

FILED

MAR 01, 2017

Court of Appeals
Division III
State of Washington

No. 34776-1-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LONNIE LEE PRZESPOLEWSKI

Appellant.

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

The Honorable Judge John Hotchkiss

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorney for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT.....7

Issue 1: Whether the defendant was denied his constitutional right to a fair trial when the prosecutor told the jury during closing arguments the defendant’s testimony was “a complete lie.”7

Issue 2: Whether the trial court erred by rejecting the defendant’s request for a low-end standard-range sentence based on the defendant exercising his constitutional right to a jury trial.....13

Issue 3: Whether the court’s finding that Mr. Przespolewski had the ability to pay legal financial obligations, and its imposition of \$1,315.10 in discretionary costs against this defendant whose sole source of income is SSI disability benefits, was unsupported by the record and contrary to state and federal law18

Issue 4: Whether this Court should refuse to impose LFOs on appeal in the event Mr. Przespolewski is not the substantially prevailing party.....27

E. CONCLUSION31

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....20-22, 24, 27-30

State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006).....23, 24

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992).....22

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984).9

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012).....8

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009)9

Matter of Flippo, 187 Wn.2d 106, 385 P.3d 128 (2016).....21

In re Pers. Rest. of Glassman, 175 Wn.2d 696, 286 P.3d 673 (2012).....9

State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968).....8

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010).....8, 9

State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014).....8, 9

State v. Mail, 121 Wn.2d 707, 854 P.2d 1042 (1993).....13

State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008).....7

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2001).....8

State v. Osman, 157 Wn.2d 474, 139 P.3d 334, 339 (2006).....14

Nordstrom Credit, Inc. v. Dep’t of Revenue, 120 Wn.2d 935,
845 P.2d 1331 (1993).....23

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984).....10, 12

State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011).....7

City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016)..18-29

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008).....9
State v. Williams, 149 Wn.2d 143, 65 P.3d 1214 (2003).....13

Washington Courts of Appeals

State v. Horton, 116 Wn. App. 909, 68 P.3d 1145 (2003).....9
State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013).....18, 20, 22
State v. O’Donnell, 142 Wn. App. 314, 174 P.3d 1205 (2007).....8
State v. Richardson, 105 Wn. App. 19, 19 P.3d 431 (2001).....15-17
State v. Sandefer, 79 Wn. App. 178, 900 P.2d 1132 (1995).....14, 15, 17
State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016).....27

Federal Authorities

Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663,
54 L.Ed.2d 604 (1978).14, 18
United States v. Brooks, 508 F.3d 1205 (9th Cir. 2007).....9
United States v. Medina-Cervantes, 690 F.2d 715 (9th Cir. 1982).....14
United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973).14, 16
U.S. Const. amend. VI, XIV.....8, 9, 14

Washington Constitution, Statutes & Court Rules

Division III General Court Order issued on June 10, 2016.....27
GR 3421, 27, 29, 30
RAP 2.5(a)(3).....8, 14, 20

RAP 14.2 (eff. January 31, 2017).....	27, 30
RAP 15.2.....	29, 30
RCW 7.68.035(1)(a).....	18
RCW 9.94A.585(1).....	13
RCW 9.94A.760(1).....	20
RCW 10.01.160	20, 21
RCW 10.73.160.....	28
RCW 36.18.020(2)	18
RCW 43.43.7541.....	18
Wash. Const. art. I.....	8, 9, 14

Secondary Resources

American Bar Ass’n, <i>Standards for Criminal Justice: Pleas of Guilty</i> , std. 14-1.8(b) (3d. ed. 1999).....	16
--	----

A. ASSIGNMENTS OF ERROR

1. The prosecutor erred by commenting on Mr. Przespolewski's credibility as a witness.
2. The prosecutor erred by expressing a personal opinion as to the guilt of the defendant.
3. The court erred by convicting Mr. Przespolewski of unlawful possession of a firearm where the prosecutor engaged in the above misconduct.
4. The court erred by rejecting Mr. Przespolewski's request for the low end of the standard range based on the defendant having exercised his constitutional right to go to trial.
5. The court erred by finding Mr. Przespolewski had the present or future ability to pay legal financial obligations (LFOs).
6. The court erred by imposing discretionary LFOs of \$1,315.10.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the defendant was denied his constitutional right to a fair trial when the prosecutor told the jury during closing arguments the defendant's testimony was "a complete lie."

Issue 2: Whether the trial court erred by rejecting the defendant's request for a low-end standard-range sentence based on the defendant exercising his constitutional right to a jury trial.

Issue 3: Whether the court's finding that Mr. Przespolewski had the ability to pay legal financial obligations, and its imposition of \$1,315.10 in discretionary costs against this defendant whose sole source of income is SSI disability benefits, was unsupported by the record and contrary to state and federal law.

Issue 4: Whether this Court should refuse to impose LFOs on appeal in the event Mr. Przespolewski is not the substantially prevailing party.

C. STATEMENT OF THE CASE

On June 25, 2016, Lonnie Przespolewski drove his parents' vehicle to a local car dealership for servicing in East Wenatchee, Washington. RP 66, 76, 129. Mr. Przespolewski's stepfather kept a firearm in the glovebox of the vehicle (RP 123-25), which Mr. Przespolewski said he did not know about when he took the vehicle that day (RP 135-36, 144). Mr. Przespolewski was not present when his father placed the gun in the glovebox some weeks prior. RP 125. Mr. Przespolewski had prior felonies making it unlawful for him to possess a firearm. RP 55, 92, 143; CP 54.

As there was no immediate availability for vehicle servicing, Mr. Przespolewski looked at other vehicles on the dealership lot. RP 76, 131-32. Salesperson Kristy Taylor thought Mr. Przespolewski appeared suspicious, so she texted her friend, Sergeant James Marshall, to ask if there was any reason to be concerned. RP 15-16, 62-63, 68, 91-92. Meanwhile, Sergio Avila Morales, another salesperson, offered to drive a truck with Mr. Przespolewski. RP 63. Mr. Przespolewski said he retrieved a shirt from the glovebox of his parents' vehicle to take with him for the test drive. RP 135-36. Mr. Przespolewski said he did not know there was a gun wrapped inside that shirt as he set it inside the dealer's vehicle they were about to test drive. *Id.* Salesman Mr. Avila testified he

saw the defendant carrying a wallet with something in the middle of it, which the defendant placed on the seat of the dealer's vehicle. RP 79.

Mr. Przespolewski then noticed the other salesperson, Ms. Taylor, taking pictures of or texting while she was standing close to the back of his parents' vehicle, so Mr. Przespolewski got out of the dealership's vehicle and approached Ms. Taylor to determine what she was doing. RP 136. Salesman Mr. Avila brought the gun to Mr. Przespolewski from the dealer's vehicle and handed it through the passenger's side of the defendant's parents' vehicle; the salespersons both testified that they could at this time see a firearm sticking out of a wallet that was wrapped around the gun, and Ms. Taylor testified Mr. Przespolewski thanked Mr. Avila for returning the item. RP 64-65, 79-81. Mr. Avila testified he saw the defendant push the gun aside on the front seat of his parents' vehicle. RP 86.

Shortly thereafter, Mr. Przespolewski left the dealership and picked up his wife. RP 139. He testified his wife moved the items from the front seat to the back seat to make room to sit down, at which time he says he first noticed there was a gun wrapped in the shirt that was moved to the back. RP 139-40, 142-43, 147.

Sergeant Marshall, who had responded to the area, saw Mr. Przespolewski driving his parents' vehicle, verified the defendant's license

was revoked, and proceeded to stop and arrest the defendant. RP 16-17, 26, 56, 94; CP 54. Sergeant Marshall testified that, after Mr. Przespolewski's arrest, the defendant informed him his father's firearm was in the back of the vehicle. RP 21, 96, 99, 148. He said Mr. Przespolewski asked him not to retrieve the firearm from the vehicle or it would "lock [him] up." RP 98. Sergeant Marshall said the defendant claimed he needed the firearm to protect his son from recent threats and that he had merely secured the firearm for safekeeping while at the dealership. RP 91, 97. Mr. Przespolewski countered that he did not recall making these statements to the sergeant when he later testified, and that he never intended to possess a firearm. RP 141-42, 144, 146. The firearm was retrieved from the back of the vehicle, where Mr. Przespolewski said it would be located, pursuant to a search warrant. RP 101, 103, 104; Exhibit P1.

After Mr. Przespolewski's arrest, he telephoned his mother on a recorded line from the jail. RP 120-21, 152. Mr. Przespolewski made the following pertinent statements during that call:

... I wasn't brandishing that firearm at that time either. I wasn't raising it, didn't have it swinging around or doing nothing wrong. That's what I'm pissed off about. That f--king lady had no reason to f--king call the cops on me in the first place. She was around my own f--king car and I got pissed off because I seen her f--king taking pictures of the license plate. I didn't even pick that f--king gun up out of the f--king pick-up to bring it back to your car, he did.

RP 121, 152.

Mr. Przespolewski proceeded to a jury trial on charges of second-degree unlawful possession of a firearm and first-degree driving while license revoked (DWLR). He conceded the DWLR charge (RP 56, 160, 175; CP 54), but asked the jury to find him not guilty of unlawful possession of a firearm, arguing he never knowingly possessed the gun. In rebuttal closing argument, the prosecutor told the jury, “frankly, the Defendant’s story is pretty much -- well, there’s not really words for it other than it’s a complete lie... everything, pretty much everything the Defendant said up on the stand was a lie.” RP 176. The jury convicted Mr. Przespolewski as charged. RP 179; CP 65-66.

Mr. Przespolewski was sentenced on his fiftieth birthday. RP 181. He requested the low end of the standard range of 51 to 60 months (RP 185), but the trial court rejected his request and imposed 55 months incarceration (RP 186). The trial court explained as follows:

Mr. Przespolewski, I just don’t understand all of it, to be honest with you. I mean, you’re, you’re pleasant enough in Court and I understand that you’re not overly pleasant to your mother sometimes from the telephone calls, but you’re pleasant enough in Court. I mean, this is just silly. This is absolutely silly. And I hate sending you back to prison since that’s something that’s so silly for almost five years. It’s just absolutely amazing to me. And I also can’t believe and it’s amazing to me that you went to trial and to a 3.5 Hearing on circumstances where you had no chance. And I’m assuming that your attorney told you had no chance, but you took 12 people out of (indiscernible) and missed their job because they

had to come up here and you had no defense. I don't understand your thought process.

RP 186 (emphasis added).

As to legal financial obligations (LFOs), the trial court asked Mr. Przespolewski how much he could afford to pay once he got out of prison, and Mr. Przespolewski responded “\$25, a month, I’ll shoot for that right now.” RP 187. The trial court did not ask about Mr. Przespolewski’s employment history, income source, or assets before finding the defendant had the likely current or future ability to pay LFOs. *See* RP 187; CP 83. The court imposed a total of \$2,115.10 in LFOs with payment to commence “immediately” at a rate of \$25 per month. CP 83-84.

Mr. Przespolewski is a disabled person who relies entirely on SSI benefits to meet his basic needs when not incarcerated due to what the defendant described as serious medical problems, anxiety disorder, A.D.H.D., and PTSD. RP 3, 9, 31; Report as to Continued Indigency (filed contemporaneously with this opening brief). As demonstrated by Mr. Przespolewski’s order of indigency, indigency screening form, and Report as to Continued Indigency, Mr. Przespolewski relied entirely on SSI benefits prior to his incarceration to meet his basic needs, he has no recent employment history, he has no assets, he has over \$25,000 in outstanding debts, he is unable to contribute any amount toward LFOs imposed by this Court, and his mental or physical disabilities are likely to

interfere with his ability to secure future employment. CP 8, 109-10; *see also* Mr. Przespolewski's Report as to Continued Indigency (on file).

This appeal timely follows. CP 95.

D. ARGUMENT

Issue 1: Whether the defendant was denied his constitutional right to a fair trial when the prosecutor told the jury during closing arguments the defendant's testimony was "a complete lie."

The defendant did not object during the prosecutor's rebuttal closing argument when the prosecutor described the defendant's testimony as "a complete lie... pretty much everything the Defendant said up on the stand was a lie." RP 176. However, these comments were so flagrantly improper that no curative instruction would have cured the prejudice to the defendant, so this matter should be reversed and remanded for a new trial.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). If the defendant fails to object to the misconduct, "a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice

it engendered.” *State v. O’Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotations omitted); RAP 2.5(a)(3).

When applying this standard, reviewing courts should ““focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.”” *State v. Lindsay*, 180 Wn.2d 423, 430n.2, 326 P.3d 125 (2014) (quoting *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)). ““In order to prove the conduct was prejudicial, the defendant must prove there is a substantial likelihood the misconduct affected the jury’s verdict.”” *State v. Ish*, 170 Wn.2d 189, 200, 241 P.3d 389 (2010) (internal citations omitted).

Prosecutors serve two equally important functions: They enforce the laws by prosecuting those who have violated peace and dignity of the state by breaking it, and they function as the representative of the people in a quasijudicial search for justice. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2001). Defendants are among the people the prosecutor represents. *Id.* The prosecutor owes a duty to defendants to see their rights to a constitutionally fair trial are not violated (*id.*) and to “seek a verdict free of prejudice and based on reason.” *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968); U.S. Const. amend. VI, XIV; Wash. Const. art. I, §§3, 22. Prosecutors “have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *State v.*

Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). It is “well established that a prosecutor cannot use his or her position of power and prestige to sway the jury...” *In re Pers. Rest. of Glassman*, 175 Wn.2d 696, 706-07, 286 P.3d 673 (2012) (internal citations omitted).

Whether a witness has testified truthfully is entirely for the jury to determine.” *Ish*, 170 Wn.2d at 196 (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). “It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Similarly, a “prosecutor errs...by expressing a ‘personal opinion about...the guilt or innocence of the accused....’” *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). A prosecutor’s personal comments may infringe upon the defendant’s constitutional rights to a fair trial by an impartial jury. U.S. Const. amend. VI, XIV; Wash. Const. art. I, §§3, 22.

Furthermore, a prosecutor’s comment on a witness’s credibility or expression as to his personal belief in the accused’s guilt “constitutes misconduct...and violates the advocate-witness rule, which ‘prohibits an attorney from appearing as both a witness and an advocate in the same litigation.’” *Lindsay*, 180 Wn.2d at 437. It has been described as “reprehensible for one appearing as a public prosecutor to assert in

argument his personal belief in the accused's guilt." *State v. Reed*, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984) (internal citation omitted) (during closing arguments, the prosecutor commented Reed was a "liar" and stated the defense did not have a case, which prejudiced the defendant's "sole defense theory," resulting in reversal of the murder conviction and remand for a new trial.)

Here, the prosecutor commented as follows during rebuttal closing argument: "frankly, the Defendant's story is pretty much – well, there's not really words for it other than it's a complete lie... everything, pretty much everything the Defendant said up on the stand was a lie." RP 176.

These comments were so flagrantly improper that no curative instruction would have remedied the prejudice to the defendant. Defense counsel had just presented closing argument and reiterated the defense theory of the case, that Mr. Przespolewski did not knowingly possess his father's firearm, when the prosecutor countered with the above comments in rebuttal. RP 172-75, 176. The defense theory was primarily based on Mr. Przespolewski's testimony that he had retrieved a shirt from the glovebox of his parents' vehicle, not realizing there was a gun wrapped in that shirt when he went to test drive the vehicle at the car lot. RP 135-36. It was the jury's sole prerogative to decide whether to believe Mr. Przespolewski's testimony.

An untainted jury could have chosen to believe Mr. Przespolewski, despite the other evidence presented in this case. The salespersons at the dealership did not notice Mr. Przespolewski carrying a gun when he went to the vehicle that was to be test driven (RP 77), and they only said they noticed the gun sticking out from a wallet after the salesman brought it from the dealership vehicle back to Mr. Przespolewski and placed it inside Mr. Przespolewski's parents vehicle through the passenger's side (RP 64-65, 79, 86). Mr. Przespolewski said he then noticed the gun located on the front seat when he picked up his wife and she moved items to the back of the vehicle, including the gun. RP 139-40, 142-43, 147. A jury could have chosen to believe Mr. Przespolewski did not knowingly possess the firearm during these events.

A jury could have also found Mr. Przespolewski's statements to his mother in the recorded jail phone call consistent with this testimony, since the defendant never indicated he knew there was a firearm in the vehicle until sometime after the salesman placed it in the vehicle. RP 152. And, a jury could have found the defendant's statements to the officer, wherein he told the officer where the firearm was located (RP 148), consistent with the rest of the defendant's testimony that he did not know about the firearm until after the salesman placed it in his parents' vehicle and his wife relocated it to the back of the vehicle. Regardless, the jury

could have chosen to reject any testimony or evidence that could be considered inconsistent with Mr. Przespolewski's testimony, since it was the jury's sole duty and right to do so as the exclusive fact finders of this trial.

Ultimately, the question is not whether sufficient evidence supported Mr. Przespolewski's conviction, but whether the prosecutor's improper comments that Mr. Przespolewski had lied while testifying unfairly prejudiced the defendant's right to an impartial jury. Like in *Reed, supra*, the entire defense theory relied on the jury believing the defendant's testimony. But when the prosecutor expressed his personal belief that Mr. Przespolewski was guilty, specifically that his testimony was all a "complete lie," Mr. Przespolewski was prejudiced by the infringement on having the jury decide which witnesses to believe and what facts were true in this case.

It is no more this Court's position to determine the truth of the evidence in this case than for the prosecutor to instruct the jury on the truths of the case. The jury is charged with the sole duty of determining credibility and deciding which facts to believe. Mr. Przespolewski never experienced the opportunity to present his defense theory to an untainted jury, since the prosecutor personally opined on his credibility and guilt and

invaded that independent, impartial jury trial right by functioning as the thirteenth juror.

Based on the foregoing, Mr. Przespolewski respectfully requests this Court reverse his conviction and remand for a new trial.

Issue 2: Whether the trial court erred by rejecting the defendant's request for a low-end standard-range sentence based on the defendant exercising his constitutional right to a jury trial.

In the event this Court affirms Mr. Przespolewski's convictions, the matter should still be remanded for resentencing. The trial court abused its discretion by rejecting Mr. Przespolewski's request for a low-end standard range sentence on an impermissible basis: the defendant's decision to exercise his constitutional right to a jury trial. It is not clear the trial court would have imposed the same mid-standard range sentence if not for its consideration of this impermissible basis, so remand for resentencing is the proper remedy at this time.

It is true a sentence imposed under the Sentencing Reform Act (SRA) that is within the standard range is generally not appealable. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, "constitutional challenges to a standard range sentence are always allowed." *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). A sentencing court abuses its discretion if it "categorically refuses to impose a particular sentence or if it denies a sentencing request on an

impermissible basis.” *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334, 339 (2006) (internal citation omitted). Thus, a “defendant may appeal a standard range sentence if the sentencing court failed to comply with... constitutional requirements.” *Id.* at 481-82 (internal citations omitted).

The federal and state constitutions guarantee the right to a public trial by an impartial jury. U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22. If the sentence imposed is designed to punish a defendant for exercising his right to go to trial instead of pleading guilty, it is an error of constitutional magnitude that may be appealed. *State v. Sandefer*, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995); RAP 2.5(a). “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

“It is well settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial.” *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982). “[C]ourts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice.” *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973).

In deciding this issue, reviewing courts typically consider the trial court’s remarks and whether those remarks suggest the penalty is based on

the defendant's decision to go to trial rather than plead guilty. *Sandefer*, 79 Wn. App. at 182-83. In *Sandefer, supra*, the defendant asked the sentencing court why he could not receive the sentence originally offered by the State during the plea bargaining phase. *Id.* at 180. The trial court explained it typically gave a "break" of a lower sentence to those who pleaded guilty and, as a result, saved child rape victims from having to testify. *Id.* The Court of Appeals held this was a permissible response by the sentencing court, noting defendants retain no right to a sentence that was rejected during plea bargaining, and holding the sentencing court's remarks did not indicate it had improperly considered the defendant's decision to stand trial when imposing the sentence. *Id.* at 183-84.

In contrast, in *State v. Richardson, infra*, the Court of Appeals reversed and remanded for resentencing, because the sentencing court's comments made it clear the penalty imposed was higher due to the defendant's decision to go to trial rather than plead guilty. *State v. Richardson*, 105 Wn. App. 19, 20-24, 19 P.3d 431 (2001). The *Richardson* court distinguished *Sandefer, supra*, where the *Sandefer* trial "court acknowledged that it routinely decreased the sentence of child molestation defendants who elected to plead guilty." *Id.* at 22-23. "In contrast, because Richardson decided *not* to plead guilty here, the court *increased* the penalty by imposing costs it had previously declined to

impose.” *Id.* at 23. The Court of Appeals held, “[i]n so doing, the [trial] court improperly penalized Richardson’s exercise of his rights.” *Id.*

The basic premise is that a “[sentencing] court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere.” American Bar Ass’n, *Standards for Criminal Justice: Pleas of Guilty*, std. 14-1.8(b) (3d. ed. 1999). Rather, as explained by the Ninth Circuit, “the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty.” *Stockwell*, 472 F.2d at 1188.

Here, the sentencing court did not focus on the facts of this case and the defendant’s personal history, or the protective, deterrent or other purposes sentencing under the SRA, when deciding on the length of confinement to impose. *C.f.*, *Standards for Criminal Justice, supra*; *Stockwell*, 472 F.2d at 1187-88. Indeed, the trial court commented it found the defendant to be a “pleasant” individual, said this was all just “absolutely silly,” and said it “hate[d] sending [Mr. Przespolewski] back

to prison since that's something that's so silly for almost five years.” RP 186. Instead, the trial court focused on the defendant's decision to exercise his constitutional right to go to trial when deciding to reject Mr. Przespolewski's request for a sentence at the bottom of the standard range. The trial court reasoned as follows:

...It's just absolutely amazing to me. And I also can't believe and it's amazing to me that you went to trial and to a 3.5 Hearing on circumstances where you had no chance. And I'm assuming that your attorney told you had no chance, but you took 12 people out of (indiscernible) and missed their job because they had to come up here and you had no defense. I don't understand your thought process.

RP 186.

The court's rejection of the defendant's sentencing request was centered on an impermissible basis: Mr. Przespolewski's exercise of his constitutional right to a jury trial. Unlike in *State v. Sandefer* where the trial court commented it may give lesser sentences to those defendants who decided to plead guilty in order to save child victims from testifying (79 Wn. App. at 180), Mr. Przespolewski's case is much more akin to *State v. Richardson*, where the trial court explained the higher penalty resulted from the defendant taking his case to trial (105 Wn. App. at 22-23). The trial court here emphasized the hassle caused to the 12 jurors who were forced to miss their jobs as a result of this underlying trial. RP 186. But this very fact of jurors missing work is an unavoidable part of

our system of jurisprudence whenever a person exercises his constitutional right to a jury trial, and Mr. Przespolewski should not be punished for exercising that right. To punish Mr. Przespolewski “because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *Bordenkircher*, 434 U.S. at 363.

Mr. Przespolewski respectfully requests this Court remand for resentencing to ensure his punishment is not based on the lawful exercise of the defendant’s constitutional rights.

Issue 3: Whether the court’s finding that Mr. Przespolewski had the ability to pay legal financial obligations, and its imposition of \$1,315.10 in discretionary costs against this defendant whose sole source of income is SSI disability benefits, was unsupported by the record and contrary to state and federal law.

The court entered a finding that it had considered the total amount owing, the defendant’s present, and future ability to pay legal financial obligations (LFOs), including the defendant’s financial resources and the likelihood that the defendant’s status will change. CP 80. The court then imposed a total of \$2,115.10 in LFOs, of which \$800 were mandatory costs and the remaining \$1,315.10 were discretionary costs.¹

The trial court’s imposition of LFOs in this case was clearly erroneous, especially given the Supreme Court’s decision 10 days after Mr. Przespolewski was sentenced in *City of Richland v. Wakefield*, 186

¹ Mandatory costs included the \$500 victim assessment fee, \$200 criminal filing fee and \$100 DNA collection fee. RCW 7.68.035(1)(a); RCW 36.18.020(2)(h); RCW 43.43.7541; *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013).

Wn.2d 596, 599-613, 380 P.3d 459 (2016). There, the Supreme Court acknowledged, “federal law prohibits courts from ordering defendants to pay LFOs if the person’s only source of income is social security disability.” *Id.* at 609.

Furthermore, the trial court never engaged in the required inquiry to make its finding that Mr. Przespolewski had the likely present or future ability to pay LFOs. And, the court’s finding of ability to pay is actually inconsistent with Mr. Przespolewski’s indigent and disabled status, which render his financial circumstances dire and unlikely to change in the future. Finally, while the trial court asked Mr. Przespolewski what amount he may be able to pay toward LFOs once he was released, and received an answer of \$25 per month, the trial court then ignored Mr. Przespolewski’s disabled status along with the effect of compounding interest on that debt, and ordered the payments to commence immediately rather than upon Mr. Przespolewski’s release. RP 187; CP 84.

Mr. Przespolewski requests this Court exercise its discretion to decide this LFO issue and order Mr. Przespolewski’s discretionary LFOs be stricken from his judgment and sentence. Mr. Przespolewski acknowledges his attorney did not challenge the LFOs below, but he asks this Court to exercise its discretion to decide this issue, particularly because one of the principal cases upon which he relies was decided 10

days after his sentencing hearing. *See* RAP 2.5(a) (appellate courts have discretion to accept review of claimed errors not appealed as a matter of right); *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015) (acknowledging discretion of appellate courts to decide LFO issues for the first time on appeal); *Wakefield*, 186 Wn.2d at 599-611 (decided on 9/22/2016, holding it violates state and federal law to impose LFOs against a person whose sole source of income is social security disability benefits).

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

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

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant’s current or future ability to pay based on the

particular facts of the defendant’s case. *Blazina*, 182 Wn.2d at 834. The record must reflect the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id.* at 837–39. This inquiry requires the court to consider important factors, such as incarceration and a defendant’s other debts, including any restitution. *Id.* at 838-39. *Accord Matter of Flippo*, 187 Wn.2d 106, 110, 385 P.3d 128 (2016).

“[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Blazina*, 182 Wn.2d at 838 (quoting RCW 10.01.160(3)). “[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline or if he receives need-based assistance such as social security, thereby automatically meeting “the GR 34 standard of indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839; *Wakefield*, 186 Wn.2d at 606-07 (emphasis added).

The *Blazina* Court acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful

recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants' inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants' lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 834–837. “Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs.” *Id.* at 837. The *Wakefield* Court recently reiterated these concerns, including that, on average, “a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction than they did when LFOs were initially assessed. 186 Wn.2d at 607 (quoting *Blazina*, 182 Wn.2d at 836).

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant's ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). Where a finding of fact is entered, however, it “is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Id.* (internal quotations omitted).

Ultimately, a finding of fact must be supported by substantial evidence in the record. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Here, Mr. Przespolewski's indigent status rendered him unable to pay LFOs at the time of sentencing and in the future, so the court's finding that he had the ability to pay and its imposition of \$1,315.10 in discretionary LFOs must be set aside. Mr. Przespolewski filed an indigency screening form before trial, stating his sole income source was SSI (CP 8), a stipend income provided to low-income people like Mr. Przespolewski who are disabled (RP 31, 187; *Wakefield*, 186 Wn.2d at 607-09). Mr. Przespolewski informed the court he has serious medical problems, an anxiety disorder, PTSD, ADHD and is considered disabled for SSI purposes. RP 3, 9, 31; CP 8; Report as to Continued Indigency on File. As of sentencing, Mr. Przespolewski had no other source of income other than SSI, he did not receive funds from any other source, he had no money saved, and he had no property. CP 8. This status has not changed, and is unlikely to change in the future, based on Mr. Przespolewski's Report as to Continued Indigency on file with this Court. Mr. Przespolewski's dire financial position is likely to persist indefinitely, considering Mr. Przespolewski's SSI-qualifying disability and the 55

months of incarceration this 50-year-old now faces before reentering society. RP 181; CP 81.

The trial court was required to consider important factors, such as the incarceration Mr. Przespolewski faced, his debts, his financial resources, and the nature of the burden that LFOs would impose on Mr. Przespolewski when he attempts to successfully reenter society. *Blazina*, 182 Wn.2d at 838-39; RCW 10.01.160(3). Given the defendant's indigent and disabled status, the trial court should have "seriously question[ed]" Mr. Przespolewski's ability to pay LFOs. *Id.* The cursory questioning done at sentencing in this case, asking how much Mr. Przespolewski could pay toward LFOs once released (RP 187), did not satisfy the more thorough inquiry that is supposed to precede a finding on Mr. Przespolewski's ability to pay LFOs.

The court's finding of Mr. Przespolewski's ability to pay LFOs is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343. Because Mr. Przespolewski is indigent and receiving SSI need-based assistance, the court should have "seriously question[ed Mr. Przespolewski's] ability to pay LFOs." *Blazina*, 182 Wn.2d at 839; *Wakefield*, 186 Wn.2d at 607. Like in *Wakefield*, the fact that Mr. Przespolewski "qualifies for social security disability is evidence that [he] has a permanent disability that prevents [him] from working."

186 Wn.2d at 610. Accordingly, Mr. Przespolewski's inability to pay LFOs is unlikely to change in the future, and the trial court's contrary finding should be set aside.

Finally, even if the trial court had made the adequate inquiry before imposing LFOs, which it did not, ordering LFOs against this disabled individual is also contrary to federal law. Mr. Przespolewski's case is directly on point with *City of Richland v. Wakefield*, 186 Wn.2d at 599-611. There, like here, the offender was disabled, suffered from attention deficit hyperactivity disorder (ADHD), posttraumatic stress disorder (PTSD), and other medical issues, and the only income source was from social security disability payments. *Id.* at 599; RP 31; Mr. Przespolewski's Report as to Continued indigency. As a threshold matter, the *Wakefield* Court agreed with the analysis Mr. Przespolewski presented above that, under state law, LFOs should not have been imposed when the disabled person had no present or future ability to pay. *Wakefield*, 186 Wn.2d at 599, 607-08. But of even further significance here, the *Wakefield* Court acknowledged that, under federal law, LFOs could not be collected from someone whose sole source of income is SSI disability benefits. *Id.* at 608-09. The Court vacated the LFO order "because it was contrary to both state and federal law regarding LFO enforcement against indigent and disabled people. *Id.* at 611. The Court explained:

Under the Social Security Act, “none of the moneys paid” as part of social security disability benefits “shall be subject to execution, levy, attachment, garnishment, *or other legal process*, or to the operation of any bankruptcy or insolvency law.” 42 U.S.C. § 407(a) (emphasis added). Wakefield argues that the district court's order violated this provision because it legally requires her to make a payment from her social security disability benefits. She reasons that since she has no other income, there is no other source from which her LFOs could be paid.

Wakefield is correct. The United States Supreme Court has already rejected prior state attempts to recoup money from social security disability recipients, even after the money has been deposited in a bank.

Wakefield, 186 Wn.2d at 607-08. In sum, “federal law prohibits courts from ordering defendants to pay LFOs if the person’s only source of income is social security disability.” *Id.* at 609.

The fact that Mr. Przespolewski’s sole source of income is SSI disability benefits is undeniably dispositive in this case. Federal law prohibits courts from ordering defendants like Mr. Przespolewski to pay LFOs where the person’s only source of income is social security disability. *Wakefield*, 186 Wn.2d at 607-09; CP 8.

In sum, the court entered a finding on Mr. Przespolewski’s ability to pay that was not supported by a sufficient, individualized review of the defendant’s circumstances and was not supported by substantial evidence in the record. The finding on Mr. Przespolewski’s ability to pay LFOs was contrary to the record and state and federal law; thus, the

discretionary court costs should be stricken from Mr. Przespolewski's judgment and sentence.

Issue 4: Whether this Court should refuse to impose LFOs on appeal in the event Mr. Przespolewski is not the substantially prevailing party.

Mr. Przespolewski preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

Mr. Przespolewski was found indigent by the trial court, an automatic finding where a person's sole source of income is SSI disability benefits. CP 8, 109-10; GR 34(a)(3)(A)(iii). There has been no change in Mr. Przespolewski's indigent status since that time. *See* Report as to Continued Indigency, on file with this Court, dated 11-17-16.

The imposition of appellate costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*, *supra*, and more recently in *City of Richland v. Wakefield*, *supra*, as set forth in the prior section of this brief. *See Blazina*, 182 Wn.2d at 835-37; *Wakefield*, 186 Wn.2d at 607-11. Additionally, the Supreme Court has made it clear that "federal law prohibits courts from ordering defendants to pay LFOs if the person's only source of income is social security

disability.” *Id.* at 609. The fact that Mr. Przespolewski’s sole source of income once he is released from incarceration is SSI disability benefits forecloses this Court’s ability to impose appellate costs.

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

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, an inquiry into the appellant’s ability to pay would actually demonstrates that the appellant’s

sole source of income is SSI disability benefits, showing the inability to pay appellate costs now or in the future.

The *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that every level of court has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. The *Wakefield* Court reiterated that, not only should LFOs not be imposed against a disabled, indigent defendant whose sole source of income is SSI benefits, it would actually be unlawful pursuant to state and federal law to order those costs. 186 Wn.2d at 607-11. The *Wakefield* Court’s reasoning applies every bit as strongly to costs on appeal where the appellate costs become a part of the judgment and sentence that is imposed against the defendant. RCW 10.73.160(3). Imposing appellate costs against Mr. Przespolewski would contravene state and federal law.

Finally, this Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial

court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839. After viewing Mr. Przespolewski's Report as to Continued Indigency, it is clear his inability to pay LFOs has not changed since the trial court found him indigent. This Report also proves an inability to pay costs in the future.

Mr. Przespolewski asks this Court to exercise its principled discretion and deny appellate costs. Denying appellate costs at this time is consistent with RAP 14.2 (effective January 31, 2017), and state and federal law. This Court, a commissioner of this court, or the court clerk is specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

Unfortunately, Mr. Przespolewski's financial circumstances have not improved. He, therefore, requests this Court deny any request to impose costs against him on appeal.

E. **CONCLUSION**

Mr. Przespolewski respectfully requests this Court reverse and remand for a new trial due to the prejudice that resulted from the prosecutor commenting on his credibility as a witness and the prosecutor personally opining as to the defendant's guilt. Alternatively, Mr. Przespolewski requests this Court remand for resentencing, since the trial court rejected Mr. Przespolewski's sentencing request on an impermissible basis (the defendant's exercise of his constitutional right to a jury trial). Finally, Mr. Przespolewski requests this Court strike all discretionary LFOs from his judgment and sentence and deny any costs that would otherwise be imposed against Mr. Przespolewski on appeal.

Respectfully submitted this 1st day of March, 2017.

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34776-1-III
vs.) Douglas County No. 16-1-00128-2
)
LONNIE LEE PRZESPOLEWSKI,) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 1, 2017, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Lonnie Lee Przespolewski DOC #936710
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Having obtained prior permission, I also served a copy of this same document on the Respondent by email at gedgar@co.douglas.wa.us and sclem@co.douglas.wa.us using Division III's e-service feature.

Dated this 1st day of March, 2017.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com

NICHOLS LAW FIRM PLLC

March 01, 2017 - 1:20 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34776-1
Appellate Court Case Title: State of Washington v. Lonnie Lee Przespolewski

The following documents have been uploaded:

- 347761_20170301131914D3762263_1695_Briefs.pdf
This File Contains:
Briefs - Appellants
The Original File Name was State v. Lonnie Przespolewski 347761 Opening Brief.pdf
- 347761_20170301131914D3762263_6350_Financial.pdf
This File Contains:
Financial - Other
The Original File Name was Report as to Continued Indigency with POS 347761.pdf

A copy of the uploaded files will be sent to:

- gedgar@co.douglas.wa.us
- sclem@co.douglas.wa.us

Comments:

Sender Name: Kristina Nichols - Email: wa.appeals@gmail.com
Address:
PO BOX 19203
SPOKANE, WA, 99219-9203
Phone: 509-731-3279

Note: The Filing Id is 20170301131914D3762263