

No. 34781-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

FERNANDO FRANCISCO,

Appellant.

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

The Honorable Judge Douglas L. Federspiel

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Fernando Francisco and his wife Monica Salazar Mendoza engaged in an argument that escalated into an alleged assault of Ms. Mendoza and damages to Ms. Mendoza's car. Mr. Francisco hit the back window of Ms. Mendoza's car, and very small pieces of glass landed in the backseat, where Mr. Francisco and Ms. Mendoza's three children seated.

Following a jury trial, Fernando Francisco was convicted of five gross misdemeanor offenses: third degree malicious mischief; fourth degree assault; and three counts of reckless endangerment. Mr. Francisco now appeals, arguing there was insufficient evidence to convict him of the three counts of reckless endangerment, because the evidence was insufficient to establish that he created a substantial risk of death or serious physical injury each child by hitting the back window of the car. Mr. Francisco also argues that the State committed misconduct in its closing arguments that was prejudicial and incurable, by shifting the burden of proof to him and commenting on his right to not testify at trial.

In addition, Mr. Francisco argues that trial court erred in imposing a no-contact order that exceeds the maximum sentencing term; challenges the discretionary legal financial obligations imposed by the trial court; and preemptively objects to the imposition of any appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Francisco guilty of three counts of reckless endangerment, where the evidence was insufficient that he created a substantial risk of death or serious physical injury to S.F., F.F., and J.F.
2. The State committed misconduct in its closing arguments that was prejudicial and incurable.
3. The trial court erred by imposing a two-year no contact order on the gross misdemeanor offense that carries a maximum term of 364 days.
4. The trial court erred by failing to conduct a sufficient inquiry into Mr. Francisco's likely present or future ability to pay and imposing discretionary legal financial obligations.
5. An award of costs on appeal against Mr. Francisco would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Francisco guilty of three counts of reckless endangerment, where the evidence was insufficient that he created a substantial risk of death or serious physical injury to S.F., F.F., and J.F.

Issue 2: Whether the State committed misconduct in its closing arguments that was prejudicial and incurable, by shifting the burden of proof to Mr. Francisco and commenting on his right to not testify at trial.

Issue 3: Whether the trial court erred by imposing a two-year no contact order on a gross misdemeanor where the maximum sentencing term is 364 days.

Issue 4: Whether the trial court erred by imposing discretionary legal financial obligations against this indigent defendant without conducting a sufficient inquiry into Mr. Francisco's present or likely future ability to pay.

Issue 5: Whether this Court should deny costs against Mr. Francisco on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

Monica Salazar Mendoza and Fernando Francisco are married with three children in common, S.F., F.F., and J.F. (RP¹ 82-83, 87). On April 1, 2016, Ms. Mendoza and Mr. Francisco were not living together. (RP 85). Mr. Francisco was living with his mother, Michaela Rodriguez. (RP 86-87, 133). That day, Ms. Mendoza picked Mr. Francisco up in her car, so that he could see their children. (RP 87, 98, 116). The three children were seated in the backseat of the car. (RP 88, 90).

While they were driving, Mr. Francisco got a phone call. (RP 88, 129). Mr. Francisco and Ms. Mendoza argued regarding the call, and Ms. Mendoza pulled over to the side of the road. (RP 88-89, 129). Mr. Francisco then struck Ms. Mendoza. (RP 89-90, 129).

Ms. Mendoza drove the car back to the home of Ms. Rodriguez and parked the car. (RP 90-91, 116, 129). Ms. Mendoza got a phone call and a text message, and she and Mr. Francisco continued to argue. (RP

¹ The Report of Proceedings consists of three volumes containing a pretrial hearing and first three days of the jury trial, reported by Joan E. Anderson, and one volume containing the fourth and final day of the jury trial and the sentencing hearing, transcribed by Amy M. Brittingham. The three volumes reported by Ms. Anderson are referred to herein as "RP." The one volume transcribed by Ms. Brittingham is referred to herein as "2 RP."

90-91, 115). Mr. Francisco took Ms. Mendoza's phone and struck her again. (RP 90-91, 129).

Mr. Francisco then got out of the car and hit the car's windshield with Ms. Mendoza's phone, causing damage to the windshield and the phone. (RP 85, 93, 129-130, 182; Pl.'s Ex. 3, 4, 5, 6). Mr. Francisco got onto the hood of the car, and Ms. Mendoza moved the car back and forth to get him off the hood. (RP 93, 116-121, 130-131).

Mr. Francisco also hit the car's back window, causing damage to the window. (RP 94, 106, 121, 130; Pl.'s Ex. 5, 7, 16). Ms. Mendoza and the three children were inside the car during this time. (RP 93-94, 121-122, 130-131).

Ms. Mendoza then got out of the car, and she and Mr. Francisco engaged in a physical altercation. (RP 94-98, 108-111, 122). Mr. Francisco left the scene in his car. (RP 97-98, 138, 148, 156-158). Ms. Mendoza went to a neighbor's house and called 911. (RP 83-85, 99; Pl.'s Ex. 20).

The State charged Mr. Francisco with one count of second degree malicious mischief (domestic violence); one count of fourth degree assault (domestic violence); and three counts of reckless endangerment (domestic violence), with one count for each of the three children, S.F., F.F., and J.F.

(CP 87-88).² The trial court found Mr. Francisco “indigent but able to contribute,” and appointed counsel to represent him at public expense. (CP 11, 18, 171).

The case proceeded to a jury trial. (RP 70-301, 2 RP 6-74). State’s Exhibit No. 7 admitted into evidence, is an enlarged photograph of the back seat of Ms. Mendoza’s car, with glass pieces on the seat. (RP 64, 102-103, 106; Pl.’s Ex. 7).

At the jury trial, witnesses testified consisted with the facts stated above. (RP 82-227).

Ms. Mendoza testified Mr. Francisco “grabbed a metal bar and broke my back window.” (RP 94). She testified the three children were in the back of the car at the time. (RP 94, 106). She testified “glass is getting all over them.” (RP 94).

Yakima County Sheriff’s Office Sergeant Cory Sanderson testified he did not find a metal bar at the scene, but he found a baseball bat located in the front yard. (RP 168, 174). He testified Ms. Mendoza was allegedly armed with the baseball bat. (RP 181).

Sergeant Sanderson testified the type of glass used in automobiles is safety glass. (RP 184). He explained what safety glass is: “[t]he glass

² The State also charged Mr. Francisco with one count of Interfering with Reporting of Domestic Violence. (CP 88). This count was dismissed with prejudice, following the State’s case-in-chief. (CP 142-143; RP 202-203). Therefore, this count is not on appeal here.

is covered with a laminate, and the glass is also designed to break into pieces that aren't sharp to minimize cutting and keep the glass intact upon impact.” (RP 184). He further testified that safety glass is used in automobiles to reduce injuries and protect people from any kind of shards. (RP 184).

Ms. Rodriguez testified she was home when the incident occurred. (RP 135-136). She testified she observed Mr. Francisco and Ms. Mendoza yelling at each other and fighting over Mr. Francisco's car keys, but that she did not observe a physical altercation between them. (RP 136-139, 140). She testified Ms. Mendoza grabbed her, pushed her, and tried to hit her. (RP 138-139). Ms. Rodriguez also testified she observed injuries on Mr. Francisco. (RP 136-137, 147, 153). She testified she saw a bat at the scene, and that Mr. Francisco said Ms. Mendoza wanted to hit his car with a bat. (RP 143, 147-148).

Ms. Rodriguez testified she had not seen the damage to the back window of Ms. Mendoza's car, as depicted in State's Exhibit No. 5, prior to the day in question. (RP 153; Pl.'s Ex. 5).

Mr. Francisco's sister Ms. Flores testified that she called the police on the day in question, to report that Ms. Mendoza assaulted Ms. Rodriguez. (RP 211, 213-214). She testified there was not any previous

damage to the back window of Ms. Mendoza's car. (RP 212-213; Pl.'s Ex. 5).

The trial court instructed the jury on self-defense. (CP 114-117; 2 RP 15-16). In its closing argument, the State argued regarding self-defense:

I've got to disprove this beyond a reasonable doubt . . . that there's self-defense. But the thing is that we're - - we don't even have - - you'd have to speculate to find him guilty by self-defense because there's all these elements to it.

. . . .

Okay, here's one thing we have no evidence about and that is that for there to be self-defense, you have to be able to find that - - that he believed he's about to be injured. What's the evidence of that? There's no evidence about what he believed. No evidence at all about what he believed. I would suggest that you stop right there. You know, if you want to go - - if you want to go a step further - - and there's no reason why you should. I think you'd just have to speculate. I would argue to you you'd just have to speculate in order to - - to say that he believed he was about to be injured because we don't know what he believed. No evidence about that whatsoever about what he really actually believed - - what was in his mind at that time.

(2 RP 41-42).

In its rebuttal closing argument, the State again argued regarding self-defense:

And once again, no evidence that he actually believed that he was going to be harmed. No evidence of that at all. It's just a distraction I would suggest to you. It's a - - you'd have to speculate to be able - - to find self-defense in this case.

(2 RP 57).

The State further argued:

And we had a witness that had the courage to come and testify and you listened to her testimony. You looked at all the other evidence. Considered the fact there wasn't anyone that really contradicted almost everything that she said.

(2 RP 61).

The jury found Mr. Francisco guilty of the lesser-included offense of third degree malicious mischief; fourth degree assault; and the three count of reckless endangerment. (CP 128-132, 142-148; 2 RP 64-65). The jury also returned special verdicts for each count, finding that Mr. Francisco and Ms. Mendoza, and Mr. Francisco and S.F., F.F., and J.F., were "family or household members" at the time of the offenses." (CP 133, 135-138, 143; 2 RP 65-66, 72).

At sentencing, the trial court imposed a sentence of 364 days confinement, with 94 days suspended. (CP 144; 2 RP 98).

Addressing legal financial obligations, the trial court asked Mr. Francisco about employment, property or assets, and child support. (CP 143; 2 RP 95-97). Mr. Francisco told the trial court he was employed prior to this incident, that his average monthly net paycheck was \$2,000 to \$2,500, and that he thinks his employer will hire him back. (2 RP 95-96). He also told the trial court he supports four children and has no property or other assets. (2 RP 95-97). Mr. Francisco pays child support for three of

his children, and he told the trial court that although he “currently got all caught up with that . . . I just paid that off and during my incarceration it’s just adding up as well.” (2 RP 95, 97).

After this colloquy, the trial court stated “[b]ecause of your financial circumstances, I’m going to provide you some financial relief on some of the obligations.” (2 RP 99). The trial court imposed \$1250 in legal financial obligations: \$500 crime penalty assessment; \$200 criminal filing fee; \$300 court appointed attorney recoupment; and \$250 jury fee. (CP 145; 2 RP 99-100, 102). The trial court also imposed costs of incarceration, up to \$500, and \$493 in restitution. (CP 145, 172-173; 2 RP 99, 102). Mr. Francisco did not object. (2 RP 99-100, 102).

The Judgment and Sentence contains the following boilerplate language:

2.5 Financial Ability: The Court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay legal financial obligations imposed herein. RCW 10.01.160.

(CP 143).

The Judgment and Sentence also contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total financial obligations.” (CP 145).

The trial court entered a domestic violence no-contact order prohibiting Mr. Francisco from contacting Ms. Mendoza. (CP 149-150; 2 RP 98, 100-103). The trial court set an expiration date for the order of October 4, 2018, two years from the date of sentencing. (CP 149-150; 2 RP 101, 103). Mr. Francisco did not object. (2 RP 89).

Mr. Francisco timely appealed. (CP 151). The trial court entered an Order of Indigency, granting Mr. Francisco a right to review at public expense. (CP 152-159).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Francisco guilty of three counts of reckless endangerment, where the evidence was insufficient that he created a substantial risk of death or serious physical injury to S.F., F.F., and J.F.

Mr. Francisco's actions in hitting the back window of Ms. Mendoza's car, resulting in very small pieces of safety glass landing where S.F., F.F., and J.F. were seated in the backseat, did not create a considerable risk of death or serious physical pain or injury to S.F., F.F., and J.F. Therefore, the evidence is insufficient to support his convictions for reckless endangerment of S.F., F.F., and J.F.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the

evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence “is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt.” *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from

which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff’d*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . .”). “A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is ‘manifest.’” *Id.*

To find Mr. Francisco guilty of each of the three counts of reckless endangerment, the jury had to find two elements, that he “[1] recklessly engage[d] in conduct . . . [2] that creates a substantial risk of death or serious physical injury to another person[,]” S.F., F.F., and J.F. RCW 9A.36.050(1); *see also* CP 118-122.

Addressing the first element of reckless endangerment, “[a] person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of

such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c); CP 119; *see also State v. Rich*, 184 Wn.2d 897, 904–05, 365 P.3d 746 (2016) (applying this definition to reckless endangerment). Thus, whether “an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts[.]” *State v. Graham*, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005) (quoting *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999)).

To prove the second element of reckless endangerment, the State must prove that the defendant’s reckless conduct created “a substantial risk of death or serious physical injury to another person[.]” RCW 9A.36.050(1). A “risk” is not a certainty. *See Rich*, 184 Wn.2d at 904.

Our Supreme Court has defined “substantial” as “considerable in amount, value, or worth and more than just having some existence.” *Rich*, 184 Wn.2d at 904-05 (citations omitted) (internal quotation marks omitted). In addition, there is no statute defining “serious physical injury.” *Id.* at 904. RCW 9A.04.110(4)(a) defines “physical injury” as “physical pain or injury, illness, or an impairment of physical condition[.]”

Therefore, in order to convict Mr. Francisco of reckless endangerment, the State had to prove beyond a reasonable doubt that Mr. Francisco knew of and disregarded a considerable risk - not a certainty -

of death or serious physical pain or injury that his conduct posed to S.F., F.F., and J.F., and that his behavior constituted a gross deviation from how a reasonable person would have acted based on the known facts.

See Rich, 184 Wn.2d at 905 (setting forth this standard).

Here, there was insufficient evidence of the second element of reckless endangerment, “conduct . . . that creates a substantial risk of death or serious physical injury to another person.” RCW 9A.36.050(1).

Specifically, there was insufficient evidence that Mr. Francisco created a substantial risk of death or serious physical injury to S.F., F.F., and J.F., when he hit the back window of Ms. Mendoza’s car while S.F., F.F., and J.F. were seated in the backseat. (RP 88, 90, 94, 106, 121, 130; Pl.’s Ex. 5, 7, 16).

Although there was glass found on the back seat and Ms. Mendoza testified that glass got all over S.F., F.F., and J.F., the type of glass used in automobiles is safety glass. (RP 94, 184; Pl.’s Ex. 7). Safety glass is covered with laminate, and designed to break into pieces that are not sharp, in order to minimize cutting. (RP 184). It is used in automobiles to reduce injuries and protect people from shards. (RP 184).

Given the fact that the back window was made of safety glass, and that therefore the broken pieces of glass in the backseat were not sharp (RP 184), Mr. Francisco’s actions in hitting the back window did not

create a considerable risk of death or serious physical pain or injury to S.F., F.F., and J.F. *See Rich*, 184 Wn.2d at 905. Also, the broken pieces of glass in the backseat were very small, and therefore, did not pose such a risk. (Pl.'s Ex. 7). There was not a considerable risk that the very small pieces of safety glass could cut S.F., F.F., or J.F., or that the glass could be fatally ingested by them.

In addition, the object that broke the back window did not pass through the car, and therefore, it did not pose a considerable risk of death or serious physical pain or injury to S.F., F.F., and J.F.

There was insufficient evidence presented at trial that Mr. Francisco created a substantial risk of death or serious physical injury to S.F., F.F., and J.F. A rational jury could not have found Mr. Francisco guilty of the three counts of reckless endangerment beyond a reasonable doubt. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22); *see also* CP 120-121; RCW 9A.36.050(1)). His three convictions for reckless endangerment should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy).

Issue 2: Whether the State committed misconduct in its closing arguments that was prejudicial and incurable, by shifting the burden of proof to Mr. Francisco and commenting on his right to not testify at trial.

In its closing arguments, the State committed misconduct by implying that Mr. Francisco had a duty to present evidence, both regarding self-defense and regarding the charges in general, and by commenting on his right to not testify at trial. The misconduct was prejudicial and incurable, and therefore, requires 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)); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant “must first show that the prosecutor's statements are improper.”).

If the defendant fails to properly 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 quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328,

336, 26 P.3d 1017 (2001)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). “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.” *Id.* at 762.

“[A] prosecutor has wide latitude to argue reasonable inferences from the evidence.” *Thorgerson*, 172 Wn.2d at 453. “However, it is improper for the prosecutor to argue that the burden of proof rests with the defendant.” *Id.* “A prosecutor generally cannot comment on the defendant's failure to present evidence because the defendant has no duty to present evidence.” *Id.* (citing *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003)).

“A prosecutor may commit misconduct if he mentions in closing argument that the defense did not present witnesses or explain the factual basis of the charges or if he states that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory.” *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553 (2009). However, “[t]he mere mention that defense evidence is lacking does not

constitute prosecutorial misconduct or shift the burden of proof to the defense.” *Id.* at 885–86. “It is improper to imply that the defense has a duty to present evidence.” *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009) (citing *State v. McKenzie*, 157 Wn.2d 44, 58–59, 134 P.3d 221 (2006)).

Both the federal and state constitutions protect a criminal defendant's rights to remain silent and be free from self-incrimination. U.S. Const. amend. V; Wash. Const. art. 1, § 9. A prosecutor violates these rights when he improperly comments on a defendant's refusal to testify. *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987).

“A prosecutor violates a defendant's Fifth Amendment rights if the prosecutor makes a statement ‘of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify.’” *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728–29, 899 P.2d 1294 (1995) (internal quotation marks omitted) (quoting *Ramirez*, 49 Wn. App. at 336). “The prosecutor may say that certain testimony is undenied as long as he or she does not refer to the person who could have denied it.” *Id.* at 729 (citing *Ramirez*, 49 Wn. App. at 336). When a prosecutor asserts that certain facts are undisputed or that there was no evidence as to contrary facts, there is no violation of a defendant's Fifth Amendment

rights unless “no one other than [the defendant] himself could have offered the explanation the State demanded.” *Id.*

Here, in its closing argument, the State argued as follows, addressing self-defense:

I’ve got to disprove this beyond a reasonable doubt . . . that there’s self-defense. But the thing is that we’re - - we don’t even have - - you’d have to speculate to find him guilty by self-defense because there’s all these elements to it.

. . . .

Okay, *here’s one thing we have no evidence about* and that is that for there to be self-defense, you have to be able to find that - - that he believed he’s about to be injured. *What’s the evidence of that? There’s no evidence about what he believed. No evidence at all about what he believed.* I would suggest that you stop right there. You know, if you want to go - - if you want to go a step further - - and there’s no reason why you should. I think you’d just have to speculate. I would argue to you you’d just have to speculate in order to - - to say that he believed he was about to be injured because we don’t know what he believed. *No evidence about that whatsoever about what he really actually believed - - what was in his mind at that time.*

(2 RP 41-42) (emphasis added).

In its rebuttal closing argument, the State again addressed self-defense:

And once again, *no evidence that he actually believed that he was going to be harmed. No evidence of that at all.* It’s just a distraction I would suggest to you. It’s a - - *you’d have to speculate to be able - - to find self-defense in this case.*

(2 RP 57) (emphasis added).

The State further argued:

And we had a witness that had the courage to come and testify and you listened to her testimony. You looked at all the other evidence. *Considered the fact there wasn't anyone that really contradicted almost everything that she said.*

(2 RP 61) (emphasis added).

The State committed misconduct in its closing arguments by shifting the burden of proof to Mr. Francisco and commenting on his right not to testify at trial. The State implied that Mr. Francisco had a duty to present evidence, both regarding self-defense (2 RP 41-42, 57), and regarding the charges in general (2 RP 61). *See Toth*, 152 Wn. App. at 615. The State did not merely point out a lack of evidentiary support for Mr. Francisco's theory, but rather, impermissibly implied that Mr. Francisco was required to present evidence. *See Jackson*, 150 Wn. App. at 885-86.

The State improperly argued that Mr. Francisco had the burden of proof to prove self-defense, rather than properly arguing the State had the burden of proof to disprove self-defense. (2 RP 41-42, 57); *see also Thorgerson*, 172 Wn.2d at 453; *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (stating that “[t]o be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden

shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt.”).

The State’s arguments also improperly commented on Mr. Francisco’s constitutional right to remain silent and be free from self-incrimination. (2 RP 41-42, 57, 61); *see also* U.S. Const. amend. V; Wash. Const. art. 1, § 9; *Ramirez*, 149 Wn. App. at 336. Only Mr. Francisco could have offered the explanation demanded by the State, because the only testifying eyewitnesses to the incident were Mr. Francisco and Ms. Mendoza. *See Fiallo-Lopez*, 78 Wn. App. at 729.

The State’s argument prejudiced Mr. Francisco. *See Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). There was evidence that Mr. Francisco acted in self-defense, and the jury was instructed on self-defense. (CP 114-117; RP 93, 116-121, 130-131, 143, 147-148, 181; 2 RP 15-16). There was evidence that Ms. Mendoza was an aggressor during the confrontation, by moving her car back and forth to get Mr. Francisco off of the hood; being armed with a baseball bat and wanting to hit Mr. Francisco’s car with the bat; and that she grabbed, pushed, and tried to hit Ms. Rodriguez. (RP 93, 116-121, 130-131, 143, 147-148, 181).

The State’s misconduct ““was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.””

O'Donnell, 142 Wn. App. at 328 (quoting *Munguia*, 107 Wn. App. at 336); see also *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). No curative instruction would have alleviated the view in the jurors' minds that it was Mr. Francisco's duty to present evidence to counter Ms. Mendoza's account of the incident; the view that he had to prove he acted in self-defense; and the view that they must believe Ms. Mendoza because Mr. Francisco exercised his constitutional right to remain silent at trial.

The State committed misconduct in its closing arguments that was prejudicial and incurable, by shifting the burden of proof to Mr. Francisco and commenting on his right to not testify at trial. This Court should reverse his convictions and remand for a new trial.

Issue 3: Whether the trial court erred by imposing a two-year no contact order on a gross misdemeanor where the maximum sentencing term is 364 days.

Mr. Francisco was convicted of two crimes involving Ms. Mendoza: third degree malicious mischief and fourth degree assault, both gross misdemeanors. The trial court erred by imposing a two-year no-contact-order as to Ms. Mendoza, because it exceeded the maximum 364-day sentence for the gross misdemeanor offenses of third degree malicious mischief and fourth degree assault.

A trial court's authority to impose conditions of a sentence is limited to the authority provided by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Sentencing errors can be addressed for the first time on appeal pursuant to RAP 2.5. *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996). In general, sentencing conditions, including the terms of a no contact order, cannot exceed the maximum term for the crime. *State v. Rodriguez*, 183 Wn. App. 947, 959, 335 P.3d 448 (2014), *review denied*, 182 Wn.2d 1022 (2015); *accord State v. Armendariz*, 160 Wn.2d 106, 120, 156 P.3d 201 (2007).

Mr. Francisco was convicted of third degree malicious mischief and fourth degree assault, both gross misdemeanors. (CP 128-129; 2 RP 64-65); *see also* RCW 9A.36.041(2) (fourth degree assault); RCW 9A.48.090(2) (third degree malicious mischief). These gross misdemeanors carry a maximum term sentence of 364 days confinement, plus fines. *See* RCW 9.92.020; RCW 9A.20.021(2).

Therefore, the two-year no-contact-order as to Ms. Mendoza exceeded the maximum term for these gross misdemeanor convictions and should be vacated or amended to a term of no longer than 364 days. *See, e.g., State v. Bronowski*, No. 33599-2-III, 2016 WL 3483528, at *4 (Wash. Ct. App. June 21, 2016) (holding that the trial court abused its discretion

in entering a five-year no-contact order protecting a victim of a gross misdemeanor, and imposing this remedy); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Issue 4: Whether the trial court erred by imposing discretionary legal financial obligations against this indigent defendant without conducting a sufficient inquiry into Mr. Francisco’s present or likely future ability to pay.

Mr. Francisco requests this Court remand this case for resentencing and direct the trial court to strike the discretionary legal financial obligations (LFOs) from his judgment and sentence. (CP 145). The trial court’s boilerplate finding that Mr. Francisco had the present or likely future ability to pay was not supported by the record. (CP 143). The imposition of discretionary costs is inconsistent with the principles enumerated in *Blazina, infra*, *Blank, infra*, and *Mahone, infra*.

As a threshold matter, “[a] defendant who makes no objection to the imposition of discretionary LFOs [legal financial obligations] at sentencing is not automatically entitled to review.” *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Instead, “RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right . . . [and] [e]ach appellate court must make its own decision to accept discretionary review.” *Id.* at 834-35.

Mr. Francisco asks this Court to exercise its discretion under RAP 2.5(a) to decide the LFO issue for the first time on appeal. *See id.* The factors identified by this Court when deciding whether to exercise its discretion to decide the LFO issue weigh in favor of deciding the issue. *See State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 693, 370 P.3d 989 (2016) (stating “[a]n approach favored by this author is to consider the administrative burden and expense of bringing a defendant to court for a new hearing, versus the likelihood that the discretionary LFO result will change.”). The trial court would not have to hold a resentencing hearing only to address this issue, because remand is already required to address the erroneous no-contact order (Issue 4 above). And, because Mr. Francisco is not incarcerated, the State would not incur the cost of transporting him to court. In addition, there is a high likelihood that a new sentencing hearing would change the LFO amount, given Mr. Francisco’s other debts stated in his report as to continued indigency, filed in this Court on the same day as this opening brief.

Turning to the substantive issue, the court may order a defendant to pay LFOs, including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). Mr. Francisco was ordered to pay mandatory court costs (\$500 crime penalty assessment and \$200 criminal filing fee) and discretionary court costs (\$300 court

appointed attorney recoupment and \$250 jury fee). (CP 145; 2 RP 99-100, 102); *see also In re Personal Restraint of Dove*, 196 Wn. App. 148, 152, 381 P.3d 1280 (2016) (acknowledging that a \$500 crime victim assessment and a \$200 criminal filing fee are mandatory LFOs, and a court appointed attorney fee is a discretionary LFO). The trial court also imposed costs of incarceration, up to \$500, which is discretionary. (CP 145; 2 RP 99, 102); *see also State v. Leonard*, 184 Wn.2d 505, 507, 358 P.3d 1167 (2015) (costs of incarceration are discretionary).

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

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

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant’s current or future ability to pay based on the particular facts of the defendant’s case. *Blazina*, 182 Wn.2d at 834. The record must reflect that 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.

“[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 and thereby meets “the GR 34 standard of indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

The *Blazina* court specifically 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.

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, 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, the court found “the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.” (CP 143). But this finding was clearly erroneous. Although the trial court asked Mr. Francisco about

employment, property or assets, and child support, it did not consider Mr. Francisco's other debts. (CP 143; 2 RP 95-97); *see also Blazina*, 182 Wn.2d at 838-39 (holding that the inquiry under RCW 10.01.160(3) "requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay."); *Gonzalez-Gonzalez*, 193 Wn. App. at 692 n.2 (acknowledging that *Blazina* makes clear that the sentencing court must consider a defendant's other debts). Mr. Francisco's report as to continued indigency, filed in this Court on the same day as this opening brief, states that he owes more than \$15,000 in LFOs. Assuming the majority of these LFOs existed prior to sentencing in this case, the amount of outstanding debt weighs against a finding that Mr. Francisco has the current or future ability to pay LFOs.

Our Supreme Court in *Blazina* detailed the inquiry the trial court should undertake before finding that a defendant has the ability to pay, but the trial court did not consider Mr. Francisco's outstanding debts, the LFOs he already owed. The court's finding that Mr. Francisco had the present or likely future ability to pay LFOs was not made after a sufficient individualized inquiry. The court's finding is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343.

The finding on Mr. Francisco's ability to pay LFOs should be set aside, and discretionary court costs, the \$300 court appointed attorney recoupment, the \$250 jury fee, and the costs of incarceration, should be stricken from Mr. Francisco's judgment and sentence.

Issue 5: Whether this Court should deny costs against Mr. Francisco on appeal in the event the State is the substantially prevailing party.

Mr. Francisco preemptively objects to any appellate costs being imposed against him, 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).

At sentencing, the trial court inquired into Mr. Francisco's current and future ability to pay legal financial obligations (LFOs). (CP 143; 2 RP 95-97). After Mr. Francisco informed the trial court he was employed prior to this incident and thought his employer would hire him back, and that he was current with his child support payments, the trial court imposed mandatory, and some discretionary, LFOs. (CP 145, 172-173; 2 RP 95-96, 99-100, 102). Subsequently, the trial court entered an Order of Indigency. (CP 152-159).

An order finding Mr. Francisco indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 152-159). To the contrary, Mr. Francisco’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Francisco remains indigent. The report, filed over five months after the date of sentencing, shows that Mr. Francisco’s financial circumstances have not improved and are arguably more dire, considering he has been unable to secure employment.

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

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as 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, Mr. Francisco has demonstrated his indigency and current and future inability to pay costs.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.”

GR 34 cmt. (emphasis added). The *Blazina* court 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. Mr. Francisco met this standard for indigency. (CP 152-159).

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 152-159. “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) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Francisco to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Francisco’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Francisco remains indigent.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the “supreme court . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991

P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State's requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now 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.*

There is no evidence Mr. Francisco's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Francisco remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Francisco guilty of three counts of reckless endangerment. These convictions should be reversed and the charges dismissed with prejudice.

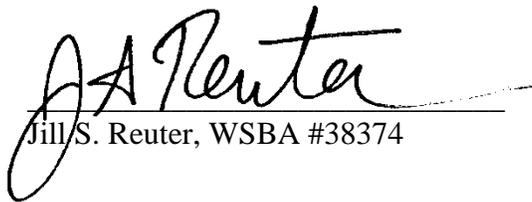
At a minimum, Mr. Francisco's convictions should be reversed and remanded for a new trial because the State committed misconduct in its closing arguments that was prejudicial and incurable.

In addition, Mr. Francisco's sentence should be corrected so that the two-year no-contact order as to Ms. Mendoza does not exceed the maximum 364-day sentencing term for the third degree malicious mischief and fourth degree assault convictions.

Mr. Francisco also requests this Court remand the case for the trial court to strike discretionary LFOs from Mr. Francisco's judgment and sentence: the \$300 court appointed attorney recoupment, the \$250 jury fee, and the costs of incarceration.

Finally, Mr. Francisco asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 14th day of April, 2017.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

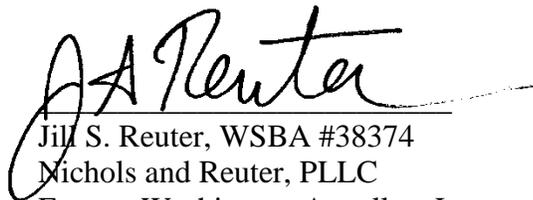
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34781-8-III
vs.)
FRANCISCO FERNANDO)
Defendant/Appellant)
PROOF OF SERVICE
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 14, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Fernando Francisco
161 Yakima Street
Parker, WA 98939

Having obtained prior permission from the Yakima County Prosecutor's Office, I also served the Respondent State of Washington at appeals@co.yakima.wa.us using the Washington State Appellate Courts' Portal.

Dated this 14th day of April, 2017.


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