

NO. 34947-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

RICK KELLY,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting Rachel Pritchard's out-of-court statements made in response to police questioning.

2. The trial court erred in imposing \$700 in legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Excited utterances are admissible, as a limited exception to the hearsay prohibition, only if the statement relates to a startling event or condition and is made while the declarant remained continuously under the stress of excitement caused by the event or condition. The proponent of the statement bears the burden to prove admissibility. Did the trial court abuse its discretion, requiring reversal of the conviction, by admitting the alleged victim's out-of-court statements under the excited utterance exception where they were made to police officers during their investigation and after the declarant had time to pause and reflect on the event?

2. RCW 10.01.160 mandates the waiver of costs and fees for indigent defendants. Further, "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future

ability to pay before the court imposes LFOs.” *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). While the trial court recognized Rick Kelly was indigent and waived most legal financial obligations, did the trial court err when it determined it was required to impose \$200 in court costs and \$500 for a victim assessment despite Kelly’s inability to pay?

### C. STATEMENT OF THE CASE

Rachel Pritchard called 911 from her home alleging a domestic dispute had just occurred and her live-in, ex-boyfriend Rick Kelly had recently choked her. RP 115, 134, 153-54. The police arrived 20 to 30 minutes later to investigate and arrested Kelly after speaking with him and Pritchard. *E.g.*, RP 111-12. The State charged Kelly with assault in the second degree by strangulation and unlawful imprisonment. CP 3-4.

Kelly provided his account at trial. RP 15. He was packing his belongings, preparing to move out in the coming days, when Pritchard came to talk to him before she left for the weekend. RP 196-97. Pritchard asked for her laptop, which Kelly had been borrowing, and then, saying she would take back the phone she gave to him, reached across Kelly for his cellular phone, which was plugged in at the other

end of the bed. RP 197-98; *see* RP 146-47. Kelly grabbed his phone at the same time as Pritchard. RP 199. He was trying to protect his cellular phone, which had personal information stored on it. RP 189-90, 198. Pritchard fell on top of him. RP 199-200. He tried to reach out his arm to catch her. RP 200. He did not make any effort to restrict or stop her breathing. RP 200, 204; *see* RP 104 (Kelly also told police he did not try to strangle Pritchard).

Pritchard also testified. RP 131. She told the jury she went to the basement to retrieve her laptop. RP 147. Kelly told her that he first needed to remove some of his personal files. RP 147-48. She asked him to do it later, and they argued about finances. RP 148. She told Kelly that she would just take back the phone she had given him as well, and she reached over the bed to grab it. RP 149. Kelly then jumped up, grabbed her around the neck with his forearm and “jerked” her down onto the bed. *Id.* He was using a lot of force, and she could not get away. *Id.* It lasted for maybe 10 seconds. RP 150, 161-62. She is not sure why, but Kelly then let go. RP 153.

The court admitted Pritchard’s statements to police officers who arrived about 30 minutes after the event to investigate. RP 102-04, 105-07, 109-11. Officers testified Pritchard had a red mark on her

neck. RP 108. They advised her to seek medical attention. RP 112, 114, 122-23, 155-56. The physician's assistant who examined Pritchard testified she had a "cervical strain". Although the physician's assistant did not observe any other injuries, he averred that being strangled for 10 seconds is a long time that could lead to loss of consciousness and other injuries that Pritchard did not show. RP 166-77. He could not determine whether the red mark on Pritchard's neck derived from strangulation or impact with a forearm. RP 174-76.

The jury acquitted Kelly of the charged counts, but convicted him of the lesser-included crime of assault in the fourth degree with a domestic violence finding. CP 50-53. He had no prior history of domestic violence. RP 268.

#### D. ARGUMENT

- 1. Because Pritchard's statements to investigating officers were made after she had the opportunity to fabricate, the trial court abused its discretion in admitting them under the limited hearsay exception for excited utterances.**

Kelly objected to the admission of out-of-court statements Pritchard made to the police officers who investigated her 911 call. RP 105-07; *see* RP 111-12 (officers were investigating). Pritchard called 911 after the alleged incident was over and Pritchard had removed

herself from the basement. RP 153-54. Police officers arrived at Pritchard's house 20 to 30 minutes after she had called 911. RP 154. She was standing in the driveway with her sister and brother, who had come for support. *Id.*; RP 113-14 (Pritchard and Kelly were separated by about 40 feet and not arguing when police arrived). Although Pritchard was sobbing at first, she was able to talk to the police three to five minutes later and to provide an accounting of the event. RP 105-07; *see* RP 112-13 (Pritchard was breathing normally and officer did not have any trouble understanding her). The court initially sustained the objection. RP 106.

Without any additional foundation, the State again questioned the police witness about the content of Pritchard's accounting. RP 107-10. Kelly again objected. RP 109-10. The court overruled the objection and the officer testified to the full extent of Pritchard's statements to him. RP 109-11 (officer recounts Pritchard's statements that Kelly wrapped his arm around her neck, pulled her on top of him used force to pull on her throat area for 10 seconds; she was scared for her life, worried about her children, and unable to scream).

- a. The hearsay exception for excited utterances is limited to circumstances where the declarant remains continuously under the stress of the startling event.

Hearsay is “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Subject to narrow exceptions, hearsay is presumptively inadmissible. ER 802.

Hearsay is admissible at trial if it is a statement “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2). The proponent of hearsay under this exception must satisfy three closely connected requirements: “that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition.” *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007) (citation omitted).

This hearsay evidence is admissible only under the rationale that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence § 1747, at

195 (1976)). “[T]he key determination is ‘whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.’” *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995) (quoting *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)). Thus, to admit the evidence, the trial court must find by a preponderance of the evidence that the declarant remained continuously under the influence of the event at the time the statement was made. ER 104(a); *State v. Ramires*, 109 Wn. App. 749, 757, 37 P.3d 343 (2002).

ER 803(a)(2) must be interpreted in a restrictive manner, so as to “not lose sight of the basic elements that distinguish excited utterances from other hearsay statements. This is necessary . . . to preserve the purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present.” *State v. Dixon*, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

- b. The State failed to satisfy the requirement of showing that while Pritchard stood in her driveway with her family, separated from Kelly, she remained continuously under the stress of the startling event that occurred 30 minutes before.

As the proponent of the evidence, the State was required to prove Pritchard remained continuously under the stress of the event as

she removed herself from the basement, called 911 from upstairs, exited to her driveway, and spent the next 20 to 30 minutes waiting there with her siblings. The continuing stress “element is the essence of the rule.” *Chapin*, 118 Wn.2d at 687. Spontaneity is the key. *Id.* at 688. A statement made contemporaneously with or soon after the startling event giving rise to it is most likely to satisfy this requirement. *Id.* The more time that has passed between the startling event and the statement, the more important the “proof that the declarant did not actually engage in reflective thought.” *Id.* As the time between the event and the statement lengthens, “the opportunity for reflective thought arises and the danger of fabrication increases.” *Id.*

The ultimate inquiry in determining whether this requirement is satisfied is whether the declarant had the time and opportunity between the startling event and the utterance to reflect and consciously fabricate a lie about the incident. *State v. Briscoeray*, 95 Wn. App. 167, 174, 974 P.2d 912 (1999). Satisfying this requirement ensures the statement is “‘a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock’, rather than an expression based on reflection or self interest.” *Chapin*, 118 Wn.2d at 686 (quoting 6 J. Wigmore, Evidence § 1747 at 195).

When the officers arrived, 20 to 30 minutes after Pritchard called 911, she was breathing normally and the officers had no difficulty understanding her. RP 105-07, 112-13. Since the alleged event, Pritchard had extricated herself from the basement, called 911, cared for her children, put them in the care of her mother, and stood in the driveway removed from Kelly with her sister and brother. RP 153-55.

Although Pritchard remained upset when she spoke with police, an out-of-court statement is not admissible as an excited utterance simply because the declarant was upset when making the statement. *Dixon*, 37 Wn. App. at 873-74. If that were the case, then “virtually any statement given by a crime victim within a few hours of the crime would be admissible because many crime victims remain upset or frightened for many hours, and even days and months, following the experience.” *Id.*; see *Brown*, 127 Wn.2d at 752-53, 757-58 (not excited utterance where victim had opportunity to lie when she conversed with others following startling event).

Because the State failed to show Pritchard remained continuously under the stress of the alleged altercation with Kelly, the statements were not excited utterances and the trial court abused its

discretion in admitting them at trial. *See Chapin*, 118 Wn.2d at 689-90; *Dixon*, 37 Wn. App. at 873-74.

c. The improper admission of Pritchard's out-of-court statements requires remand for a new trial.

Evidentiary errors require reversal “if the error, within reasonable probability, materially affected the outcome.” *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

The out of-court statements were admitted here through the first witness at trial. RP 100, 105-07. This timing was likely to have a great impression on the jury. Moreover, the statements were admitted through a police officer, who carries a special aura of “reliability and trustworthiness.” *State v. Demery*, 144 Wn.2d 753, 762-63, 30 P.3d 1278 (2001) (“An officer’s live testimony offered during trial, like a prosecutor’s statements made during trial, may often carr[y] an aura of special reliability and trustworthiness.” (internal quotations omitted)); *accord State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (noting weight of opinion offered by a government official, such as a

sheriff or police officer). Finally, the admission of these out-of-court statements was prejudicial because it bolstered Pritchard's in-court testimony. Ultimately, the jury had to determine whether Pritchard or Kelly's account was more credible. It is within reasonable probability that the hearsay statements had an effect on the jury's credibility determination.

Therefore, the improper admission requires reversal and remand for a new trial.

**2. The \$700 in legal financial obligations should be stricken because the trial court erroneously believed it lacked discretion to waive the costs due to Kelly's inability to pay.**

At sentencing, the court noted it "could care less" about the \$500 victim assessment or the \$200 court costs. RP 276. The court would have rather had the money "go to [Kelly's] child support or something else or assistance for [his] daughter." *Id.* However, the court believed it lacked any ability to waive those legal financial obligations. *Id.* ("the law doesn't give me any ability to waive them"). Thus, despite finding Kelly indigent and without ability to pay, the court imposed the \$700 in costs. *Id.*; CP 59-60, 63-68. Because those

costs are subject to an ability to pay inquiry, the Court should strike them.

A sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). This means “a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.” *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); *accord, e.g., City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016) (strict enforcement of LFO statutes violates state and federal law); *State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016) (remanding to trial court for resentencing with “proper consideration” of defendant’s ability to pay). This Court has recognized the equal hardships imposed by “mandatory” and “discretionary” LFOs. *E.g., State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016) (upholding imposition of “mandatory” costs); *see also State v. Lewis*, 194 Wn. App. 709, 379 P.3d 129, 131-34 (2016) (same); *State v. Shelton*, 194 Wn. App. 660, 663, 378 P.3d 230 (2016) (same). Although the Court has denied that trial courts have discretion to waive costs in these circumstances, for the reasons set forth here, the Court should reexamine those conclusions.

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment “shall be imposed”); RCW 36.18.020(2)(h) (convicted criminal defendants “shall be liable” for a \$200 fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

The Legislature would have used different language if it intended to obliterate an ability to pay determination. *See* RCW 9.94A.753 (restitution “shall be ordered” for injury or damage absent extraordinary circumstances and “the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability

to pay the total amount.”); *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093, 1097 (2015).<sup>1</sup>

*State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992) does not hold otherwise because that case examined the constitutionality of the fee, not the statute’s interpretation. Additionally, *Blazina* supersedes *Curry* to the extent they are inconsistent. *See Blazina*, 182 Wn.2d at 830, 839.

It is particularly problematic to require Kelly to pay court costs, because many counties do not impose this obligation on indigent defendants. *Cf. Blazina*, 182 Wn.2d at 857 (noting significant disparities in administration of LFOs across counties). This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, 183 Wn.2d at 712 (“we apply the rule of lenity to ambiguous statutes and interpret the

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<sup>1</sup> The Legislature did amend the DNA statute to remove consideration of “hardship” at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the Legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because "the error, if permitted to stand, would create inconsistent sentences for the same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties); RCW 9.94A.010(3) (stating that a sentence should "[b]e commensurate with the punishment imposed on others committing similar offenses").

*Jafar v. Webb* also supports this reading, as there the Supreme Court held the trial court was required to waive all fees for indigent litigants under General Rule 34, despite the appearance of mandatory language ("shall") in applicable statutes. 177 Wn.2d 520, 303 P.3d 1042 (2013); *see* RCW 36.18.020.

Finally, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct.

2027, 32 L. Ed. 2d 600 (1972) (holding statute violated equal protection by stripping indigent criminal defendants of the protective exemptions applicable to civil judgment debtors).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) (upholding costs statute because it required ability to pay determination and prohibited imposition of costs upon those who would never be able to pay). Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Imposing LFOs on indigent defendants also violates substantive due process because such a practice is not rationally related to a legitimate government interest. See *Nielsen v. Wash. State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Although the government might have a legitimate interest in collecting recoupable costs, imposing costs and fees on impoverished people like Kelly is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs

counter to the Legislature’s stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because “incarceration would result only if failure to pay was willful” and not due to indigence. *Id.* at 241. This assumption was not borne out.<sup>2</sup>

The Court should remand with instructions to strike the LFOs.

#### E. CONCLUSION

The Court should reverse and remand for a new trial because the trial court abused its discretion in admitting out-of-court statements

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<sup>2</sup> *See, e.g., Wakefield*, 186 Wn.2d 596; Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm’n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 49-55 (2008), *available at* [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf); *Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).

under the excited utterance exception. In the alternative, the Court should strike the \$700 legal financial obligations.

DATED this 20th day of September, 2017.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
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v.	)	NO. 34947-1-III
	)	
RICK KELLY,	)	
	)	
APPELLANT.	)	

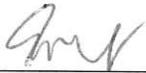
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X \_\_\_\_\_ 

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# WASHINGTON APPELLATE PROJECT

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