5 beers but he denied having a knife. RP 142-143. Moments later, Deputy Odegaard arrested Mr. Ash. RP 143-144.

That day, Ms. Ash returned home from church to find that Mr. Ash had been arrested and taken to jail. RP 335. The next day, Ms. Ash spoke with Mr. Mize and asked if his clothes were cut up or if he had any

injuries. RP 336. Mr. Mize had no bruises and no wounds. RP 342. Mr. Mize told Ms. Ash that his feet were his weapon. RP 348.

Mr. Mize remained living on the Ash property. RP 263.

II. PROCEDURAL BACKGROUND

On September 30, 2015, Mr. Ash was charged with assault in the second degree with a deadly weapon and harassment by making threats to kill. CP 1-2.

Pretrial, the State moved under 404(b) to admit evidence of two prior incidents between Mr. Mize and Mr. Ash. RP 122-133. The first incident was one where Mr. Ash yelled at Mr. Mize for parking his vehicle on a neighbor's property. RP 123. The second incident occurred when Ms. Ash and her husband were helping Mr. Mize fill out a form to obtain a post office box. RP 123-124. Mr. Ash "came out of nowhere" and started making threats and lunging at Mr. Mize. RP 123-124. Ms. Ash's husband had to get between Mr. Ash and Mr. Mize and break it up. RP 124.

The State offered evidence of these alleged events to show previous hostility, as evidence of Mr. Ash's motive, as an element of the element of the crime of harassment that Mr. Mize's fear be reasonable, for purposes of establishing the credibility of Mr. Mize, and as *res gestae* of

the current charges. RP 124-128. Mr. Ash argued that the prior incidents were irrelevant to the current charges and were being offered only as evidence of propensity. RP 130-131. The trial court concluded that evidence of the two prior incidents was admissible for purposes of establishing the reasonableness of Mr. Mize's fear and as evidence of Mr. Ash's motive, intent, and malice. RP 131-132.

At trial, Mr. Mize confirmed that he had been riding his motorcycle around the Ash property on September 27, 2015. RP 265-266. Mr. Mize claimed he rode his motorcycle to locate the garbage cans. RP 265-266. Mr. Mize testified that he made two trips around the property on his motorcycle looking for the garbage cans. RP 266.

Mr. Mize told the jury that during the attack he saw Mr. Ash reach into his right pocket, pull out a folding knife, and then stab and slash at Mr. Mize's chest and arms. RP 249. Mr. Mize testified that he did not get cut but thought that might get cut. RP 250.

Mr. Mize claimed that Mr. Ash landed a light punch on his forehead but that it didn't leave a mark. RP 251. Mr. Mize testified that Mr. Ash walked away but then came back and told Mr. Mize that Mr. Ash would kill him if he reported anything. RP 252.

The trial court granted Mr. Ash's request that the jury be instructed on assault in the fourth degree as a lesser-included alternative to the second degree assault charge. RP 222, 388; CP 18-20, 49-51.

The jury did not believe Mr. Mize's testimony that Mr. Ash attacked him with a knife and returned verdicts of guilty on the lesser-included charge of fourth degree assault and on the charge of harassment. RP 456; CP 61-63.

The trial court imposed 364 days imprisonment on the assault charge but suspended the term of custody with conditions. CP 71. The trial court imposed 22 months on the harassment charge and ordered the sentences to run concurrently. CP 71-72. The trial court imposed \$800 in legal financial obligations including \$200 for a "criminal filing fee," \$50 for a "bench warrant fee," and \$50 for a "booking fee." CP 73-74.

Mr. Ash timely filed his notice of appeal on January 29, 2016. CP 79.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. ASH OF FELONY HARASSMENT BY MAKING DEATH THREATS WHERE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT EITHER A FINDING THAT MR. MIZE’S PURPORTED BELIEF THAT HE WOULD BE KILLED WAS OBJECTIVELY REASONABLE OR A FINDING THAT A REASONABLE PERSON IN MR. ASH’S POSITION WOULD BELIEVE THAT HIS STATEMENTS WOULD BE INTERPRETED AS A SERIOUS EXPRESSION OF INTENT TO KILL MR. MIZE.

Mr. Ash was charged with felony harassment by making threats to kill in violation of RCW 9A.46.020(1)(a)(i) and (2)(b). RCW 9A.46.020 provides, in pertinent part,

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person... and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. “Words or conduct” includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)...(b) A person who harasses another is guilty of a class C felony if any of the following apply:...(ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

a. Standard of review.

In a criminal matter, the State must prove every element of the

crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *In re Winship*, 397 U.S. 358, 362-363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence most favorably to the State, any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. *State v. Prestegard*, 108 Wn.App. 14, 22, 28 P.3d 817 (2001), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In determining whether the “necessary quantum of proof exists,” the reviewing court must be convinced that “substantial evidence” supports the State’s case. *Prestegard*, 108 Wn. App. at 22-23, 28 P.3d 817, *citing State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). “Substantial evidence is evidence that ‘would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.’” *Prestegard*, 108 Wn. App. at 23, 28 P.3d 817, *quoting State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). “Substantial evidence” cannot be based upon “guess, speculation, or conjecture.” *Prestegard*, 108 Wn. App. at 23, 28 P.3d 817.

A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt; the reviewing court need only be satisfied that substantial evidence supports the State’s case. *State v. Galisia*, 63 Wn.App. 833, 838, 822 P.2d 303 (1992), *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992), *abrogated on other grounds by State v. Trujillo*, 75 Wn.App. 913, 883 P.2d 329 (1994).

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

- b. The State’s burden included proving that Mr. Mize was subjectively fearful that Mr. Ash would kill him and that Mr. Ash’s fear was objectively reasonable.

RCW 9A.46.020(1)(b) requires that the defendant by “words or conduct places the person threatened in reasonable fear that the threat will be carried out.” The person threatened must subjectively feel fear and that fear must be reasonable. Assuming the evidence established the victim's subjective fear, the issue is whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found beyond a reasonable doubt, using an objective standard, that the victim's fear...was reasonable.

State v. E.J.Y., 113 Wn. App. 940, 952-53, 55 P.3d 673, 679-80 (2002),
citing *State v. Alvarez*, 74 Wn.App. 250, 260–61, 872 P.2d 1123 (1994),
aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995).

“[U]nder the plain language of RCW 9A.46.020, supported by the related statute, RCW 9A.46.010, the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out.” *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594, 597 (2003).

Thus, to sustain a conviction for felony harassment based on a threat to kill, the State must establish that the threatened person had an objectively reasonable subjective belief that he or she would actually be killed- it is not sufficient for the State to demonstrate only that the individual feared harm.

For example, in *C.G.*, C.G. was convicted of threatening to kill the vice-principal of her school. *C.G.*, 150 Wn.2d at 606-07, 80 P.3d 594. The vice-principal testified that, “C.G.’s threat caused him concern. He testified that based on what he knew about C.G., she might try to harm him or someone else in the future.” *C.G.*, 150 Wn.2d 604, 607, 80 P.3d 594. The trial court found C.G. guilty of felony harassment and she appealed, arguing that there was insufficient evidence to support her conviction because the State did not prove that the vice-principal was placed in reasonable fear that she would *kill* him. *C.G.*, 150 Wn.2d at 607,

80 P.3d 594. The Court of Appeals affirmed in a per curiam opinion, *State v. C.G.*, 114 Wn.App. 101, 55 P.3d 1204 (2002), and the Washington Supreme Court granted review.

The Supreme Court reversed C.G.’s conviction, finding that, “In order to convict an individual of felony harassment based upon a threat to kill, RCW 9A.46.020 requires that the State prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense.” *C.G.*, 150 Wn.2d at 612, 80 P.3d 594. Because the State’s evidence established only that the vice-principal believed C.G. “might” harm him or someone else in the future, the Supreme Court found that the State had presented insufficient evidence to convict C.G. for felony harassment. *C.G.*, 150 Wn.2d at 607-08, 80 P.3d 594.

Finally, the “reasonable fear” element of RCW 9A.46.020(1)(b) requires the trier of fact to consider defendant's conduct in context and sift out idle threats from threats that warrant mobilization of penal sanctions. *State v. Alvarez*, 74 Wn. App. 250, 260-61, 872 P.2d 1123, 1129 (1994), *aff'd*, 128 Wn.2d 1, 904 P.2d 754 (1995).¹

¹ “Importantly, only threats that are ‘true’ may be proscribed. The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole. We recently interpreted the bomb threat statute, RCW 9.61.160, to reach only ‘true threats’ in order to save it from a constitutional challenge. We adhere to this principle and construe the threats-to-kill

(Continued)

- c. The State's evidence was insufficient to support the inference that any fear on the part of Mr. Mize that Mr. Ash would kill him was objectively reasonable.

Mr. Mize testified that Mr. Ash told Mr. Mize that if Mr. Mize contacted the police or reported the assault, Mr. Ash would come back and kill Mr. Mize. RP 249, 252. Mr. Mize testified that when Mr. Ash said he was going to murder Mr. Mize, Mr. Mize "had a feeling of -- something leaving my body. Like fear." RP 252. Mr. Mize testified that when Mr. Ash told him "those things", Mr. Mize was worried for his safety and felt a little ridiculous, like he was being scolded or he was a child being punished. RP 253-254. Mr. Mize's fear was that he would have to move off the Ash property. RP 253. However, despite this purported fear, Mr. Mize remained living on the Ash property at least until the time of trial. RP 263.

Mr. Mize testified that he reported this incident to the police because he was worried for his safety and felt his life was in danger and that it might end in the yard. RP 258, 297. However, Mr. Mize did not offer details as to why he believed that Mr. Ash's threat to kill him was believable.

provision of RCW 9A.46.020 to the same effect." *State v. Schaler*, 169 Wn.2d 274, 283-84, 236 P.3d 858, 863 (2010) (internal citations omitted).

Mr. Mize testified that Mr. Ash had been aggressive towards Mr. Mize on two occasions prior to the incident on September 27 and described the two incidents the State had moved to admit under ER 404(b). RP 214-221. On the first occasion, Mr. Mize was sitting on the front steps of Ms. Ash's home speaking with Ms. Ash and her husband when Mr. Ash came out of the house and "darted" at Mr. Mize like he was going to knock Mr. Mize over. RP 215. Ms. Ash's husband took Mr. Ash back into the house and Mr. Mize left. RP 215. Mr. Ash did not say anything to Mr. Mize but Mr. Mize felt "mentally threatened" by Mr. Ash's actions. RP 215-216.

Mr. Mize described a second incident when Mr. Ash spoke to Mr. Mize about parking Mr. Mize's car on the neighbor's property. RP 218-219. Mr. Mize testified that Mr. Ash told Mr. Mize that it was dumb for Mr. Mize to park his vehicle at the neighbor's house, that Mr. Mize should never do it again, and that Mr. Ash was going to come back and do something about it. RP 219. Mr. Mize testified that this conversation made him feel fine and that Mr. Ash had a right to have that conversation since Mr. Ash's mother owned the property. RP 219. Mr. Ash did not say if he was going to do anything when he came back. RP 219-220.

Mr. Mize testified that he got along with Mr. Ash and even after these incidents he liked Mr. Ash, was friendly towards Mr. Ash, and invited Mr. Ash to go fishing with him. RP 213, 220.

The evidence introduced at trial provides no basis for an objectively reasonable fear on Mr. Mize's part that Mr. Ash would actually kill him based on Mr. Ash's threat to do so on September 27. Mr. Ash had never threatened to kill Mr. Mize before, had never physically harmed Mr. Mize before, and Mr. Mize testified that he felt fine about Mr. Ash and invited Mr. Ash to go fishing even after both the prior incidents had occurred. Even viewed in the light most favorable to the State, the evidence supports only the inference that Mr. Ash's threat to kill Mr. Mize on September 27 was an idle threat or hyperbole and not a sufficient basis to form an objectively reasonable belief that Mr. Ash would actually kill Mr. Mize.

The evidence introduced by the State at Mr. Ash's trial did not include evidence sufficient to permit an unprejudiced thinking mind that Mr. Mize's fear that Mr. Ash would kill him was objectively reasonable. This court should vacate Mr. Ash's conviction for felony harassment and remand this case for dismissal with prejudice.

- d. The State's burden also included demonstrating that a reasonable person in Mr. Ash's position would foresee that

the threat would be interpreted as a serious expression of intention to kill Mr. Mize.

Where a threat to commit bodily harm is an element of a crime, the State must prove that the alleged threat was a “true threat.” *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). This is because of the danger that the criminal statute will be used to criminalize pure speech and impinge on First Amendment rights. *State v. Kohonen*, 192 Wn.App. 567, 575, 84 P.3d 1215 (2004). True threats are not protected speech because of the “fear of harm aroused in the person threatened and the disruption that may occur as a result of that fear.” *Kilburn*, 151 Wn.2d at 46, 84 P.3d 1215.

The test for determining a “true threat” is an objective test that focuses on the speaker. *Kilburn*, 151 Wn.2d at 54, 84 P.3d 1215. The question is whether a reasonable person in the speaker's position would foresee that the threat would be interpreted as a serious expression of intention to inflict the harm threatened. *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013); *accord Kilburn*, 151 Wn.2d at 46, 84 P.3d 1215.

The jury’s finding that Mr. Ash was guilty of fourth degree assault rather than second-degree assault indicates the jury did not believe a knife

was used.² Had jurors believed Mr. Mize's testimony that Mr. Ash attacked him with a knife, the evidence might have supported the conclusion that Mr. Ash could have reasonably foreseen that his threat to kill Mr. Mize if Mr. Mize reported anything would be interpreted as a serious expression of his intent to kill Mr. Mize. But if a knife was not used in the attack then the evidence does not support such a conclusion.

As discussed above, the jury rejected the State's contention that Mr. Ash assaulted Mr. Mize with a knife and Mr. Mize testified that Mr. Ash had never threatened to kill Mr. Mize before. Mr. Mize also testified that, despite the two prior incidents with Mr. Ash, Mr. Mize felt fine about Mr. Ash and invited Mr. Ash to go fishing. Mr. Ash never physically harmed Mr. Mize during any of the incidents discussed at trial.

Given the history between the two men and the nature of their relationship, Mr. Ash might have reasonably foreseen that his statement that he would "kill" Mr. Mize would be foreseen as a serious expression of his intent to yell at or possibly to punch Mr. Mize, but not that Mr. Mize would interpret Mr. Ash's statement as a serious expression of an intent to actually **kill** Mr. Mize.

² Mr. Ash was charged with second degree assault in violation of RCW 9A.36.021(1)(c). CP 1-2. Under RCW 9A.36.021(1)(c), "A person is guilty of assault in the second degree if he... assaults another with a deadly weapon." Therefore, by finding Mr. Ash guilty of fourth degree assault rather than second degree assault, the jury rejected the State's argument that Mr. Ash used a knife when he assaulted Mr. Mize.

Even when viewed in the light most favorable to the State, the evidence presented by the State was insufficient to establish either that any believe by Mr. Mize that Mr. Ash actually intended to kill him was objectively reasonable or that Mr. Ash could have reasonably foreseen that his statement that he would “kill” Mr. Mize would be foreseen as a serious expression of his intent to actually murder Mr. Mize. This court should vacate Mr. Mize’s conviction for felony harassment and remand this case for dismissal of the charge with prejudice.

II. THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ON THE RECORD INDIVIDUALIZED INQUIRY INTO MR. ASH’S CURRENT AND FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS IMPOSED BY THE COURT.

The trial court imposed \$800 in legal financial obligations including \$200 for a “criminal filing fee,” \$50 for a “bench warrant fee,” and \$50 for a “booking fee.” RP 479; CP 73-74. In imposing these legal financial obligations, the trial court conducted no inquiry into Mr. Ash’s present or future ability to pay the legal financial obligations. This is error that requires remand for such an inquiry to be performed on the record.

- a. The trial court is required to conduct an on-the-record inquiry into a defendant’s present and future ability to pay legal financial obligations before imposing any such obligations.

RCW 10.01.160(1)³ authorizes sentencing courts to impose costs upon a defendant convicted of a crime. RCW 10.01.160(3) mandates that,

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.

“Because statutes imposing court costs are in derogation of common law, they should be strictly construed.” *State v. Cawyer*, 182 Wn.App. 610, 619, 330 P.3d 219 (2014)

RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

In *Blazina*, our highest Court interpreted RCW 10.01.160(3). *Blazina* involved two consolidated cases, each with an indigent defendant. 182 Wn.2d at 831-32. In one case, the sentencing court ordered a \$500 crime victim penalty assessment, a \$200 filing fee, a \$100 DNA fee, \$1,500 for assigned counsel and restitution to be determined “by later

³ The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.”

order.” *Id.* The other sentencing court ordered the same fees except only \$400 for appointed counsel and an additional \$2,087.87 in extradition costs. *Id.*

Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. *Id.*

On review, the defendants argued that the failure to comply with the requirements of RCW 10.01.160(3) on the record was error. The prosecution first argued that the issue was not “ripe for review” until the state tried to enforce collection of the amounts imposed. 182 Wn.2d at 4, 833 n. 1. The Supreme Court majority found instead that the issue was primarily legal, did not require further factual development and involved a final action of the sentencing court, a conclusion of “ripeness” with which the concurring justice seemed to agree. *Id.*

The Court majority also found that RCW 10.01.160(3) was mandatory, noting that it requires that a trial court “shall not” order costs without making an “individualized inquiry” into the defendant’s individual financial situation and their current and future ability to pay, and that the trial court “shall” take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose” in determining the amount and method for paying the costs. 182 Wn.2d at

834-35 (emphasis in original). And the Court found that, in this context, the word “shall” is imperative. *Id.*

Further, the Court agreed with the defendants in both of the consolidated appeals that the individualized inquiry must be done on the record. It then rejected the a “boilerplate” clause, preprinted on the judgment and sentence, as sufficient:

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors. . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

182 Wn.2d at 837-38.

The *Blazina* majority gave sentencing courts guidance on making the determination of “ability to pay,” referring them to the comments to GR 34 which set forth nonexclusive ways of determining indigency, including looking at household income, federal poverty guidelines, whether the person receives federal assistance and other relevant questions, specific to that particular defendant. *Id.*

Here, the trial court engaged in absolutely no analysis of Mr. Ash’s current and future ability to pay before imposing the \$800 in legal

financial obligations. Where “the record[] in th[e] case do[es] not show that the sentencing judge[] made this inquiry into [the] defendant's ability to pay, [the remedy is to] remand the cases to the trial court[] for [a] new sentenc[ing] hearing[.]” *Blazina*, 182 Wn.2d at 839, 344 P.3d 680, 685.

- b. Mr. Ash’s challenge to the legal financial obligations may be heard on appeal.

It is anticipated that the State will argue that Mr. Ash’s challenge to his legal financial obligations is not an issue of constitutional magnitude and therefore cannot be raised on appeal. *See State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327, 329 (2015), *review granted, cause remanded*, 365 P.3d 1263 (2016) (“Lyle did not challenge the trial court's imposition of LFOs at his sentencing, so he may not do so on appeal.”) However, *Lyle* is not dispositive of whether this court may consider Mr. Ash’s challenge to the legal financial obligations.

- i. *Mr. Ash challenged the imposition of any non-mandatory legal financial obligations at sentencing.*

Mr. Ash’s counsel clearly requested the court impose only “the standard mandatory LFOs.” RP 471. This is plainly an objection to imposition of any non-mandatory LFOs. Any argument that Mr. Ash cannot attack the legal financial obligations imposed by the trial court because he failed to object to them at trial fails.

- ii. *Even if this court finds that Mr. Ash did not object to the imposition of non-mandatory legal financial obligations at trial, this court may still exercise its discretion to consider the argument on appeal under RAP 2.5.*

RAP 2.5(a), titled “Errors Raised for First Time on Review,” states that “the appellate court may refuse to review any claim of error that was not raised in the court of limited jurisdiction.” This is not an absolute bar. This court retains discretion to consider Mr. Ash’s argument for the first time on appeal.

The appellants in *Blazina* failed to object in the trial court to the court’s failure to conduct an inquiry into their ability to pay, yet the Supreme Court of Washington exercised its discretion to address that issue for the first time on appeal, despite the Court of Appeals refusing to address it. As the *Blazina* court stated, “While appellate courts normally decline to review issues raised for the first time on appeal...RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. **Each appellate court must make its own decision to accept discretionary review.**” *Blazina*, 182 Wn.2d 834-835, 344 P.3d 680 (emphasis added, internal citations omitted).

The *Blazina* majority held that, in crafting RCW 10.01.160(3) the Legislature “intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant’s

circumstances.” *Id.*; *see also*, 182 Wn.2d at 840-41 (Fairhurst, J., concurring). Further, the majority believed that the trial judge’s failure to consider the defendants’ ability to pay in the consolidated cases on review in *Blazina* was “unique to these defendants’ circumstances.” *Blazina*, 182 Wn.2d at 833. The Court therefore believed that the failure of a sentencing court to properly consider the defendant’s present and future ability to pay was an error not expected to “taint sentencing for similar crimes in the future.” *Id.*

But the majority nevertheless decided to reach the issue. While stopping short of faulting lower appellate courts for declining to exercise their discretion to do so thus far, the *Blazina* court held that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” 182 Wn.2d at 834. The Court chronicled national recognition of “problems associated with LFO’s imposed against indigent defendants,” including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems “caused by inequitable LFO systems.” *Id.* One of the proposed reforms the Court mentioned was a requirement “that courts must determine a person’s ability to pay before the court imposes LFOs.” *Id.*

The Court then noted the flaws in our own state's LFO system and the system's "problematic consequences." *Id.* The Court was highly troubled by the fact that, in our state, LFOs accrue at 12 percent interest and lead to potential collection fees. *Id.* And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford \$25 a month will end up owing more than initially imposed even after 10 years of making payments. *Id.* The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. *Id.*

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 182 Wn.2d at 836-37. This increased involvement "inhibits reentry," the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. *Id.* The Court recognized that this and other "reentry difficulties increase the chances of recidivism." *Id.*

Finally, the *Blazina* majority pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or

Latino. *Id.* The court also noted that certain counties seem to have higher LFO penalties than others. *Id.*

The concurrence in *Blazina* agreed that the issue required action by the Court, but disagreed with how the majority applied RAP 2.5(a) and its exceptions. 182 Wn.2d at 839. The concurrence would have found the error non-constitutional and would not have addressed it under RAP 2.5(a)(3) but would instead have reached the issue under RAP 1.2(a), “to promote justice and facilitate the decision of cases on the merits.” *Id.* The concurring justice felt it was appropriate for the court to exercise its discretion to reach the unpreserved error “because of the widespread problems” with the LFO system as applied to indigents “as stated in the majority.” *Id.* And she also would have reached the error, because “[t]he consequences of the State’s LFO system are concerning, and addressing where courts are falling short of the statute will promote justice.” *Id.*

Ultimately, should this court find that Mr. Ash did not preserve the issue at trial, this court retains its discretion to consider his challenge to the legal financial obligations for the first time on appeal under RAP 2.5(a).

- c. The trial court imposed discretionary legal financial obligations without the required inquiry into Mr. Ash’s ability to pay.

It is anticipated that the State will argue that *Blazina* applies only to the imposition of discretionary legal financial obligations and the trial court did not impose any discretionary legal financial obligations on Mr. Ash. This argument is incorrect.

While *Blazina* did not address mandatory legal financial obligations,⁴ here the trial court imposed some discretionary legal financial obligations. The trial court imposed \$800 in legal financial obligations including \$50 for a “bench warrant fee” and \$50 for a “booking fee.” CP 73-74. These were discretionary legal financial obligations.

RCW 10.01.060(2) provides, in pertinent part, “Expenses incurred for serving of warrants for failure to appear...**may be included** in costs the court **may** require a defendant to pay...Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars.” RCW 10.01.062(2) clearly indicates that a court “may” impose costs for preparing and serving a warrant for failure to appear. Therefore, the \$50 “bench warrant fee” is a discretionary legal financial obligation.

⁴ “The court in **Blazina** did not address imposition of mandatory fees. The court held RCW 10.01.160(3) requires the sentencing court to make an individualized inquiry into the defendant's ability to pay **discretionary** legal financial obligations.” *State v. Shelton*, 72848-2-I, 2016 WL 3461164, at *6 (2016) (emphasis in original).

The trial court did not indicate the statutory authority permitting collection of \$50 as a “booking fee.” It is possible that the trial court intended this fee to fall under the costs that may be imposed under RCW 10.01.160, however, without clear indication from the court what authority it believed authorized the \$50 “booking fee,” it cannot be presumed that this fee is a mandatory or discretionary legal financial obligation.

This court should remand Mr. Ash’s case back to the trial court for a new sentencing hearing at which the trial court will make the required individualized inquiry into Mr. Ash’s current and future ability to pay any LFOs taking into account such factors as Mr. Ash’s incarceration and other debts, including restitution.

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).⁵

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Ash indigent. CP 80-81. There is no reason to believe that status will change, given his felony history and the imposition of a lengthy prison term. CP 71. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the reasons stated above, this court should vacate Mr. Ash’s conviction for felony harassment and remand his case to the trial court for dismissal of that charge with prejudice. Further, this court should vacate the portion of Mr. Ash’s judgment and sentence imposing discretionary

⁵ Division II’s commissioner has indicated that Division II will follow *Sinclair*.

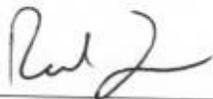
legal financial obligations and remand this case for resentencing where the trial court will identify the statutory authorization for each mandatory or discretionary financial obligation imposed and conduct the requisite inquiry into Mr. Ash's present and future ability to pay the legal financial obligations.

Respectfully submitted on July 14, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Ferry County Prosecuting Attorney
kiburke@wapa-sep.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 14, 2016.



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