

NO. 34172-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

COREY PUGH A/K/A COREY WILLIAMS,

Appellant.

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

The Honorable Bruce Spanner, Robert Swisher, Jacqueline Shea-Brown,
Alexander Ekstrom & Vic Vanderschoor, Judges

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecution presented insufficient evidence of theft of a motor vehicle.

2a. The prosecution improperly commented on Pugh's Fifth Amendment right not to take the witness stand.

2b. The prosecution improperly suggested that Pugh had a burden to produce evidence regarding the validity of the lien he filed.

3a. The Faretta¹ colloquy was inadequate because the trial court failed to inform Corey Javon Pugh² that technical rules exist that would bind him in the presentation of his case and failed to ensure Pugh understood the risks of self-representation.

3b. The Faretta colloquy was inadequate because the trial court failed to inform Pugh of the maximum penalties he faced upon conviction.

4. The trial court failed to make an adequate inquiry into Pugh's financial resources and current and future ability to pay before imposing discretionary LFOs.

¹ Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

² Pugh contends his name is Corey Javon Pugh and not Corey Javon Williams. The trial court referred to the defendant as Pugh throughout the trial. The information was amended to read "Corey Javon Williams aka Corey Javon Pugh." CP 38. This brief therefore refers to the appellant as Pugh.

5. The \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h) violates equal protection.

6. The \$200 criminal filing fee is not a mandatory legal financial obligation.

7. RCW 7.68.035 and RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

Issues Pertaining to Assignments of Error

1. The State conceded it presented no evidence that the lien Pugh filed and used to obtain control over the motor vehicle was invalid. Although a detective testified Pugh had filed invalid liens in the past, the jury was instructed to consider the detective's testimony only for the "common scheme or plan of using legal documents to obtain property." Was there therefore insufficient evidence that Pugh obtained the vehicle either wrongfully or by color or aid of

2. The prosecutor argued that the jury heard no testimony about the validity of Pugh's lien on the motor vehicle. Was this reversible misconduct given that it commented on Pugh's decision not to testify and/or shifted the burden to Pugh by suggesting it was burden to produce evidence about the lien's validity?

3. Was the trial court's Faretta colloquy inadequate because it failed to ensure Pugh understood the risks of self-representation and the maximum penalties he faced upon conviction?

4. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without making adequate inquiry into Pugh's financial resources and current and future ability to pay?

5. Criminal defendants and civil litigants are similarly situated with respect to the purpose of court filing fees, which is to fund counties, county and regional law libraries, and the state general fund. Courts may waive filing fees for civil litigants, but the Court of Appeals has held that court may not waive filing fees for criminal litigants. Given that there is no rational basis for this differential treatment, does the mandatory imposition of the \$200 criminal filing fee violate equal protection?

6. Is the \$200 criminal filing fee a discretionary LFO that requires consideration of financial circumstances and ability to pay before imposition?

7. RCW 7.68.035 requires trial courts to impose a victim penalty assessment whenever a person is found guilty in any superior court. RCW 43.43.7541 requires trial courts to impose a DNA collection fee whenever a person is convicted of a felony or certain misdemeanors. While both statutes ostensibly serve a state interest, they mandate payment even

when the defendant has no ability to pay. Do these mandatory legal financial obligations (LFOs) violate substantive due process when imposed on those who do not have the ability to pay?

B. STATEMENT OF THE CASE

The State charged Pugh with theft of a motor vehicle. CP 1-2.

1. Colloquy regarding self-representation

At his initial appearance,³ Pugh indicated he did not wish to be represented by an attorney. 1RP⁴ 3. The trial court inquired as to his request to proceeding pro se, initially advising him that theft of a motor vehicle was a class C felony and Pugh agreed. 1RP 4. The prosecutor corrected them both; then the court asked Pugh if he understood the charge was a class B felony punishable by up to “10 years in the Department of Corrections and a fine not to exceed \$20,000.” 1RP 4. Pugh said “Yes.” 1RP 5. The trial court asked Pugh if he understood he would be held to the same standards as an attorney as to his knowledge of the law, court rules, and presentation of evidence, and Pugh said, “Yes, sir.” 1RP 5.

³ As of December 28, 2015, Pugh had two pending cases in Benton County Superior Court. The first was cause no. 15-1-01280-4, involving the instant count of theft of a motor vehicle. The second, cause no. 15-1-01178-6, involved two counts of residential burglary and one count second degree theft; this matter is currently before this court under no. 34171-2-III.

⁴ This brief refers to the verbatim reports of proceedings as follows: 1RP—December 28, 2015; 2RP—January 14, 2016 and March 23, 2016; 3RP—January 28, 2016; 4RP—February 22 and 23, 2016; 5RP—May 12 and 18, 2016.

The court then inquired as to Pugh's educational background. 1RP 5. Pugh stated he completed three years of college. 1RP 5. The court asked if Pugh was familiar with the rules of evidence, and Pugh said "Yes." 1RP 5. Pugh also stated he was familiar with the rules of evidence after studying criminal law and business law at Columbia Basin College. 1RP 5. The court asked Pugh if he was familiar with the Revised Code of Washington as it relates to the charge of theft of a motor vehicle, and Pugh said "Yes, I am." 1RP 5. When asked how he was familiar with that RCW, Pugh responded, "I believe that I've had prior 7.8 motions with this prior RCW with another Alaska statute which I fought in the Supreme Court [of Washington]." 1RP 6. The court confirmed that, when he mentioned "7.8," Pugh was referring to Washington Criminal Rule 7.8. 1RP 6. The court did not inquire further as to Pugh's familiarity with the applicable RCW or to which RCW Pugh was referring.

With respect to the other charges, the trial court asked if Pugh understood residential burglary is a class B felony "subject to the same potential maximum of 10 years or a fine not to exceed \$20,000." 1RP 7. Pugh said, "Yes, sir." 1RP 7. The court did not ensure Pugh understood he faced two counts of residential burglary. The court did not ensure Pugh understood that he faced a potential maximum sentence of 20 years' imprisonment and \$40,000 if convicted of both counts of residential burglary, should the

sentences be run consecutively. The court did not ensure Pugh understood he faced a potential total maximum sentence of 30 years' imprisonment and \$60,000 if convicted of all three pending charges, should the sentences be run consecutively.

The trial court asked if it was Pugh's desire to represent himself. 1RP 7. Mr. Pugh responded, "Absolutely. As a secured party, I am." 1RP 7. The trial court then asked Pugh if he was familiar with the Revised Code of Washington and the elements as they relate to residential burglary. 1RP 8. Pugh responded, "As a secured party, sir, I am aware and I do object to that." 1RP 8. This exchange followed:

THE COURT: Sir, I will have to ask you what you mean by the term secured party?

MR. [PUGH]: I'm secured party in the State of Washington. My organization is secured party C. Williams LLC. I've been brought before this Court in that the Court is aware of my secured party status. Nothing further.

THE COURT: All right. With that said, at this time I'm going to find that you are aware of the nature of the charge. You are aware you will be held to the same standard as would an attorney before the Court. And I will allow you to represent yourself, sir.

1RP 8.

At no time did the court inquire further as to Pugh's understanding of the RCW and the elements of theft of a motor vehicle. Despite that Pugh faced 30 years' imprisonment, the court never advised Pugh of the risks or

disadvantages of self-representation. At no point did the court assure that Pugh understood how existing technical rules would bind him in the presentation of his cases.

2. Factual background and trial evidence

The theft of a motor vehicle charge arose from Pugh's failure to return a vehicle he had rented from Avis Budget Group d/b/a Budget Rental Car in Richland. 4RP 96, 105, 112-13. The registered owner of the vehicle was P.V. Holding Corporation and the lienholder on the car was Bank of New York Mellon Trust Company. 4RP 108, 121-22, 192.

Pugh contacted Budget Car Sales and indicated that the Bank of New York Mellon owed him significant money and he was therefore going to file a lien to take ownership of the vehicle. 4RP 150. Pugh had filed a lien against the bank for \$1 billion and faxed the Uniform Commercial Code financing statement. 4RP 154, 156-58.

Prior to trial, under an ER 404(b) common scheme or plan theory, the State sought leave to present testimony about Pugh's previous crimes by using liens or other legal documents to obtain property. 4RP 70. The trial court allowed this testimony, finding Pugh had used legal documents as a common scheme or plan "to assert authority or ownership over a variety of items, whether it's a home or it's a vehicle for the purpose of . . . gaining pecuniary interest." 4RP 74-75. Detective Rick Runge gave lengthy testimony about

his various investigations into Pugh's use of legal documents to attempt to obtain or pass of ownership interests in property. 4RP 230-59. Runge, however, was not involved in any aspect of investigating the instant case. 4RP 273-74.

Although Runge testified Pugh had falsified documents in the past to obtain ownership, the jury was instructed it could not consider Runge's testimony for this purpose at the State's express request. 4RP 305. The State requested that the limiting instruction not indicate that the jury could consider Runge's testimony for the purpose of establishing Pugh's scheme of falsifying legal documents, given that the State had not proven that the lien Pugh filed was false. 4RP 305. The trial court assented to the State's request and the limiting instruction stated the jury could only consider Runge's testimony "for the purpose of determining whether the defendant had a common scheme or plan of using legal documents to obtain property." CP 55; 4RP 317. Thus, the jury was not permitted to consider Runge's testimony for determining whether the lien Pugh had filed in this case was false.

Because the State had presented no evidence as to the lien's falsity, it argued in closing, "You guys, we didn't hear any testimony about how he came to be owed a billion dollars between September 29th and October 4th when this filing was made." 4RP 325. Pugh objected, "They did a jury instruction stating that the defendant does not have to testify, now she's

testifying for me.” 4RP 325. The trial court stated, “No. I’m going to overrule the objection.” 4RP 325.

3. Verdict, sentencing, and appeal

The jury found Pugh guilty of theft of a motor vehicle. CP 58; 4RP 345.

At sentencing, the trial court imposed a sentence of 57 months at the top of the standard range. CP 90; 2RP 49. The trial court also imposed several discretionary LFOs, including a \$200 filing fee, a sheriff’s service fee of \$60, a jury demand fee of \$250, and a witness fee of \$41.34. CP 95; 2RP 52-53. Before imposing these LFOs, the trial court only inquired as to Pugh’s past ability to support himself and did not consider the burdens of incarceration, the \$4,468.59 in restitution it imposed, or any other aspect of Pugh’s financial circumstances. 2RP 50-51. The court also imposed the mandatory victim penalty assessment and DNA collection fee. CP 88-89. Pugh stated he could not pay given his incarceration, explaining prison wages paid about 30 cents per hour. 2RP 50. In his motion and affidavit for indigency, Pugh indicated he had no assets or income. CP 165, 167-68.

Pugh timely appeals. CP 66-67.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE OF THEFT OF A MOTOR VEHICLE GIVEN THAT THERE WAS NO EVIDENCE PRESENTED THAT PUGH OBTAINED PROPERTY WRONGFULLY OR BY COLOR OR AID OF DECEPTION

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). Because the State presented no evidence that Pugh obtained a motor vehicle wrongfully or by color or aid of deception, no rational juror could have found sufficient evidence of either of these alternative essential elements of theft of a motor vehicle. This court must reverse Pugh's theft of a motor vehicle conviction and remand for dismissal of this charge with prejudice.

Pugh was charged with theft of a motor vehicle under RCW 9A.56.065(1), which provides, "A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle." To commit any theft, the defendant must "(a) wrongfully obtain or exert unauthorized control over the property . . . of another . . . with intent to deprive him or her of such property"

of “(b) [b]y color or aid of deception,” “obtain control over the property . . . other another . . . with intent to deprive him or her of such property” RCW 9A.56.020(1)(a)–(b). Pugh’s jury was instructed on both these alternative means. CP 54.

In its failed attempt to meet its burden, the State introduced evidence that Pugh had filed a lien against the owner of the vehicle and another lienholder of the vehicle, P.V. Holding Corporation and The Bank of New York Mellon Trust Company, respectively. 4RP 156-58. According to witness Shelly Horton, Pugh stated he was taking ownership of the vehicle through legal process because the legal owner on the title—The Bank of New York Mellon Trust Company—owed him money. 4RP 150, 156-57. Pugh faxed a Uniform Commercial Code financing statement to Budget Car Sales showing his \$1 billion lien. 4RP 151, 154, 156-57. Although the State introduced evidence of Pugh’s duly filed lien, the State never introduced any evidence that the lien was invalid in any way.

The State also obtained pretrial permission to present Detective Rick Runge’s testimony about Pugh’s previous crimes under ER 404(b)’s common scheme or plan provision. 4RP 70 (State explaining Pugh’s “scheme where he trying to use legal filings that sound great on their face but have no, in effect, no real legal relevance, have no legal significance and certainly don’t give him any ownership interest”); 4RP 74-75 (court finds common scheme

or plan “to assert authority or ownership over a variety of items, whether it’s a home or it’s a vehicle for the purpose of . . . gaining pecuniary interest”). Runge proceeded to testify at length regarding his investigations into Pugh’s use of legal documents to attempt to obtain or pass off ownership interests in property. 4RP 230-59. However, Runge stated he was not involved in investigating Pugh in the instant case. 4RP 273-74. Thus, although he might have testified to previous invalid liens filed by Pugh, he gave no indication that the lien filed in this case was invalid.

The lack of evidence regarding the validity of the lien came to a head when the parties were discussing the ER 404(b) limiting instruction with the trial court. The State proposed instructing the jury that Runge’s testimony regarding prior instances of Pugh’s conduct “may be considered by you only for the purpose of determining whether the defendant had a common scheme or plan.” 4RP 302-03 (asking that the court place a period after “common scheme or plan” and state no more). The court, however, explained,

the goal, the discussion of 404(b) that we had really came down to what the -- and I pursued this further after lunch yesterday, what was that common scheme or plan. And what I understood and I ruled upon was to falsify documents to obtain property. So I’m going to include that language.

4RP 305 (emphasis added). The State was “concerned about that language that by putting that in there that the State would then be held to have to prove the falsity of those documents.” 4RP 305. The State continued, “If this were

to come back on appeal and that that could be putting a burden on the State to prove an additional element of theft of a motor vehicle that I have not proven. So I guess that's my concern." 4RP 305. The trial court furthered the exchange:

I'm not going to do that. I think it will confuse the jury. I don't think it puts a burden on you. I think it's more for explanation purposes. I mean, ultimately it's difficult to include testimony and not give the jurors some understanding about that; because I think the goal of essentially that information was to demonstrate, from the State's perspective, that this particular action on the theft of the motor vehicle was exactly that, falsifying documents to obtain property.

Is there other language that you would be proposing then?

4RP 306. The State proposed, "Maybe if we take out falsifying and just say use legal documents without making a comment on the veracity of the document; to say use legal documents to obtain property?" 4RP 306. The trial court assented to this request. 4RP 307. Thus, the instruction in its entirety read,

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony from Detective Rick Runge regarding prior instances of conduct of the defendant, and may be considered by you only for the purpose of determining whether the defendant had a common scheme or plan of using legal documents to obtain property. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 55 (emphasis added); 4RP 317 (emphasis added).

This instruction cabined the jury's consideration of Detective Runge's testimony. The jury was permitted to consider Runge's testimony for the sole purpose of whether Pugh had the common scheme of using legal documents to obtain property. This issue was not in dispute—legal documents are typically used to obtain property, especially significant property like houses and cars, and Pugh obviously had used a lien in this case to obtain control of the motor vehicle. The jury was not permitted to consider Runge's testimony to determine whether Pugh wrongfully used legal documents to obtain property. Nor was the jury permitted to consider Runge's testimony to determine whether Pugh used legal documents by color of aid or deception to obtain property. Appellate courts presume jurors follow their instructions. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Even when viewing the evidence in the light most favorable to the State, a rational trier of fact could not consider Runge's testimony to establish Pugh's use of legal documents to obtain property was wrongful or deceptive.

As the State expressly conceded, it did not prove that the lien Pugh used to obtain control of the motor vehicle was falsified. 4RP 305. There was no evidence presented to the jury that the lien Pugh filed to obtain the rental vehicle was wrongful or deceptive rather than completely lawful and binding. Because there was no evidence presented to meet the wrongful and color-or-aid-of-deception alternative elements, the State failed to carry its burden of

proving every element of theft of a motor vehicle beyond a reasonable doubt. Accordingly, Pugh asks this court to reverse his conviction and remand for dismissal of this prosecution with prejudice.

2. THE PROSECUTOR'S IMPROPER COMMENTS ON PUGH'S CONSTITUTIONAL RIGHT NOT TO TESTIFY AND ON NOT PRESENTING EVIDENCE REGARDING THE VALIDITY OF THE LIEN IMPROPERLY SHIFTED THE BURDEN OF PROOF TO PUGH AND DEPRIVED HIM OF A FAIR TRIAL

Perceiving she had presented insufficient evidence, the prosecutor argued in closing, "You guys, we didn't hear any testimony about how he came to be owed a billion dollars between September 29th and October 4th when this filing was made." 4RP 325. Pugh objected: "They did a jury instruction that the defendant does not have to testify, now she's testifying for me." 4RP 325. Even though Pugh's objection was correct—the prosecutor indeed castigated Pugh for not testifying or otherwise presenting evidence—the trial court overruled the objection. 4RP 325. The trial court erred. The prosecutor's repugnant comment both violated Pugh's constitutional right to remain silent and improperly shifted the burden of proof to Pugh, depriving him of a fair trial.

a. Improper comment on right to remain silent

Drawing the jury's attention to the defendant's failure to testify is constitutional error. Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229,

14 L. Ed. 2d 106 (1965). That is exactly what the prosecutor did here by arguing there was no testimony showing Pugh's lien was valid.

This case is similar to State v. Dixon, 150 Wn. App. 46, 57-58, 207 P.3d 459 (2009), where the prosecutor stated in closing that the defendant had not testified that another person planted his drugs on her: "Did the defendant make any statement that 'he put that in my purse'? No. We didn't hear any of that testimony." The court concluded these statements were improper, given that "the prosecutor suggested Dixon had an obligation to testify and to produce evidence of [the other] person's guilt," and reversed. Id. at 58.

The prosecutor made an almost identical suggestion here. Even though the State had not produced any evidence on the validity or invalidity of the lien in question, and conceded as much, 4RP 305, in closing the State suggested Pugh had an obligation to testify to show that the lien was valid. This was improper and infringed on Pugh's Fifth Amendment right not to take the witness stand.

b. Improper comment on not presenting evidence

The prosecutor's statement could also be construed as a comment on Pugh's failure to present evidence from another witness regarding the lien's validity. "A prosecutor may not comment 'on the lack of defense evidence because the defendant has no duty to present evidence.'" Dixon, 150 Wn. App. at 54 (quoting State v. Cleveland, 58 Wn. App. 634, 347, 794 P.2d 546

(1990)); accord State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (“A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt.”). It is improper even “to imply that the defense has a duty to present evidence.” State v. Toth, 152 Wn. App. 610, 615, 217 P.3d 377 (2009).

The exception to this rule is the missing witness doctrine.

Under this doctrine, if a party fails to call a witness to provide testimony that would properly be part of the case, the testimony would naturally be in the party’s interest to produce and the witness is within the control of the party, the jury may be allowed to draw an inference that the testimony would be unfavorable to that party.

Dixon, 150 Wn. App. at 54-55. However, several exceptions apply to this exception: “the doctrine applies only if the missing witness is particularly under the control of the defendant rather than being equally available to both parties” and “the doctrine may not be applied if it would infringe on a criminal defendant’s right to silence or shift the burden of proof.” Id. at 55 (quoting State v. Montgomery, 163 Wn.2d 577, 598, 183 P.3d 267 (2008)). In addition, “[a] prosecutor may only ‘comment on the defendant’s failure to call a witness’ where ‘it is clear the defendant was able to produce the witness and the defendant’s testimony unequivocally implies the uncalled witness’s ability to corroborate his theory of the case.’” Dixon, 150 Wn. App. at 55 (quoting State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990)).

Pugh did not unequivocally imply that a missing witness would be able to corroborate the validity of his lien—Pugh did not testify at all. Nor was any witness who could establish the validity or invalidity of the lien particularly under Pugh’s control—the State could have attempted to establish the invalidity of the lien through other testimony, such that of bank personnel regarding the presence or absence of any debt owed to Pugh or other pending legal claim. Witnesses that could weigh in on the lien’s validity, aside from Pugh himself, were thus available to both the prosecution and the defense. And, as discussed, “the prosecutor shifted the burden of proof to [Pugh] when [s]he implied that [h]e should have presented evidence to support h[is] defense.” Dixon, 150 Wn. App. at 55.

- c. The State cannot show its improper comments on Pugh’s constitutional rights were harmless beyond a reasonable doubt

Generally, when there is an objection, the defense bears the burden of establishing that prosecutorial misconduct had a substantial likelihood of affecting the verdict. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). However, where the misconduct directly violates certain constitutional rights, the misconduct is presumed prejudicial and the State bears the heavy burden of establishing harmlessness beyond a reasonable doubt. State v. Fuller, 169 Wn. App. 797, 813, 282 P.3d 126 (2012). Prosecutorial comments on the defendant’s silence or on the defense’s failure

to produce evidence fall within this category of constitutional error. State v. Emery, 174 Wn.2d 742, 757, 278 P.3d 653 (2012) (citing State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996); State v. Fricks, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1979)); see also State v. Espey, 184 Wn. App. 360, 369-70, 336 P.3d 1178 (2014) (prosecution must satisfy constitutional harmless error standard where prosecutor improperly comments on defendant's right to counsel during closing argument).

The State cannot meet its burden to show harmlessness. Because the State failed to prove an element of the crime—that Pugh had wrongfully or deceptively obtained the motor vehicle by filing an invalid lien—it needed to explain its failure of proof to the jury. It opted to do so by shifting the burden of proof to Pugh, pointing out that Pugh had not presented any regarding the lien's validity and rebuking Pugh for exercising his constitutional right not to testify himself. The State's argument directly asked the jury to presume the lien was invalid because neither Pugh nor anyone else explained "how [Pugh] came to be owed a billion dollars between September 29th and October 4th when this filing was made." 4RP 325. The State assigned to Pugh the responsibility to disprove the State's assumption that the lien was invalid. This was constitutional error. Given that there was no evidence presented at all on the lien's validity, which the State acknowledged, 4RP 305, the State

cannot show its misconduct was harmless beyond a reasonable doubt. In light of this egregious prosecutorial misconduct, reversal is required.

3. THE TRIAL COURT FAILED TO SECURE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF PUGH'S RIGHT TO COUNSEL

The state and federal constitutions guarantee an accused the right to counsel at all critical stages of a criminal proceedings and also guarantee the right to self-representation. U.S. CONST. amends. VI, XIV; CONST. art. I, § 22; Faretta, 422 U.S. at 807; State v. Coley, 180 Wn.2d 543, 560, 326 P.3d 702 (2014). However, a waiver of counsel must be knowing, voluntary, and intelligent. City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). The grant of a defendant's request for self-representation is reviewed for abuse of discretion. State v. James, 138 Wn. App. 628, 636, 158 P.3d 102 (2007). The trial court abuses its discretion if its decision is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." Id.

To knowingly, voluntarily, and intelligently waive counsel, the defendant should be made aware of the nature and classification of the charge, the maximum penalty upon conviction, and the dangers and disadvantages of self-representation and what the task entails. Faretta, 422 U.S. at 835; Acrey, 103 Wn.2d at 211; State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). Defendants should also be advised that presenting a defense requires

the observance of technical rules and is not just a matter of “telling one’s story.” State v. Nordstrom, 89 Wn. App. 737, 742, 950 P.2d 946 (1997). Courts must indulge every reasonable presumption against finding waiver of the right to counsel. Coley, 180 Wn.2d at 560.

- a. The trial court’s colloquy failed to inform Pugh that technical rules exist that would bind him in the presentation of his case and to advise him of the risks of self-representation

The trial court’s inquiry into Pugh’s understanding of the charges against him and his educational background was insufficient to establish a knowing, voluntary, and intelligent waiver of the constitutional right to counsel. When the trial court sought substantive answers from Pugh as opposed to single-word responses, Pugh’s answers did not establish an understanding of the charges, applicable technical rules as they related to his case, or of the risks of self-representation. The colloquy was insufficient to overcome the presumption against finding a waiver of the right counsel. Instead, the trial court seemed to indulge every presumption in favor of waiver, which was manifestly unreasonable. Pugh’s conviction must accordingly be reversed.

The trial court’s colloquy lacked any advisement of the dangers and disadvantages of self-representation. “[T]he record must somehow reflect that the accused was advised that the decision to proceed to trial without the

assistance of counsel carries with it substantial risks and disadvantages.” Nordstrom, 89 Wn. App. at 744. While the trial court inquired as to Pugh’s familiarity with the “rules of evidence in the State of Washington” generally, it failed to establish Pugh understood what those rules were or how they would affect the presentation of his case. Compare IRP 5 with Nordstrom, 89 Wn. App. at 744 (holding waiver of counsel invalid where court gave explanation of certain rules that would apply at trial but did not explain the link between the existence of the rules and the dangers of proceeding pro se).

The trial court did not ask if Pugh understood that the rules of evidence would govern what evidence may or may not be introduced. It did not ask if Pugh understood that, if he wished to testify on his own behalf, he would need to present testimony by asking questions of himself and answering them, and could not simply stand up and tell his story. Cf. Nordstrom, 89 Wn. App. at 742. The trial court did not ask Pugh if he was familiar with the right to present witnesses at state expense, determine if he understood his opportunity to voir dire a jury, including the use of peremptory and for-cause challenges, or ask if Pugh understood the process or importance of submitting pretrial motions for omnibus, 3.5 hearings, or the like. The trial court did not ask Pugh if he had ever represented himself before. It did not advise Pugh that he would likely be better represented by a trained attorney, or discourage Pugh’s self-representation in any way. The court did not advise Pugh that it would not

assist him. The court did not ask Pugh if he was making his decision voluntarily. The court did not even so much as advise Pugh that trying a jury trial was difficult.

To be sure, Pugh was not required to possess any working technical knowledge of applicable rules to validly waive his right to counsel. Pugh certainly could have waived counsel even if he betrayed he lacked any knowledge about self-representation at all. But, to determine whether Pugh fully understood the risks he faced, the trial court had the responsibility to ask substantive questions of Pugh to “establish that he knows what he is doing and his choice is made with eyes open.” Vermillion, 112 Wn. App. at 857.

The trial court failed in this responsibility. “The judge must make a penetrating and comprehensive examination in order to properly assess that the waiver was made knowingly and intelligently.” State v. Chavis, 31 Wn. App. 784, 788, 644 P.2d 1202 (1982). Pugh’s passive responses to the court’s flimsy questions fail under this standard. Pugh agreed with the court that theft of a motor vehicle was a class C felony; but then when advised it was actually a class B felony, Pugh also said he understood. 1RP 4-5. When asked if he understood that he would be held to the same standards as an attorney, Pugh said, “Absolutely.” 1RP 5. When asked if he understood the rules of evidence, he said, “Yes, sir.” 1RP 5. When asked if he was familiar with the Revised Code of Washington, he said, “Yes, I am.” 1RP 5. When asked if he

understood that residential burglary was a class B felony punishable by up to 10 years of imprisonment and a \$20,000 fine, Pugh said he did. 1RP 7. These single-answer responses did not establish that Pugh fully understood the dangers of self-representation. Chavis, 31 Wn. App. at 789.

The substantive answers Pugh did provide also suggest he was not aware of the risks. When the trial court asked if he was familiar with the residential burglary statute and its elements, Pugh responded he was a secured party and objected, apparently to the application of the law to him. 1RP 7. He stated that as the secured party of C. Williams LLC, he had been brought before the court before. 1RP 8. This suggests Pugh believed he was appearing before the court as a limited liability company instead of as an individual charged with multiple felonies; however, it is unclear what Pugh meant because the trial court failed to explore his somewhat incongruous statements further. On the contrary, the trial court appeared satisfied with Pugh's answer regarding his secured party status, stating, "All right. With that said, at this time . . . I will allow you to represent yourself, sir." 1RP 8. When the trial court asked how Pugh was familiar with the theft of a motor vehicle statute, Pugh answered he had "[CrR] 7.8 motions with this prior RCW with another Alaska statute which I fought in the Supreme Court." Thought the court asked the follow up, "Supreme Court of which state, sir," to which Pugh responded, "Washington." It is unclear what Pugh was referring to in his answer about

familiarity with the motor vehicle theft statute and the trial court did little if anything to clarify this with further inquiry.

The trial court's questions regarding Pugh's educational background were irrelevant to the issue of whether his waiver of counsel was made knowingly, voluntarily, and intelligently. "A defendant's background is certainly relevant to his *ability* to make a sensible, intelligent decision regarding his self-representation. That background, however, is not relevant to show whether a sensible, literate, and intelligent defendant *possesses the necessary information* to make a meaningful decision as to the waiver of counsel." Acrey, 103 Wn.2d at 211 (emphasis added). Because the trial court's colloquy failed to ensure Pugh possessed the necessary information regarding risks of self-representation to make the decision to waive counsel, the court's finding was manifestly unreasonable. Pugh's conviction must be reversed.

b. The trial court's colloquy failed to inform Pugh of the maximum penalties upon conviction

To make a knowing, voluntary, and intelligent waiver of counsel, the defendant should be made aware of the maximum penalty upon conviction. Acrey, 103 Wn.2d at 211; Vermillion, 112 Wn. App. at 851; Nordstrom, 89 Wn. App. at 742. While the court told Pugh that theft of a motor vehicle carried a maximum penalty of 10 years in prison and a \$20,000 fine and that

residential burglary carried a maximum penalty of 10 years in prison and a \$20,000 fine, the court did not ensure that Pugh understood the sentences could be run consecutively or that he understood he was charged with two counts of residential burglary instead of one. The court simply did not ensure that Pugh understood he faced 30 years' imprisonment and a \$60,000 fine as opposed to 10 years in prison and a \$20,000 fine. Because the court did not ensure Pugh understood the possible maximum penalties he faced, the waiver of counsel was not knowing, voluntary, and intelligent. The trial court's acceptance of the waiver under these circumstances was manifestly unreasonable. Pugh's conviction must be reversed for this reason as well.

4. THE TRIAL COURT'S INQUIRY INTO PUGH'S FINANCIAL CIRCUMSTANCES WAS INADEQUATE TO SATISFY RCW 10.01.160

The trial court attempted to make an inquiry into Pugh's financial circumstances, asking him, "Have you been able to support your family in the past," to which Pugh responded, "Yes." 2RP 50. The trial court also asked him whether he would be able to work in prison and "earn some wages there." 2RP 50. Pugh said no, given that in prison he would earn "about 30 cents an hour." 2RP 50. Pugh clarified he could work. 2RP 50-51. The trial court's inquiry fell short of satisfy the strictures of RCW 10.01.160(3) for several reasons.

RCW 10.01.160(3) provides,

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.

This statute is mandatory: “it creates a duty rather than confers discretion.” State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (citing State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). “Practically speaking . . . the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” Id. (emphasis added). “Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts . . . when determining a defendant’s ability to pay.” Id. (emphasis added).

The Blazina court also instructed courts engaged in this inquiry to “look to the comment in court rule GR 34 for guidance.” Id. The court explained that, “under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps.” Id. Under GR 34, courts must also “find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline.” Id. at 838-39. “[I]f

someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." Id. at 839 (emphasis added).

The catalyst for clarifying and emphasizing the mandates of RCW 10.01.160(3) was the Blazina court's recognition that our "broken" LFO system creates a permanent underclass of Washington citizens. 182 Wn.2d at 835-37. This underclass is created because of the outrageously high, compounding interest rate of 12 percent. Id. at 836.

Many defendants cannot afford these high sums and either do not pay at all or contribute a small amount every month. But on average, a person who pays \$25 per month toward their LFOs will owe the state more after 10 years conviction than they did when the LFOs were initially assessed. Consequently, indigent offenders owe high LFO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount that they owe. The inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs. The court's long-term involvement in defendants' lives inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. This active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism.

Id. at 836-37 (citations omitted). And, in spite of the imposition of LFOs, the government does not collect much: "for three quarters of the cases sentenced in the first two months of 2004, less than 20 percent of LFOs had been paid

three years after sentencing.” Id. at 837. In addition, there are “[s]ignificant disparities” in the administration of LFOs: “drug-related offenses, offenses resulting in trial, Latino defendants, and male defendants all receive disproportionately high LFO penalties.” Id. It was in light of these problematic consequences—the very real creation of a permanent underclass—that prompted our supreme court to require meaningful, on-the-record compliance with RCW 10.01.160(3)’s language.

Although the trial court may have attempted to comply with its compulsory duties under Blazina and RCW 10.01.160, its efforts fell short. The trial court asked Pugh whether he had supported his family in the past and whether he could work in the future. 2RP 50-51. These inquiries might have been a good starting point, but they were not sufficient. They did not “take account of the financial resources of the defendant” or the “burden that payment of costs will impose.” RCW 10.01.160(3).

The trial court’s minimal questions did not take account of Pugh’s financial resources, such as his other debts and the burden of incarceration. See Blazina, 182 Wn.2d at 838. The trial court refused to take this into account even though Pugh expressly stated he would not have any ability to pay while incarcerated because of the low wages available. To comply with the statutory requirements the trial court was also required to consider Pugh’s circumstances, including his significant amount of LFOs from other matters

dating back to 2002. CP 86-87. The trial court should also have considered Pugh's the amount of restitution—\$4,468.59—it was imposing when determining his ability to pay. Blazina, 182 Wn.2d at 838. The trial court did not consider any of this. Its inquiry was inadequate.

Nor did the trial court follow Blazina's instruction to look to GR 34 for guidance. 182 Wn.2d at 838-39. GR 34 specifies that persons who receive "assistance under a needs-based, means-tested assistance program such as" food stamps, "shall be determined to be indigent." GR 34(a)(3)(A)(v). A person whose household income is at or below 125 percent of the federal poverty level also "shall be determined to be indigent." GR 34(a)(3)(B). Pugh reported in his affidavit of indigency that he had no income, no bank accounts, no assets, and no employment. CP 165. Had the trial court engaged in a GR 34 inquiry and "seriously question[ed]" Pugh's ability to pay LFOs as Blazina instructed, the trial court would not have imposed more than \$550 in discretionary LFOs. CP 89, 95.

Nor did the trial court consider interest that would accrue at an annual rate of 12 percent. "[O]n average, a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Blazina, 182 Wn.2d at 836. The trial court ordered that interest would accrue on the LFOs from the date of judgment. CP 89-90. The trial court apparently failed to appreciate that this

ever increasing interest following Pugh's lengthy incarceration would subject him to indefinite jurisdiction of the Benton County Superior Court. The trial court's RCW 10.01.160(3) inquiry was inadequate. Pugh asks that this matter be remanded for an adequate inquiry.

5. THE "MANDATORY" IMPOSITION OF THE \$200 CRIMINAL FILING FEE VIOLATES EQUAL PROTECTION GIVEN THAT SIMILARLY SITUATED CIVIL LITIGANTS ARE PERMITTED A WAIVER

"Under the equal protection clause of the Washington State Constitution, article [I], section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." State v. Johnson, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016) (alteration in original) (quoting State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)). When a fundamental right or constitutionally cognizable suspect class is not at issue, "a law will receive rational basis review." Id. at 308 (quoting State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010)). No fundamental right or suspect class is at issue here, so a rational basis requires that the legislation and the differential treatment alleged be related to a legitimate governmental objective. In re Det. of Turay, 139 Wn.2d 379, 410, 986 P.2d 790 (1999).

The purpose of RCW 36.18.020 is the collection of revenue from filing fees paid by both civil and criminal litigants to fund counties, county or regional law libraries, and the state general fund. See RCW 36.18.020(1) (“Revenue collected under this section is subject to division with the state under RCW 36.18.025 and with the county or regional law library fund under RCW 27.24.070 . . .”). RCW 36.18.025 requires 46 percent of filing fee monies collected by counties to “be transmitted by the county treasurer each month to the state treasurer for deposit in the state general fund.” RCW 27.24.070 requires that \$17 or \$7, depending on the type of fee involved, be deposited “for the support of the law library in that county or the regional law library to which the county belongs.” Civil and criminal litigants who pay filing fees under RCW 36.18.020 are similarly situated with respect to the statute’s purpose: their fees are plainly intended to fund counties, county or regional law libraries, and the state general fund.

Although similarly situated, criminal and civil litigants are treated differently without any rational basis for different treatment considering the purpose of RCW 36.18.020. Civil litigants may obtain waiver of their filing fees. The comment to GR 34 directly states as much:

This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment of which is a condition

precedent to a litigant’s ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); . . . domestic violent prevention surcharges established pursuant to RCW 36.18.020(2)(b)

(Emphasis added.) Civil litigants have no constitutional right to access the courts. Criminal litigants do. Yet, according to State v. Gonzales, 198 Wn. App. 151, 154-55, 392 P.3d 1158 (2017), State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016), and State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), civil litigants may obtain waivers of their filing fees and criminal litigants may not. Because there is no rational basis to treat criminal litigants differently than civil litigants under a statute whose purpose is to collect filing fees to fund the state, counties, and county law libraries, interpreting and applying the RCW 36.18.020(2)(h) criminal filing fee as a nonwaivable, mandatory financial obligation violates equal protection. Pugh asks this court to strike the RCW 36.18.020(2)(h) \$200 criminal filing fee under the state and federal equal protection clauses.

6. THE \$200 CRIMINAL FILING FEE IS NOT MANDATORY AND THE TRIAL COURT SHOULD HAVE INQUIRED INTO PUGH’S ABILITY TO PAY BEFORE IMPOSING IT

RCW 36.18.020(2)(h) provides that a criminal defendant “shall be liable” for a \$200 filing fee and that the clerk “shall collect” it. The Court of Appeals has held this statute imposes a mandatory obligation. Gonzales, 198 Wn. App. at 154-55; Stoddard, 192 Wn. App. at 225; Lundy, 176 Wn. App.

at 102. However, none of these cases provides any statutory analysis whatsoever; they didn't even attempt to do so. The Court of Appeals is incorrect for several reasons.

a. The plain meaning of the word “liable” does not denote a mandatory obligation

By directing that a defendant be “liable” for the criminal filing fee, the legislature did not create a mandatory fee. The term “liable” signifies a situation in which legal liability might or might not arise. Black’s Law Dictionary confirms that “liable” might make a person obligated in law for something but also defines liability as a “future possible or probable happening that may not occur.” BLACK’S LAW DICTIONARY 915 (6th ed. 1990); see also WEBSTER’S THIRD NEW INT’L DICTIONARY 1302 (1993) (defining liable as “exposed or subject to some usu. adverse contingency or action : LIKELY”). Based on the meaning of the word liable—giving rise to a contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

Opinions addressing this challenge have overlooked the plain meaning of the word “liable.” But there is no difference in meaning between “shall be liable” and “may be liable,” however. From mandatory liability a mandatory obligation does not follow; rather, a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they

must actually pay the monetary amount or that the liability cannot be waived or otherwise resolved. Again, liability is, by definition, something that might or might not impose a concrete obligation. The legislature's use of the word "liable" in RCW 36.18.020(2)(h) shows it intended the criminal filing fee to be discretionary. Only by overlooking the meaning of the word "liable" has the Court of Appeals reached its contrary result.

- b. The difference in language in other provisions of RCW 36.18.020(2) supports Pugh's interpretation that "shall be liable" does not impose a mandatory obligation

The Court of Appeals has simplistically reasoned that because RCW 36.18.020(2) contains the word "shall," the legislature intended the criminal filing fee to be mandatory. This overlooks or misapprehends that the "'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002)). Pugh's nonmandatory interpretation of RCW 36.18.020(2)(h) is supported by the language of other provisions in the same statute.

The beginning of the statutory subsection reads, "Clerks of superior courts shall collect the following fees for their official services," and then lists

various fees in subsections (a) through (i). With the exception of RCW 36.18.020(2)(h), the fees are listed directly without reference to the word “liable” or “liability.” E.g., RCW 36.18.020(2)(a) (“In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the document is filed, a fee of two hundred dollars . . .” (emphasis added)); RCW 36.18.020(2)(b) (“Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall pay, when the document is filed, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(c) (“For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(d) (“For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three dollars.” (emphasis added)); RCW 36.18.020(2)(e) (“For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(f) (“In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first document therein, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(g) (“For filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to

a written agreement or memorandum as provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars.” (emphasis added)).

These other provisions of RCW 36.118.020(2), unlike RCW 36.18.020(2)(h), give a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing only liability for a fee. “Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.” Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) (“When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.”). Because RCW 36.18.020(2)(h) contains the only provision in the statute where “liable” appears (in contrast to the other provisions that are clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

- c. A related statute, RCW 10.46.190, provides that every person convicted of a crime “shall be liable to all the costs of the proceedings against him or her,” yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case

RCW 10.46.190 provides,

Every person convicted of a crime or held to bail to keep the peace shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court or before a committing magistrate, a jury fee as provided for in civil actions for which judgment shall be rendered and collected. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk and applied as the jury fee in civil cases is applied.

(Emphasis added.) This statute plainly requires that any person convicted of a crime “shall be liable” for all the costs of the proceedings.

Even though RCW 10.46.190 employs the same “shall be liable” language as RCW 36.18.020(2)(h), the legislature and the Washington Supreme Court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs “unless the defendant is or will be able to pay them.” The supreme court confirmed this in Blazina, 182 Wn.2d at 838-39. Even though a defendant “shall be liable” for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies that the legislature’s use of the phrase “shall be liable” does not impose a mandatory obligation but a contingent, waivable one. RCW 36.18.020(2)(h)’s criminal filing fee should likewise be interpreted as discretionary.

- d. The legislature knows how to make LFOs mandatory and chose not to do so with respect to the criminal filing fee

The victim penalty assessment is recognized as a mandatory assessment, given that RCW 7.68.035 states, “When a person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” (Emphasis added.). This statute is unambiguous in its command that the penalty assessment shall be imposed.

The DNA collection fee is likewise unambiguous. It states, “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.” RCW 43.43.7541 (emphasis added). Like the victim penalty assessment, there is little question that the legislature has mandated that a \$100 DNA fee be imposed in every felony sentence.

RCW 36.18.020(2)(h) is different. As discussed, it does not state that a criminal sentence “must include” the fee or that the fee “shall be imposed,” but that the defendant is merely liable for the fee. Despite the fact that the legislature knows how to create an unambiguous mandatory fee, which must be imposed in every judgment and sentence, the legislature did not do so in this statute.

The Washington Supreme Court recently suggested RCW 36.18.020(2)(h)’s fee had merely “been treated as mandatory by the Court of

Appeals” rather as actually legislatively mandated fee. State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016). That the Duncan court would identify those LFOs designated as mandatory by the legislature on one hand and then separately identify the criminal filing fee as one that has merely been treated as mandatory on the other hand strongly indicates there is a distinction.

Given the contingent meaning of the word “liable,” the Duncan court seemed to indicate that the meaning of the phrase “shall be liable” is, at best, ambiguous with respect to whether it imposes a mandatory obligation. Under the rule of lenity, RCW 36.18.020(2)(h) must be interpreted in Greger’s favor. Jacobs, 154 Wn.2d at 601.

Pugh asks this court to engage in reasoned statutory analysis on these several points instead of concluding that “shall” means mandatory without any attempt at analysis.

7. RCW 7.68.035 AND RCW 43.43.7541 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY OR LIKELY FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS

RCW 7.68.035 provides that a \$500 VPA shall be imposed upon anyone who has been found guilty in a Washington superior court. RCW 43.43.7541 provides that a \$100 DNA collection fee must be imposed whenever a person is convicted of a felony or certain misdemeanors. These statutes violate substantive due process when applied to defendants who are

not shown to have the ability or likely future ability to pay. This court should hold that the trial court erred in imposing these LFOs without first determining Pugh's ability to pay.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1; CONST. art. I, § 3. The due process clauses confer both procedural and substantive protections. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures. Id. at 218-19. It requires that deprivations of life, liberty, or property be substantively reasonable; in other words, such deprivations are constitutionally infirm if not supported by some legitimate justification. Nielsen v. Wash. State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L. REV. 625, 625-26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. JohnsonError! Bookmark not defined. v. Wash. Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is at its lightest under this standard, the rational basis standard is not a toothless one. Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976). Even under the deferential rational basis test, the court's role is to assure the challenged legislation is constitutional. DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate state interest must be struck down as unconstitutional under the due process clauses. Id.

RCW 7.68.035 ostensibly services the state's interest in funding comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes. RCW 7.68.035(4). RCW 43.43.7541 services the collection, analysis, and storage of convicted defendants' DNA samples to facilitate identification of individuals who commit crimes. See RCW 43.43.753; RCW 43.43.754. These are legitimate interests. But there is nothing reasonable about requiring sentencing courts to impose these LFOs on defendants regardless of whether they have the ability or likely future ability to pay.

Imposing fees and fines on defendants who are unable to pay does not further the state's interests. As the Washington Supreme Court recently

emphasized, the state cannot collect money from defendants who cannot pay. State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). There is no legitimate economic incentive served in imposing LFOs without first determining ability or likely future ability to pay.

Likewise, the state's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he or she cannot do so. To foster accountability, a sentencing condition must be something achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable for his or her conduct.

The Washington Supreme Court reached this conclusion in Blazina, recognizing that the state's interest in deterring crime through LFOs is actually undermined when LFOs are imposed without regard to ability to pay. 182 Wn.2d at 836-37. Indeed, imposing LFOs upon those who do not have the ability to pay increases the chances of recidivism. Id. (citing studies and reports).

Imposing LFOs on persons who cannot pay them also undermines the state's interest in uniform sentencing. Defendants who cannot pay LFOs are subject to an indeterminate length of involvement with the criminal justice system, often end up paying considerably more than the original LFO amounts imposed due to interest and collection fees, and, in turn, often pay considerably more than their wealthier counterparts. Id. at 836-37.

When applied to indigent defendants—those defendants who cannot pay and do not have the likely future ability to pay—not only do mandatory LFOs fail to further any state interest, they are pointless. It is irrational for the State to mandate that trial courts impose these criminal debts on defendants who cannot pay.

Judge Bjorgen recently explained precisely how the imposition of mandatory LFOs fails to serve a rational state interest:

Without the individualized determination required by Blazina for discretionary LFOs, mandatory LFOs will be imposed in many instances on those who have no hope of ever paying them. In those instances, the levy of mandatory LFOs has no relation to its purpose. In those instances, the only consequence of mandatory LFOs is to harness those assessed them to a growing debt that they realistically have no ability to pay, keeping them in the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still. Levying mandatory LFOs against those who cannot pay them thus increases the system costs they were designed to relieve. In those instances, the assessment of mandatory LFOs not only fails wholly to serve its purpose, but actively contradicts that purpose. The self-contradiction in such a system crosses into an arbitrariness that not even the rational basis test can tolerate.

State v. Seward, 196 Wn. App. 579, 589, 384 P.3d 620 (2016) (Bjorgen, J., dissenting).

To permit the blind imposition of mandatory LFOs without an ability to pay may be justified only through “dragnet rationales.” Id. 590. “These rationales attempt to save a law that contradicts its purpose in some instances

by pointing out that the law will serve its purpose in others or by hypothesizing that the contradiction may someday cease.” Id. As Judge Bjorgen correctly surmised, if such a dragnet approach to rational basis review “is sufficient to relieve the contradictions in assessing mandatory LFOs with no consideration of ability to pay, then the rational basis test must tolerate the irrationality of clearly antagonistic purpose and effect. That irrationality itself contradicts the core of the rational basis test.” Id. at 591.

Following Judge Bjorgen’s persuasive reasoning, Pugh asks that this court reach the same conclusion: imposing \$600 without any inquiry into his ability or likely future ability to pay violates substantive due process.

D. CONCLUSION

The State presented insufficient evidence of theft of a motor vehicle and the charge must be dismissed. Alternatively, prosecutorial misconduct and an inadequate waiver of the right to counsel require reversal and remand for a new trial. The trial court also erred in imposing LFOs without conducting an adequate inquiry; and several of the LFOs that were imposed are unconstitutional. These LFO errors require resentencing.

DATED this 15th day of June, 2017.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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State V. Corey Williams

No. 34172-1-III

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Cause No. 34172-1-III, in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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