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Court of Appeals
Division III
State of Washington

NO. 34924-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN CALVERT,

Appellant.

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

The Honorable James M. Triplet, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Nathan John Calvert's motion to suppress his confession obtained by police, in entering findings of fact 2.3 and 2.6, and in entering conclusions of law 3.2, 3.3, 3.4, 3.5, and 3.6. CP 95-96.¹

2. The trial court erred in determining the \$200 criminal filing fee pursuant to a RCW 36.18.020(2)(h) was a mandatory legal financial obligation and imposing it without considering Calvert's ability to pay.

Issues Pertaining to Assignments of Error

1a. The State bears the heavy burden to prove that Calvert understood his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and that Calvert knowingly, voluntarily, and intelligently waived these rights. Did the State fail to carry this burden where a police officer (a) read Calvert his rights immediately after he was attacked by a police dog and (b) did not receive any acknowledgment, understanding, or waiver from Calvert because, by the officer's own admission, Calvert was paying no attention to the reading of Miranda rights given that he had just been attacked by a police dog.

1b. Did the trial court improperly shift the burden to Calvert prove he did not understand or waive his rights when it concluded, "The

¹ The trial court's CrR 3.5 findings of fact and conclusions of law are appended.

defendant was advised of his constitutional rights,” “Although the defendant did not verbally acknowledge those rights, there is no evidence that he didn’t understand these rights,” “The State has established that the defendant underst[oo]d these rights when he made statements,” and “These statements were knowing, voluntary and intelligent”? CP 96 (conclusions of law 3.2, 3.3, 3.4, and 3.5).

2. Given the plain language of RCW 36.18.020(2)(h), the differences in text between RCW 36.18.020(2)(h) and other provisions of RCW 36.18.020(2)(h), the differences between RCW 36.18.020(2)(h) and other statutes imposing mandatory legal financial obligations, and the similarities between RCW 36.18.020(2)(h) and another statute requiring a defendant “shall be liable” for discretionary legal financial obligations, is the \$200 criminal filing fee a waivable, discretionary legal financial obligation?

B. STATEMENT OF THE CASE

1. Factual and procedural background

The State charged Calvert with (1) residential burglary, (2) possession of a stolen motor vehicle, (3) attempt to elude a police vehicle, (4) failure to remain at the scene of an accident, and (5) possession of a controlled substance. CP 1-2.

The charges arose from a series of incidents on August 16, 2015 in Spokane. After spending the day away from home, the Zuniga-Aguilera family returned in the evening. RP 107-08. Luis Zuniga was about 10 minutes ahead of the rest of the family and opened the garage, forgetting to close it before he left to park his car on the street. RP 107-08. Sofia Aguilera entered her garage; there were no overhead lights. RP 115, 121. She noticed someone emerging from behind a trailer in the garage who stated he was the garage to pee. RP 117. Aguilera was shocked and screamed for help. RP 118.

The man in the garage said he was doing “nothing” in the garage and immediately ran. 108, 122, 127, 133, 141. Several family members gave chase but were unable to locate the intruder. RP 108, 137, 141-43.

Spokane Sheriff's Corporal Jeff Thurman was en route to the Zuniga-Aguilera household when he noticed a vehicle travelling with no headlights. RP 71. He assumed the car was involved in the burglary, explaining that in his training and experience, people who commit crimes at need do not use headlights to use the “cover of darkness.” RP 72. Thurman gave chase and testified the vehicle was driving at least 60 miles per hour. RP 73. The vehicle lost control trying to turn and skidded into a vehicle parked along the shoulder of the road. RP 74-75.

The driver of the vehicle got out of the car and ran; Thurman deployed his police dog, who tracked and bit the driver. RP 77-78.

Police brought Sofia Aguilera and Mayra Aguilar to a show-up identification. Aguilera identified Calvert as the intruder in her garage; Calvert was surrounded by police officer, had a police light shining on him, was handcuffed, and had just been mauled by a police dog. RP 119, 123-24. Aguilar recognized Calvert's clothing but not his face. RP 128.

2. Guilty plea

Prior to trial, Calvert pleaded guilty to possession of a stolen motor vehicle, failure to remain at the scene of an accident, and possession of a controlled substance. CP 7-13.

The parties reached a stipulation regarding Calvert's guilty plea: "The defendant previously pled guilty to several charges from this incident and has admitted stealing the property found in the vehicle he fled from. This should not control your verdict on either of the remaining charges." RP 160.

Calvert proceeded to trial on the residential burglary and attempting to elude a police vehicle charges.

3. CrR 3.5 hearing and admission of Calvert's statements

Calvert disputed the admission of several statements he made to police based on the inadequacy of Miranda warnings and the failure of police to secure Calvert's valid waiver of Miranda rights.

K-9 officer Clay Hilton read Calvert the Miranda warnings. RP 27. However, Hilton testified at the CrR 3.5 hearing that Calvert was not paying any attention to the advisement of his rights but was yelling at Thurman over the dog attack, complaining about being bitten. RP 28. Hilton asked Calvert if Calvert understood his rights but Calvert did not acknowledge the question or respond in any way. RP 27, 30. Hilton could say only that there was no indication Calvert did not hear or understand his rights, even though he also testified Calvert was focused on having been attacked by a dog. RP 27, 31-32. Thurman also testified Calvert did not respond to, acknowledge, or affirmatively waive the Miranda rights. RP 35.

Although police had no indication Calvert understood or had waived his rights against self-incrimination or to counsel, Thurman questioned Calvert in the hospital 20 minutes later, where Calvert was receiving treatment for dog bits. RP 37-38. Thurman did not advise Calvert of his Miranda rights before commencing questioning because Hilton had already read the Miranda warnings. RP 37-38

Upon Thurman's questioning, Calvert confessed to stealing the vehicle and to stealing several items of property located inside the vehicle. RP 79-80; CP 95 (CrR 3.5 finding of fact 2.10). Calvert also confessed he was in the Zuniga-Aguilera garage when the homeowners arrived "and he knew he was done because [police] got into the area quickly." RP 82; CP 95 (finding of fact 2.12).

The trial court determined Calvert had been properly advised of Miranda rights and had knowingly, voluntarily, and intelligently waived them. CP 95-96. Even though there was no indication Calvert heard or understood the rights and therefore no indication that Calvert was responding to the reading of his rights, the trial court found, "In response to Deputy Hilton's questions, the defendant yelled at Corporal Thurman about the dog bite." CP 95 (finding of fact 2.6). The trial court ultimately concluded, "Although the defendant did not verbally acknowledge those rights, there is no evidence that he didn't understand these rights," thereby placing the burden of proving nonwaiver and nonunderstanding on Calvert. CP 96 (conclusion of law 3.3).

The trial court determined Calvert's statements about the stolen car, property, presence in the garage, "I knew I was done" comment were admissible in the State's case in chief. RP 57.

4. Verdict, sentence, and appeal

The jury returned guilty verdicts for residential burglary and attempting to elude a police vehicle.² CP 87, 89; RP 255, 257-60.

The trial court sentenced Calvert on three separate matters together. CP 105; RP 267-68. The court imposed an exceptional prison-based drug offender sentencing alternative (DOSA), running the five counts involved in the instant case concurrent to each other but consecutive to the sentences imposed in the other two cases. CP 105; RP 314-15. Thus, Calvert's DOSA consisted of a total of 36.75 months of prison-based treatment and 36.75 months of treatment in the community. CP 100-01, 106-07; RP 315.

With respect to legal financial obligations, the trial court imposed \$6,124.09 in restitution for the vehicle owner's \$200 deductible and \$5,924.09 for the insurance company's recovery service. CP 99; RP 271. The trial court also imposed a \$100 DNA collection fee, \$500 victim penalty assessment, and a \$200 criminal filing fee. CP 108-09; RP 315. The State did not request any legal financial obligations it did not perceive as mandatory. RP 274.

The trial court permitted Calvert to appeal at public expense based on a finding of indigency. CP 139-40. Calvert filed a timely notice of appeal. CP 117-18.

² The jury mistakenly filled out the lesser included criminal trespass verdict form, which the presiding juror confirmed was the jury's error. CP 88; RP 255-56.

C. ARGUMENT

1. THE STATE DID NOT ADEQUATELY INFORM CALVERT OF HIS MIRANDA RIGHTS OR SECURE AN ADEQUATE WAIVER OF THOSE RIGHTS BEFORE INTERROGATING HIM, REQUIRING SUPPRESSION OF CALVERT'S STATEMENTS AND RETRIAL ON THE RESIDENTIAL BURGLARY CHARGE

a. The State failed to prove Calvert understood and waived his constitutional rights to silence and to counsel before police interrogated him

When police read Miranda warnings, Calvert had just been attacked by a police dog and was focusing on his wounds and yelling at the K-9 officer who sicked a German Shephard on him. When asked whether he understood his rights, Calvert did not acknowledge the question and just continued yelling at the K-9 officer. The officer who read the warnings testified that Calvert, whose attention was on the canine attack, was paying no attention to him at all. Because there were no words or conduct indicating Calvert heard, understood, or acknowledged his rights to remain silent and to counsel, the State failed to carry its heavy burden to show Calvert knowingly, voluntarily, and intelligently waived these rights when an officer later interrogated him in his hospital bed. Calvert's statements must accordingly be suppressed.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V; see also CONST. art. I, § 9 ("No person shall compelled in any criminal case

to give evidence against himself . . .”). To honor this right, when placing an individual under custodial arrest, the police must inform the individual that he has the right to remain silent and the right to have an attorney present during any questioning. Miranda, 384 U.S. at 479. “Any waiver of these rights by the suspect must be knowing, voluntary, and intelligent.” State v. Piatnitsky, 180 Wn.2d 407, 412, 325 P.3d 167 (2014). “The government bears the burden of showing, by a preponderance, that the suspect understood his rights and voluntarily waived them.” State v. Radcliffe, 164 Wn.2d 900, 905-06, 194 P.3d 250 (2008) (citing Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)); see also Miranda, 384 U.S. at 475 (“[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”) “[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.” State v. Adams, 76 Wn.2d 650, 670, 458 P.2d 558 (1969), rev’d on other grounds, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971).

The trial court’s CrR 3.5 findings will be upheld on appeal if supported by substantial evidence. State v. Radcliffe, 164 Wn.2d at 907; State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial

evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Appellate courts review de novo whether the trial court derived proper conclusions of law from its findings of fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

The trial court found, “The defendant did not verbally acknowledge that his rights had been read and that he understood them.” CP 95 (finding of fact 2.5). Indeed, nothing in the record shows Calvert even heard the recitation of Miranda rights, let alone acknowledged, understood, or knowingly, voluntarily, and intelligently waived them.

Police testimony establishes as much. Sheriff’s deputy Clay Hilton testified, “While we were waiting for medics, I advised him of his rights. He started yelling at Corporal Thurman and really wasn’t paying much attention to me at that point.” RP 27. At first, Hilton did not recall whether Calvert said anything when asked, “Do you understand your rights?” RP 27. On cross examination, Hilton conceded, “when I advised him of his rights, he didn’t make a response one way or the other if he wanted an attorney or didn’t want an attorney.” RP 30; accord RP 30 (“I asked him if he understood his rights, and I don’t recall getting a response.”). Hilton could say only that there was no indication that Calvert did not hear or understand his rights, even though not paying any attention to Hilton as he read Miranda

rights seems itself a solid indication Calvert did not hear or understand them. RP 31-32. Corporal Jeff Thurman, who was present when Hilton recited the Miranda warnings, likewise testified Calvert gave no response to the reading of the rights. RP 35. This testimony fails to establish Calvert heard, understood, and knowingly waived his rights.

The trial court found, “In response to Deputy Hilton’s questions, the defendant yelled at Corporate Thurman about the dog bite.” CP 95 (finding of fact 2.6). This finding is not supported by substantial evidence, as it assumes Calvert was responding to Hilton’s questions about whether he understood his rights when the record does not support this assumption. Both Hilton and Thurman testified Calvert did not acknowledge having been read his rights and did not answer whether he understood them. Therefore, nothing in the record supports the trial court’s finding that Calvert’s yelling at Thurman about the dog attack was “in response to” Hilton’s questioning. On the contrary, the record establishes that throughout the period Hilton read the Miranda warnings and asked Calvert if he understood them, Calvert was already yelling at Thurman because he was focused entirely on the police dog having just bitten him. Based on this record, because no fair minded, rational person could be persuaded that Calvert “responded” to the Miranda warnings by yelling about the dog attack, the trial court’s finding of fact 2.6 is not supported by substantial evidence.

Indeed, Calvert had just been mauled by a dog when Hilton recited the Miranda warnings. He needed medical treatment for his injuries, was extremely upset and disturbed by the officer's decision to sic a German Shephard on him, and thus was in no position to intelligently waive important constitutional protections. These circumstances militate against the finding of hearing, understanding, or waiving important constitutional protections.

Without any signal that Calvert understood his rights, Thurman questioned Calvert he guessed about 20 minutes later in the hospital where Calvert was receiving medical treatment for dog bites. RP 37-38. Thurman did not advise Calvert of his Miranda rights before commencing questioning, reasoning that Hilton had already advised him. RP 37. Calvert confessed he was in the Zuniga-Aguilera garage when the homeowners got home "and he knew he was done because [police] got into the area quickly." RP 82; see also CP 95 (finding of fact 2.12). Because the State failed to prove Calvert knowingly, voluntarily, and intelligently waived his constitutional rights against self-incrimination and to counsel, Calvert's confession to residential burglary must be suppressed.

The trial court's conclusions of law demonstrate its misunderstanding of who bears the burden to prove a knowing, voluntary, and intelligent waiver. The trial court concluded, "The defendant was

advised of his constitutional rights,” and “Although the defendant did not verbally acknowledge those rights, there is no evidence that he didn’t understand these rights.”³ CP 96 (conclusions of law 3.2 and 3.3); see also CP 95 (finding of fact 2.3, which states, “The defendant was placed in handcuffs and almost immediately advised of his constitutional rights by Deputy Hilton”). The trial court also concluded, “The State has established that the defendant underst[oo]d these rights when he made statements on scene and at the hospital.” CP 96 (conclusion of law 3.4). The trial court set out the burden of proof exactly backwards. The State is not entitled to a presumption of waiver when a suspect does not acknowledge constitutional rights. On the contrary, the State must prove by a preponderance of evidence that Miranda rights are (1) understood and acknowledged and (2) knowingly, voluntarily, and intelligently waived. Radcliffe, 164 Wn.2d at 905-06. There is no evidence in this record to which the State can point to demonstrate Calvert understood his rights and waived them. By shifting the burden to the defense to show a lack of understanding and nonwaiver, the trial court erred. Calvert’s confession must be suppressed.

³ The trial court also concluded Calvert’s “statements were knowing, voluntary and intelligent.” CP 96 (conclusion of law 3.5). It is Calvert’s waiver, not the statements themselves, that must be knowing, voluntary, and intelligent. Along similar lines, the trial court found Calvert “was placed in handcuffs and almost immediately advised of his constitutional rights by Deputy Hilton.” CP 95 (finding of fact 2.3). This finding begs the question, given that Calvert’s entire dispute was centered on whether he was adequately advised of his rights.

- b. The erroneous admission of Calvert's confession was not harmless error and requires reversal of Calvert's conviction

Constitutional errors require reversal unless the prosecution can prove beyond a reasonable doubt that a jury would reach the same verdict absent the error and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1295 (1996). The State bears the burden of proving a constitutional error harmless. Id. The State cannot carry its burden here with respect to the residential burglary conviction.

There is no more powerful evidence than a confession. A confession "is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it." Hopt v. Utah, 110 U.S. 574, 584-85, 4 S. Ct. 202, 28 L. Ed. 262 (1884). Because Calvert's jury was told he confessed to being in Zuniga-Aguilera garage, which is in essence a confession to the burglary charge itself, the State cannot prove the erroneous admission of the confession was harmless beyond a reasonable doubt.

While Sofia Aguilera and Mayra Aguilar testified they identified Calvert as the person in their garage, this evidence was not so overwhelming that it necessarily led to a finding of guilt. Mayra Aguilar was able to recognize the intruder's clothing during a show-up, which she said consisted of a gray tank top and shorts. RP 127, 129. Aguilar also said the person had

a shaved head and a basketball player's backpack. RP 127. She could not recognize his face. RP 128. Sofia Aguilera had no doubt the intruder was Calvert at the show-up, even though when she identified Calvert, he was handcuffed, had just been mauled by a dog, and was surrounded by police. RP 123-24. And Aguilera could not identify Calvert as the intruder in court. RP 115. Other eyewitnesses who gave chase to the intruder were inconsistent, describing the intruder's tank top as white or light colored, not gray. RP 134, 143. No one had much time to look at the intruder because he fled quickly. RP 108, 122, 127, 133, 141. Given the inconsistencies and the suggestive show-up, the eyewitness identifications did not qualify as overwhelming evidence to show that the erroneous admission of Calvert's statements were harmless beyond a reasonable doubt.

Also, the intruder who ran from the Zuniga-Aguilera garage essentially disappeared, despite several men chasing him on foot and by vehicle. RP 108, 112, 134, 137, 141-43. Nothing directly connected the intrusion to the vehicle Calvert drove. Officer Thurman, who spotted a car driving without headlights and thereafter gave chase merely assumed the car was involved in the burglary because in his "training and experience . . . persons that commit crimes at night will use vehicles; and when they do, they obviously use the cover of darkness to have lights off to try to get out of the area." RP 72. Thurman's testimony is pure speculation and, standing

alone, is not persuasive enough to convince a reasonable juror that the car was tied to the burglary beyond a reasonable doubt.

Without Calvert's confession, the State would have been unable to prove Calvert committed the burglary beyond a reasonable doubt. Because the State cannot carry its burden to show the admission of the confession was harmless, Calvert's residential burglary conviction must be reversed.

2. THE TRIAL COURT ERRED IN IMPOSING THE CRIMINAL FILING FEE AS A MANDATORY LEGAL FINANCIAL OBLIGATION

Calvert recognizes that Divisions Two and Three have held that the filing fee listed in RCW 36.18.020(2)(h) is a mandatory legal financial obligation. See State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). More recently, Division Two, when challenged on the point that Lundy does not contain reasoned statutory analysis, concluded that RCW 36.18.020(2)(h) was mandatory simply because the statute contains the word "shall." State v. Gonzales, ___ Wn. App. ___, ___ P.3d ___, 2017 WL 986208, at *1-*2 (March 14, 2017).⁴

The Gonzales court's statutory analysis was not reasoned but overly simplistic. The same goes for Lundy and Stoddard, neither of which contained even an attempt at statutory analysis. Lundy, 176 Wn. App. 102

⁴ Undersigned counsel has filed a petition for review in Gonzales in hopes to resolve the issue once and for all.

(giving an unanalyzed proposition that “the legislature has divested courts of the discretion to consider a defendant’s ability to pay when imposing” the criminal filing fee); Stoddard, 192 Wn. App. at 225 (relying on Lundy for the one-sentence proposition that RCW 36.18.020(2)(h) “mandate[s] the fees regardless of the defendant’s ability to pay”). These decisions misapprehend the meaning of the word “liable” and overlook the differences in text between RCW 36.18.020(2)(h) and the statutes providing truly mandatory LFOs, the differences in text between RCW 36.18.020(2)(h) and the other provisions of RCW 36.18.020(2), and at least one other criminal statute that provides a convicted defendant “shall be liable” for all costs of the proceedings against him or her. This court should hold that the \$200 criminal filing fee provided in RCW 36.18.020(2)(h) is discretionary, not mandatory.

a. The word “liable” does not denote a mandatory obligation

By directing that a defendant be “liable” for the criminal filing fee, the legislature did not create a mandatory fee. The term “liable” signifies a situation in which legal liability might or might not arise. Black’s Law Dictionary confirms that “liable” might make a person obligated in law for something but also defines liability as a “future possible or probable happening that may not occur.” BLACK’S LAW DICTIONARY 915 (6th ed.

1990). Based on the meaning of the word liable—giving rise to a contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

In Gonzales, Division Two reasoned that because the statute states “shall be liable,” it “clarifies that there is not merely a risk of liability” given that the word “shall” is mandatory. 2017 WL 986208, at *2. This clarifies nothing, however, because it ignores the meaning of the word “liable.” There is no difference in meaning between “shall be liable” and “may be liable.” From mandatory liability a mandatory obligation does not follow; rather, a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they must actually pay the monetary amount or that the liability cannot be waived or otherwise resolved. Again, liability is, by definition, something that might or might not impose a concrete obligation. The legislature’s use of the word “liable” in RCW 36.18.020(2)(h) shows it intended the criminal filing fee to be discretionary. Only by avoiding the meaning of the word “liable” could the Gonzales court reach its contrary result.⁵

⁵ The Gonzales court also invoked the doctrine of legislative acquiescence, reasoning that because the legislature has not amended RCW 36.18.020, it must agree with Lundy. Gonzales, 2017 WL 986208, at *2 n.4. This is not so. “[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation.” Jones v. Liberty Glass Co., 332 U.S. 524, 533-34, 68 S. Ct. 229,

In any event, given the contingent meaning of the word “liable,” the meaning of the phrase “shall be liable” is, at best, ambiguous. Under the rule of lenity, RCW 36.18.020(2)(h) must be interpreted in Calvert’s favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2015).

- b. The linguistic differences in the other provisions of RCW 36.18.020(2) support Calvert’s interpretation that “shall be liable” does not impose a mandatory obligation

Calvert’s plain language interpretation is supported by the language of other provisions of RCW 36.18.020(2).

The beginning of the statutory subsection reads, “Clerks of superior courts shall collect the following fees for their official services,” and then lists various fees in subsections (a) through (i). With the exception of RCW 36.18.020(2)(h), the fees are listed directly without reference to the word “liable” or “liability.” E.g., RCW 36.18.020(2)(a) (“In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the document is filed, a fee of two hundred dollars . . .” (emphasis added)); RCW 36.18.020(2)(b) (“Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall

92 L. Ed. 142 (1947); see also Helvering v. Reynolds, 313 U.S. 428, 432, 61 S. Ct. 971, 85 L. Ed. 1438 (1941) (“While [legislative acquiescence] is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.”).

pay, when the document is filed, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(c) (“For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(d) (“For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three dollars.” (emphasis added)); RCW 36.18.020(2)(e) (“For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(f) (“In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first document therein, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(g) (“For filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars.” (emphasis added)).

These other provisions of RCW 36.118.020(2), unlike RCW 36.18.020(2)(h), state a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing only liability for a fee. “Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different

meaning was intended to attach to each word.” Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) (“When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.”).

The Gonzales decision conflicts with these cases and this canon of statutory interpretation. Because RCW 36.18.020(2)(h) contains the only provision in the statute where “liable” appears (in contrast to the other provisions that are clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

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

RCW 10.46.190 provides,

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

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

But, even though RCW 10.46.190 employs the same “shall be liable” language as RCW 36.18.020(2)(h), the legislature and the Washington Supreme Court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs “unless the defendant is or will be able to pay them.” Our supreme court confirmed this in State v. Blazina, 182 Wn.2d 827, 838-39, 344 P.3d 680 (2015), holding that RCW 10.01.160(3) requires the trial court to make an individualized ability-to-pay inquiry before imposing discretionary LFOs). Even though a defendant “shall be liable” for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies that the legislature’s use of the phrase “shall be liable” does not impose a mandatory obligation but a contingent, waivable one. RCW 36.18.020(2)(h)’s criminal filing fee should likewise be interpreted as discretionary.

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

The language of RCW 36.18.020(2)(h) differs markedly from statutes imposing mandatory LFOs. The VPA is recognized as a mandatory fee, given that it states, “When a person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” RCW 7.68.035 (emphasis

added). This statute is unambiguous in its command that the VPA shall be imposed.

The DNA collection fee is likewise unambiguous. It states, “Every sentence imposed for a crime specific in RCW 43.43.754^[6] must include a fee of one hundred dollars.” RCW 43.43.7541 (emphasis added). Like the VPA, there can be no question that the legislature mandated a \$100 DNA fee to be imposed in every felony sentence.

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

The Washington Supreme Court recently acknowledged as much in State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016), noting that RCW 36.18.020(2)(h)’s criminal filing fee had merely “been treated as mandatory by the Court of Appeals.” That the Duncan court would identify those LFOs designated as mandatory by the legislature on one hand and then

⁶ RCW 43.43.754(1)(a) requires the collection of a biological sample from “[e]very adult or juvenile individual convicted of a felony”

separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other hand strongly indicates there is a distinction.

- e. Judicial notice is appropriate that not all superior courts agree the criminal filing fee is mandatory

Several counties, including Washington's most populous, King, waive the \$200 criminal filing fee in every case.

Calvert asks this court to take judicial notice of the variance in treatment of the criminal filing fee when determining whether to take review. "Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). This court should consult any of the hundreds of judgments and sentences from criminal cases available in the Court of Appeals to establish that not all courts, counties, and judges agree that the \$200 criminal filing fee is mandatory. Given the disparity, this court should not follow the Gonzales court's recent unanalyzed presumption that the criminal filing is a mandatory legal financial obligation.

- f. To the extent he must argue *Lundy*, *Stoddard*, and *Gonzales* are incorrect and harmful for this court not to follow them, Calvert so argues

Calvert is mindful of the perplexing problem regarding the application of stare decisis among various divisions of the Court of Appeals,

and appreciates the court’s recent discussion of the issue in In re Personal Restraint of Arnold, ___ Wn. App. ___, ___ P.3d ___, No. 34018-0-III (Apr. 25, 2017). Calvert agrees with Judge Becker in Grisby v. Herzog, 190 Wn. App. 786, 806-11, 362 P.3d 763 (2015), and with Judge Siddoway in Arnold, slip op. of Siddoway, J., that the “incorrect and harmful” standard does not apply in the Court of Appeals—panels within the same division or among the three divisions should feel unconstrained to disagree with each other given that disagreements are oftentimes necessary, appropriate, and helpful to advance and explicate the law.⁷ Nonetheless, to the extent Calvert must argue that Gonzales, Stoddard, and Lundy are incorrect and harmful under the standard announced in In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970), to persuade this court to disagree with these decisions, Calvert so argues.

Calvert has already set out his argument of why Gonzales, Stoddard, and Lundy are incorrect. As discussed, none of the cases provides any reasoned statutory analysis nor addresses any of the arguments Calvert advances here. Instead, the cases simplistically conclude that because the

⁷ As the Grisby court acknowledged, “if the first panel to decide an issue gets it wrong, the error would be perpetuated unless and until the Supreme Court took review [T]he existence of splits within the Court of Appeals [serves] the positive function of alerting the high court to unsettled areas of the law that are in need of review.” Grisby, 190 Wn. App. at 810 (citing Mark DeForest, In the Groove or in a Rut? Resolving Conflicts between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 GONZ. L. REV. 455, 504-05 (2012/13).

word “shall” appears in the statute, the criminal filing fee must be mandatory. This is not valid statutory interpretation but oversimplified shorthand intended to minimize court workload in favor of the State. Gonzales, Stoddard, and Lundy were incorrectly decided.

These decisions are also harmful for all the reasons discussed in Blazina, where our supreme court recognized that “Washington’s LFO system carries problematic consequences.” 182 Wn.2d at 836. The court detailed the problem of a 12-percent interest rate imposed on even relatively small amounts in LFOs, noting “a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. at 836. This, in turn, “means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. at 836-37. This, in turn, “inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs.” Id. at 837. “This active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism.” Id. (citations omitted). Because the Washington Supreme Court has documented the harms of Washington’s

LFO system, it is a forgone conclusion that case law requiring imposition of certain LFOs without a clear legislative mandate is harmful. Because Gonzales, Lundy, and Stoddard are incorrect and harmful, this court should not adhere to them.

Calvert asks this court to hold that the criminal filing fee listed in RCW 36.18.020(2)(h) is not mandatory, may be waived, and that the trial court should consider a defendant's ability to pay the fee before imposing it.

3. APPELLATE COSTS SHOULD BE DENIED

In the event Calvert does not substantially prevail on appeal, appellate costs should be denied.

The Washington Supreme Court recently amended RAP 14.2 to state, in part,

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court entered an indigency order here, stating Calvert lacked sufficient resources and thus "is entitled to prosecute this appeal at public expense" CP 139. Calvert has been incarcerated since entry of the judgment and sentence, so there is no reason to believe his financial

circumstances have improved, let alone significantly improve. Thus, under RAP 14.2, there is no basis to impose appellate costs.

Although it should be the State, not Calvert, that bears the burden of showing an improvement to financial circumstances and ability to pay, Calvert nevertheless intends to comply with this court's general order on cost awards by submitting a report of continued indigency within 60 days. However, this court's procedure is now inconsistent with the letter of RAP 14.2 and unfairly shifts the burden of proof and production to an indigent party who is entitled to the RAP 15.2(f) presumption of continued indigency. This court should withdraw its general order and follow RAP 14.2. In any event, any request by the State for appellate costs should be denied.

D. CONCLUSION

Because police obtained Calvert's confession by violating his constitutional rights against self-incrimination, Calvert's confession must be suppressed. Because the admission of Calvert's confession was not harmless beyond a reasonable doubt, Calvert asks that this court reverse his residential burglary conviction and remand for retrial.

DATED this 26th day of April, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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

KEVIN A. MARCH
WSBA No. 45397
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Attorneys for Appellant

APPENDIX

FILED

NOV 15 2016

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON)	
)	No. 15-1-03097-4
Plaintiff,)	PA# 15-9-58104-0
)	RPT# CT I & III: 001-15-0282453
v.)	
)	
NATHAN J. CALVERT)	FINDINGS OF FACT AND CONCLUSIONS
WM 07/11/83)	OF LAW REGARDING CrR 3.5 HEARING
Defendant.)	

I. HEARING

Hearing in this matter was held on October 31, 2016 with Spokane County Deputy Prosecuting Attorney Sharon Hedlund, Spokane County Sheriff's Office Deputy Clay Hilton and Corporal Jeff Thurman, Attorney for Defendant Kevin Griffin and Defendant Nathan Calvert present.

The defendant was advised that he may, but need not, testify at the hearing on the circumstances surrounding the statements; that if he did testify at the hearing he would be subject to cross examination with respect to the circumstances surrounding the statements and with respect to his credibility; that if he did testify at the hearing, he did not by so testifying waive his right to remain silent during the trial; and that if he did testify at the hearing, neither this fact nor his testimony at the hearing would considered by the trier of fact unless he testified concerning the statements at trial. Deputy Hilton and Corporal Thurman testified on behalf of the State. The defendant chose not to testify on his own behalf.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING CrR 3.5 HEARING - 1

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94

II. FINDINGS OF FACT

Based upon testimony from this hearing and applicable law, this Court FINDS that the following facts are undisputed:

- 2.1 There are no disputed facts.
- 2.2 The defendant was contacted while hiding under a parked car after fleeing from law enforcement officers in a motor vehicle then on foot.
- 2.3 The defendant was placed in handcuffs and almost immediately advised of his constitutional rights by Deputy Hilton.
- 2.4 The defendant did not appear to be unduly influenced by any substances although he was angry at Corporal Thurman because his K-9 also "contacted" him.
- 2.5 The defendant did not verbally acknowledge that his rights had been read and that he understood them.
- 2.6 In response to Deputy Hilton's questions, the defendant yelled at Corporal Thurman about the dog bite.
- 2.7 Corporal Thurman subsequently spoke with the defendant at the hospital
- 2.8 The defendant was cooperative and answered questions regarding the K-9 contact.
- 2.9 The defendant said he wanted to be "frank" and that he didn't want to "bullshit" Corporal Thurman.
- 2.10 He then admitted stealing the car and most of the contents and offered to show law enforcement the areas where he stole the items.
- 2.11 He also provided information regarding his 10 year addiction to Methamphetamine and his belief he would serve 1-2 years then get out on a DOSA sentence.
- 2.12 He also answered a question about his presence in the Aguilera/Zuniga garage.
- 2.13 There was no coercion, threats or promises inducing any of the defendant's statements.

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING CrR 3.5 HEARING - 2**

III. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact this Court CONCLUDES that:

- 3.1 The defendant was in custody when he volunteered statements and answered questions.
- 3.2 The defendant was advised of his constitutional rights.
- 3.3 Although the defendant did not verbally acknowledge those rights, there is no evidence that he didn't understand these rights.
- 3.4 The State has established that the defendant understand these rights when he made statements on scene and at the hospital.
- 3.5 These statements were knowing, voluntary and intelligent.
- 3.6 All of these statements were deemed admissible at trial in this matter.

IT IS SO ORDERED this 15th day of November 2016.

Presented by:



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State V. Nathan Calvert

No. 34924-1-III

Amended Certificate of Service

On April 27, 2017, I mailed and e-served the brief of appellant directed to:

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Re: Calvert
Cause No., 34924-1-III in the Court of Appeals, Division III, for the State of Washington.

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



John Sloane
Office Manager
Nielsen, Broman & Koch

04-27-2017

Date

Done in Seattle, Washington