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Division III
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No. 35611-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHON A. BENSON,

Appellant.

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

The Honorable Judge Doug L. Federspiel

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

24-year-old J.A. alleged that Jonathon A. Benson, while fully clothed, made the following contact with her on the campus of Yakima Valley College: gave her a friendly hug and kissed her on the neck; hugged her and put his erect penis against her body and moved it back and forth; and touched her butt. Based on these allegations, the State charged Mr. Benson with one count of indecent liberties by forcible compulsion. The case proceeded to a jury trial. In its closing argument, the State argued J.A. had the courage to take the witness stand. The jury found Mr. Benson guilty as charged, and sentenced Mr. Benson to an indeterminate sentence of life, with a minimum term of 60 months.

Mr. Benson now appeals, arguing there was insufficient evidence to support his conviction, because there was insufficient evidence of forcible compulsion. Mr. Benson also argues the State committed misconduct in its closing argument by vouching for J.A. and appealing to the passion and prejudice of the jury. Mr. Benson also challenges eight of the conditions of community custody imposed by the trial court, the imposition of costs of medical and costs of incarceration, and preemptively objects to the imposition of appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Benson guilty of indecent liberties by forcible compulsion, where the evidence was insufficient.
2. The State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and by appealing to the passion and prejudice of the jury.
3. The trial court erred in imposing the following terms of community custody:

Cooperate fully with the supervising Community Corrections Officer.

....

Have no contact with the victim, or any members of the victim's family, without prior written permission from the supervising Community Corrections Officer.

Not be alone with any children under the age of 16, nor in the presence of any children under the age of 16, without an adult present that has been approved of by the Department of Corrections and without prior written permission from the Community Corrections Officer.

Have no sexual contact with any person under the age of 18.

Do not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030).

....

11. Have no direct or indirect contact with the victims or victim's family.

....

13. Do not purchase, possess, or view any pornographic material.

....

15. Submit to polygraph testing at the direction of Community Corrections Officer.

(CP 249-250, 258; RP 431-433, 435).

4. The trial court erred by entering findings in the felony judgment and sentence that Mr. Benson has the ability to pay costs of incarceration, costs of medical care, and legal financial obligations.
5. The trial court erred by requiring Mr. Benson to pay costs of incarceration and costs of medical care, or in the alternative, defense counsel's failure to request that the trial court strike its unsupported findings regarding legal financial obligations, and costs of incarceration and costs of medical care, constituted ineffective assistance of counsel.
6. An award of costs on appeal against Mr. Benson 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. Benson guilty of indecent liberties by forcible compulsion, where the evidence was insufficient.

Issue 2: Whether the State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and by appealing to the passion and prejudice of the jury.

Issue 3: Whether the trial erred in imposing certain conditions of community custody.

Issue 4: Whether the trial court erred by requiring Mr. Benson to pay costs of incarceration and costs of medical care.

- a. Mr. Benson requests that this Court review the discretionary costs of incarceration and costs of medical care that were imposed, pursuant to RAP 2.5(a).
- b. The discretionary costs of incarceration and costs of medical care that were imposed herein are inconsistent with the trial court's findings and the record on Mr. Benson's ability to pay legal financial obligations.
- c. Alternatively, defense counsel's failure to request that the trial court strike its unsupported LFO findings and costs of incarceration and costs of medical care constituted ineffective assistance of counsel.

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

D. STATEMENT OF THE CASE

Around 5:00 p.m. on August 15, 2016, Yakima Valley College Campus Security Officer Jeffrey Cornwell was informed there was a male in a nearby park with alcohol, and he was planning to observe the male's activity to make sure he did not come onto campus, where drinking alcohol was prohibited. (RP 186-190). Officer Cornwell later observed the male drinking alcohol on campus. (RP 190-191).

Officer Cornwell also observed a female, who was not a student of the college, charging her cell phone on campus. (RP 188, 220). Because the college did not allow non-students to charge their cell phones on campus, Officer Cornwell was planning to contact the female, inform her of the policy, and make sure she did not come into campus. (RP 188, 220).

Officer Cornwell observed the male and female together in the alcove of a campus building, making chest to chest contact, with the male's hands on the female's posterior. (RP 189-191, 221-222, 229). After Officer Cornwell identified himself, the male and female separated. (RP 189-190). Officer Cornwell explained to the male and female the campus policies they were violating, to get them to leave the campus. (RP 189, 220-221). Both individuals were cooperative. (RP 191-192, 220-221).

Officer Cornwell went into a building on campus to lock up. (RP 193). The female then entered the building, asked Officer Cornwell if she could leave out another exit, and to make sure the male did not follow her. (RP 150, 193).

Officer Cornwell proceeded to watch the male, who proceeded to walk off the campus. (RP 194-196). Officer Cornwell made no further observations of the male. (RP 197).

Yakima Valley College Campus Security Officer Correy Olson tracked the female as she walked off the campus. (RP 144-145, 151-152). He later encountered the female, and she voiced concerns about a male. (RP 152-153). Officer Olson spoke with Yakima Police Officer Bradley Althausser, who was on the campus at the time. (RP 153, 240-243). Officer Olson told Officer Althausser where the male had walked, and Officer Althausser made contact with the male. (RP 153-154, 160, 243-244). Officer Olson then brought the female to meet with Officer Althausser at this location. (RP 154, 246-247, 259).

The female involved in this incident was identified as J.A., and the male was identified as Jonathon A. Benson. (RP 121-122, 124, 149-150, 243-244, 246). J.A. was 24 years old at the time of these events. (CP 8-9, 259-260; RP 112).

According to J.A., Mr. Benson, while fully clothed, made the following contact with her on campus that day: gave her a friendly hug and kissed her on the neck; hugged her and put his erect penis against her body and moved it back and forth; and touched her butt. (RP 113-119, 121, 125-126, 129, 133-139).

Based on these events, the State charged Mr. Benson with one count of indecent liberties by forcible compulsion. (CP 6).

The case proceeded to a jury trial. (RP 111-380). Witnesses testified consistent with the facts stated above. (RP 112-262).

In addition, J.A. testified she did not know Mr. Benson. (RP 113). She testified Mr. Benson initially gave her a friendly hug, and she was okay with it. (RP 113-114, 129). J.A. testified Mr. Benson kissed her on the neck, and although she was not okay with that, she did not say anything. (RP 113-115, 129). She testified Mr. Benson did not touch her skin in any other place when he kissed her neck. (RP 129). J.A. also testified Mr. Benson touched her butt. (RP 125, 133-136).

J.A. testified that Mr. Benson put his penis on her body as follows:

[H]e was like grabbing me. And then I felt his dick on me. And then he turned and gave me a big old hug and I tried to - - and then I tried to move it away.

. . . .

[T]hen after that, so I tried to push him back away and then because I, I don't feel comfortable with that. And then after that, then he - - so I walk away, take my charger with me to walk away.

(RP 116).

J.A. testified that Mr. Benson's penis rubbed her body on the front side, "[l]ike on the girl's uppers . . . [o]n the pussy." (RP 137). She testified she was not able to push Mr. Benson away very well. (RP 126).

J.A. further testified:

[The State:] . . . How did he grab you?

[J.A.:] Like a big old hug.

[The State:] Okay. And were you comfortable with that?

[J.A.:] No.

[The State:] Did you say or do anything?

[J.A.:] No. Like, I, like I wanted to say something, but I just got too scared.

[The State:] Okay. And you said you felt something?

[J.A.:] Yes.

[The State:] What did you feel?

[J.A.:] Like a dick, like his hard dick.

[The State:] Okay. And just to clarify, a penis?

[J.A.:] Yeah, like a penis.

[The State:] Okay. And did you notice anything about this dick?

[J.A.:] Well, he got like a boner

. . . .

[The State:] Is that the same thing as an erection?

[J.A.:] Right.

[The State:] Okay. So, and then what was he doing when you felt the boner?

[J.A.:] Like, he was moving it back and forth.

[The State:] And was he still hugging you?

[J.A.:] And he was still hugging me.

[The State:] And what were you doing during the time he was doing that . . . what were you during the time that he was hugging you and he had his boner on you?

[J.A.:] I was like pushing him away and walking back away.

[The State:] Okay. You were pushing him away?

[J.A.:] Yeah.

[The State:] How did that go?

[J.A.:] Not good.

. . . .

[The State:] Right. But it sounds like you were trying to push him away. Was it easy to push him away?

[J.A.:] No.

[The State:] Okay. Were you - - did he eventually stop?

[J.A.:] Yes.

[The State:] What made him stop?

[J.A.:] Then he was stopping when, like, that I was walking away. Because he was dropping the bottle on the ground and then that's why, that's the day - - that's the time that he - - that I walked away.

. . . .

[The State:] Okay. So, he was hugging you and he dropped his bottle, so you walked away.

[J.A.:] Right.

(RP 117-119).

On cross-examination, J.A. testified that she did not use the word pussy to anyone prior to her trial testimony. (RP 138). She testified she did not tell the security officers about "touching your pussy or touching your butt[.]" (RP 138). J.A. testified that when she spoke to Officer Althausser, he asked her about those things, and she agreed. (RP 138-139). She testified that Officer Althausser asked her about "dry humping" and she agreed. (RP 139).

Officer Olson testified that when he spoke to J.A., she did not use the word pussy, dick, or boner, but she did use the word butt. (RP 156). Officer Olson testified he wrote a report for this incident, and the only contact he

mentioned between J.A. and Mr. Benson was Mr. Benson touching J.A.'s butt. (RP 160-161; Pl.'s Ex. 5).

Officer Althauser testified he questioned Mr. Benson following his arrest on this charge, and a recording of this interview was admitted at trial. (RP 247-257, 260-261; Pl.'s Ex. 3). In this interview, Mr. Benson stated he "probably" touched J.A.'s butt once, and that he kissed her neck. (RP 254-255; Pl.'s Ex. 3).

The interview also included the following statements:

[Officer Althauser:] . . . Did you hump the front of her leg - - like dry hump her?

[Mr. Benson:] Maybe, I don't know.

[Officer Althauser:] Maybe? Do you remember if you did?

[Mr. Benson:] Maybe.

[Officer Althauser:] Maybe? Do you remember doing it at all?

[Mr. Benson:] No. (Indiscernible), no.

[Officer Althauser:] Oh, really? But you think maybe you did?

[Mr. Benson:] If I did, I'm sorry. I apologize to her.

(RP 255-256; Pl.'s Ex. 3)

The trial court instructed the jury that in order to find Mr. Benson guilty of indecent liberties, it had to find the following elements were proved beyond a reasonable doubt:

- (1) That on or about August, 15, 2016 the defendant knowingly caused J.A. to have sexual contact with the defendant;
- (2) That this sexual contact occurred by forcible compulsion;
- (3) That any of these acts occurred in the State of Washington.

(CP 233; RP 331-332).

The jury was instructed that “[f]orcible compulsion means physical force that overcomes resistance.” (CP 235; RP 332).

The jury was also given a *Petrich*¹ instruction:

The State alleges that the defendant committed acts of Indecent Liberties by more than one act. To convict the defendant of Indecent Liberties, one particular act of Indecent Liberties must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Indecent Liberties.

(CP 237; RP 332-333).

In its closing argument, the State argued:

[J.A.] was able to and had the courage to take the stand, swear an oath to tell the truth in front of all these people that she’s never met before with the person that she says did all this in the room and tell you that that was something that happened.

(RP 343).

Defense counsel did not object to this argument. (RP 343).

The jury found Mr. Benson guilty as charged. (CP 241, 247-258).

At sentencing, defense counsel objected to the following community custody conditions:

I don’t think there is any basis for excluding [Mr. Benson] from contact with [J.A.’s] family because there’s no indication that he’s ever in any way had contact with her family or has ever expressed a desire to. She was not a minor at the time that this happened and so, I don’t believe that that’s appropriate.

.....

¹ See *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

The Community Protection Zone, I don't think that there's any basis for ordering that. I think that it is a condition that the Department of Corrections will set, but I'm not sure it needs to be a condition of the Judgment and Sentence. There is no indication that my Client is predatory in that sense.

(RP 425-426).

Defense counsel addressed Mr. Benson's financial status and legal financial obligations:

With respect to the finances, my Client's last employment was in 2013. He has not worked since then. I would ask the Court to be mindful of that in assessing the - - in reviewing the . . . factors in assessing legal financial obligations. Plus, he's going to be spending his time in prison and I don't think we should be ordering costs for being here on his way there.

. . . .
[W]e'd ask the Court to impose the minimum legal financial obligations

(RP 425, 427).

The trial court imposed an indeterminate sentence of life, with a minimum term of 60 months, pursuant to RCW 9.94A.507. (CP 247-248; RP 431). The trial court also imposed lifetime community custody. (CP 249; RP 431). The trial court imposed the following conditions of community custody, among others:

Cooperate fully with the supervising Community Corrections Officer.

. . . .

Have no contact with the victim, or any members of the victim's family, without prior written permission from the supervising Community Corrections Officer.

- Not be alone with any children under the age of 16, nor in the presence of any children under the age of 16, without an adult present that has been approved of by the Department of Corrections and without prior written permission from the Community Corrections Officer.
- Have no sexual contact with any person under the age of 18.
- Do not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030).

....

11. Have no direct or indirect contact with the victims or victim's family.

....

13. Do not purchase, possess, or view any pornographic material.

....

15. Submit to polygraph testing at the direction of Community Corrections Officer.

(CP 249-250, 258; RP 431-433, 435).

The trial court questioned Mr. Benson regarding his financial status:

[Trial court:] And I just wanted to confirm, sir, you don't have any - - a big chunk of money sitting in any bank accounts, I take it, somewhere?

[Mr. Benson:] I wish.

[Trial court:] No hard assets like a home or a paid for vehicle or anything of that nature, sir? Your skill sets, what is it that you would do if you got out and you were to be employed?

[Mr. Benson:] I'm going to go in - - I've got my food handler's card, I've got my driver's card.

[Trial court:] Okay.

[Mr. Benson:] You know, I've completed firefighter training. But I want to go in and get my degree for culinary arts or welding or mechanics, you know.

[Trial court:] General employment with some specialized skill, but employable in the future.

....

But no, no immediate assets or that to pay anything.

(RP 433).

The trial court also questioned Mr. Benson regarding medical costs:

[Trial court:] And have you been in good health, sir, while you've been here? Have you had any medical attention or anything?

[Mr. Benson:] I broke an arm.

[Trial court:] Oh, in the - - while you were here? Okay.

[Mr. Benson:] I spent five days in Memorial.

....

And broke my right hand.

(RP 434).

The trial court imposed \$800 in mandatory legal financial obligations.

(CP 251; RP 433-434). The trial court also imposed costs of incarceration and costs of medical care, capping each at \$500. (CP 251; RP 434). With respect to these costs, the felony judgment and sentence contains the following language:

“the court finds that the defendant has the means to pay for the costs of incarceration[.]” and “the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant[.]” (CP 251).

The felony judgment and sentence also contains the following language:

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 find that 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 248).

The felony 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 251).

Mr. Benson appealed. (CP 262-272). The trial court entered an Order of Indigency, granting Mr. Benson a right to review at public expense. (CP 273-277).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Benson guilty of indecent liberties by forcible compulsion, where the evidence was insufficient.

There was insufficient evidence to support Mr. Benson's conviction of indecent liberties by forcible compulsion, because the evidence presented at trial did not establish that Mr. Benson caused J.A. to have sexual contact with him by forcible compulsion. A rational jury could not have found Mr. Benson guilty of indecent liberties as charged. Therefore, the evidence is insufficient to support Mr. Benson's conviction of indecent liberties by forcible compulsion.

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.

“[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.*

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).

To find Mr. Benson guilty of indecent liberties by forcible compulsion, the jury had to find:

- (1) That on or about August, 15, 2016 the defendant knowingly caused J.A. to have sexual contact with the defendant;
- (2) That this sexual contact occurred by *forcible compulsion*;
- (3) That any of these acts occurred in the State of Washington.

(CP 233; RP 331-332) (emphasis added); *see also* RCW 9A.44.100(1)(a) (indecent liberties by forcible compulsion).

Forcible compulsion is defined as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6). Here, the jury was

instructed on the first definition part of the definition only, “[f]orcible compulsion means physical force that overcomes resistance.” (CP 235; RP 332).

“[W]hether the evidence establishes the element of resistance is a fact sensitive determination based on the totality of the circumstances, including the victim's words and conduct.” *State v. McKnight*, 54 Wn. App. 521, 526, 774 P.2d 532 (1989)). “Forcible compulsion requires more force than the force normally used to achieve sexual intercourse or sexual contact.” *State v. Ritola*, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991). “[F]orcible compulsion is not the force inherent in any act of sexual touching, but rather is that ‘used or threatened to overcome or prevent resistance by the female.’” *Id.* at 254-55, 817 P.2d 1390 (1991) (quoting *McKnight*, 54 Wn. App. at 527).

In *Ritola*, the defendant, while standing behind and a little to the right of a female juvenile detention counselor, “grabbed her right breast, squeezed it, then ‘instantaneously’ removed his hand.” *Id.* at 253. Based on these facts, the defendant was convicted of indecent liberties by forcible compulsion. *Id.* On appeal, the court found insufficient evidence to support the finding of forcible compulsion. *Id.* at 254-256. The court reasoned:

It is undisputed that [the defendant] used the force necessary to touch the counselor’s breast, but as noted, that is not enough for forcible compulsion. There is no evidence that the force he used overcame resistance, for he caught the counselor so much by surprise that she has no time to resist.

Id. at 255.

The court further reasoned “the evidence does not support a reasonable inference that the force used by [the defendant] was directed at overcoming resistance, or that such force was more than that needed to accomplish sexual touching.” *Id.* at 255-56.

Here, there was insufficient evidence that Mr. Benson had sexual contact with J.A. by forcible compulsion. The case is analogous to *Ritola*. See *Ritola*, 63 Wn. App. at 253-56. The force used by Mr. Benson was no more than that needed to accomplish the sexual contact. The force used by Mr. Benson was not directed at overcoming resistance from J.A., but rather, it was used to make sexual contact with her.

Assuming the jury could have determined that Mr. Benson touching J.A.’s butt was sexual contact, no physical force was used during this act, beyond what was needed to accomplish the sexual contact. (RP 125, 133-136, 189-191, 221-222, 229, 254-255; Pl.’s Ex. 3); see RCW 9A.44.010(2) (“‘Sexual contact’ means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.”); *In re Matter of Welfare of Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979) (“The determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of the facts.”). The only physical contact during this incident by Mr. Benson was the placing of his hands on J.A.’s buttocks. (RP 125, 133-136, 189-191, 221-222, 229).

Mr. Benson's act of putting his penis against J.A.'s body was also done with only the level of force needed to accomplish this sexual contact. (RP 116-119, 126, 137). Mr. Benson hugged J.A. in order to contact her body with his penis, but no other force was used by Mr. Benson. (RP 117-119); *cf. State v. Wright*, No. 49106-1-II, 2017 WL 3142586, at *5 (Wash. Ct. App. July 25, 2017) (finding sufficient evidence of forcible compulsion, where the defendant pushed into the victim while she was bent over a counter, placed his knee between her legs, placed his arms around her, pulled her in, and grabbed her crotch); *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).

In addition, Mr. Benson did not overcome resistance from J.A. J.A. did not say anything to Mr. Benson during the sexual contact, and according to her testimony, he stopped the contact. (RP 117-119). Mr. Benson did not overcome her resistance, but rather, ceased the sexual contact with J.A. (RP 117-119).

A rational jury could not have found Mr. Benson guilty of indecent liberties by forcible compulsion. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). The evidence presented at trial did not establish that Mr. Benson used forcible compulsion when causing J.A. to have sexual contact with him. His conviction for indecent liberties by forcible compulsion 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 argument that was prejudicial and incurable, by vouching for J.A. and by appealing to the passion and prejudice of the jury.

The State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and appealing to the passion and prejudice of the jury. This Court should reverse Mr. Benson’s conviction and remand for a new trial.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); 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's arguments calculated to appeal to the jurors' passion and prejudice and encourage them to render a verdict on facts not in evidence are improper. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *see also State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (counsel may not “make prejudicial statements that are not sustained by the record.”). “[B]ald appeals to passion and prejudice constitute misconduct.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *Belgarde*, 110 Wn.2d at 507–08). “[T]he prosecutor's duty is to ensure a verdict free of prejudice and based on reason.” *State v. Clafin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (internal citations omitted) (citing *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968)).

In addition, “[a] prosecutor commits misconduct by vouching for a witness’s credibility.” *State v. Robinson*, 189 Wn. App. 877, 892, 359 P.3d 874 (2015). “Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information

not presented to the jury supports the witness's testimony.'" *Id.* at 892-93 (quoting *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010)).

Here, in its closing argument, the State argued:

[J.A.] was able to and had the courage to take the stand, swear an oath to tell the truth in front of all these people that she's never met before with the person that she says did all this in the room and tell you that that was something that happened.

(RP 343) (emphasis added).

The State committed misconduct by appealing to the passion and prejudice of the jury, by arguing that J.A. had "the courage to take the stand" and testify at trial. (RP 343); *see also Belgarde*, 110 Wn.2d at 507; *Fisher*, 165 Wn.2d at 747 (citing *Belgarde*, 110 Wn.2d at 507-08); *Claflin*, 38 Wn. App. at 849-50 (citing *Huson*, 73 Wn.2d at 662). By characterizing J.A. as courageous for testifying at trial, the State encouraged the jury to render a verdict based on sympathy for J.A., rather than based upon the facts admitted into evidence at trial. The State's argument appealed to the passion and prejudice of the jury by encouraging them to render a verdict based on their support for J.A.'s willingness to testify, rather than based upon the facts presented.

The State's argument also constituted improper vouching for J.A.'s testimony. *See Robinson*, 189 Wn. App. at 892-93. By arguing J.A. had the courage to take the stand, the State placed the prestige of the government behind J.A. as a witness. The State personally endorsed J.A. as a witness by characterizing her as courageous. *Cf. Robinson*, 189 Wn. App. at 894 (finding the

State did not place the prestige of the government behind the witness, because the prosecutor's statements did not personally endorse the witness).

The State's argument prejudiced Mr. Benson. *See Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). The case turned on the whether the jury believed the testimony of J.A., because J.A. was the only witness to testify that Mr. Benson put his penis against her body. (RP 116-119, 137). In the statements from Officer Althausser's interview of Mr. Benson admitted at trial, Mr. Benson did not unequivocally admit to this conduct. (RP 255-256; Pl.'s Ex. 3).

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). The question for the jury was whether to believe the testimony J.A. Where the case turned on whether the jury believed this singular witness, no curative instruction would have removed the prejudice created by the State characterizing the witness as courageous.

The State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and appealing to the passion and prejudice of the jury. This Court should reverse Mr. Benson's conviction and remand for a new trial.

Issue 3: Whether the trial erred in imposing certain conditions of community custody.

Mr. Benson challenges the imposition of eight conditions of community custody imposed by the trial court. Each of these eight conditions is addressed below. Each of these community custody conditions should be stricken, or modified, as requested.

Except for the community custody conditions prohibiting contact with J.A.'s family and the community protection zone condition, Mr. Benson challenges these community custody conditions for the first time on appeal. (RP 425-426). Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

“As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). The Court of Appeals “has struck crime-related community

custody conditions when there is ‘no evidence’ in the record that the circumstances of the crime related to the community custody condition.” *State v. Irwin*, 191 Wn. App. 644, 656–57, 364 P.3d 830 (2015).

Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). Whether a community custody condition is unconstitutionally overbroad or vague is also reviewed for an abuse of discretion. *State v. Magana*, 197 Wn. App. 189, 200, 389 P.3d 654 (2016). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

Where the trial court lacked authority to impose a community custody condition, the appropriate remedy is to remand to strike the condition. *See, e.g., State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The eight conditions of community custody imposed by the trial court and challenged here by Mr. Benson are each addressed below.

[1] Cooperate fully with the supervising Community Corrections Officer.

The trial court imposed a community custody condition requiring Mr. Benson to “[c]ooperate fully with the supervising Community Corrections Officer.” (CP 249). However, this condition should be stricken, because it is unconstitutionally vague and unconstitutionally overbroad.

“A legal prohibition, such as a community custody condition, is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *State v. Padilla*, 416 P.3d 712, 715 (Wash. 2018).

A community custody condition may be considered unconstitutionally overbroad where it encompasses matters that are not crime related or restricts lawful conduct not directly related to the crime. *See State v. Bahl*, 137 Wn. App. 709, 714-15, 159 P.3d 416 (2007), *reversed in part on other grounds*, 164 Wn.2d 739, 193 P.3d 678 (2008).

The condition requiring Mr. Benson to cooperate fully with his supervising Community Corrections Officer is unconstitutionally vague, because it affords too much discretion to the Community Corrections Officer. There are no stated limits on what the Community Corrections Officer can require for Mr. Benson to “cooperate fully.” An ordinary person could not understand what is prohibited by this condition. Further, the condition is constitutionally overbroad, because it could encompass any conduct; there are no limitations requiring the Community Corrections Officer to restrict only conduct that is related to Mr. Benson’s offense. Therefore, this condition should be stricken.

[2] Submit to polygraph testing at the direction of Community Corrections Officer.

The trial court imposed a community custody condition requiring Mr. Benson to “[s]ubmit to polygraph testing at the direction of Community Correction Officer.” (CP 258). Our Supreme Court has expressly held that polygraph testing is a valid community custody monitoring condition. *See State v. Riles*, 135 Wn.2d 326, 342, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). “Trial courts have authority to require polygraph testing . . . to monitor compliance with other conditions of community placement.” *Id.* at 351-52. Therefore, a community custody condition authorizing polygraph testing should contain language setting forth this “monitoring compliance” limitation. *See, e.g., State v. Combs*, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000).

The community custody condition requiring Mr. Benson to “[s]ubmit to polygraph testing at the direction of Community Correction Officer[.]” is overbroad because it gives the Community Corrections Officer unfettered discretion to include any subject in the polygraph; it does not limit the polygraph testing to monitor compliance with community custody. (CP 258). Thus, this condition should be modified to specify a more narrow application, limiting the polygraph testing to monitor compliance with other community custody conditions.

[3] Have no contact with the victim, or any members of the victim's family, without prior written permission from the supervising Community Corrections Officer; and

[4] Have no direct or indirect contact with the victims or victim's family.

The trial court imposed two community custody conditions prohibiting Mr. Benson from having contact with the victim's family. (CP 250, 258).

However, by statute, a community custody condition prohibiting contact with family members must be limited to "immediate" family members:

If the offender was sentenced pursuant to a conviction for a sex offense, the department may . . . [r]equire the offender to refrain from direct or indirect contact with the victim of the crime or *immediate family member* of the victim of the crime.

RCW 9.94A.704(5)(a) (emphasis added).

Therefore, these two community custody conditions were not authorized by statute and should be remanded for modification to prohibit contact with "immediate" family members only. *See Leach*, 161 Wn.2d at 184.

[5] Not be alone with any children under the age of 16, nor in the presence of any children under the age of 16, without an adult present that has been approved of by the Department of Corrections and without prior written permission from the Community Corrections Officer; and

[6] Have no sexual contact with any person under the age of 18.

The trial court imposed two conditions prohibiting Mr. Benson from having contact with minors. (CP 250). However, J.A. was 24 years old at the time of these events; she was not a minor. (CP 8-9, 259-260; RP 112). Therefore, these community custody conditions were not-crime related, and should be stricken. *See Irwin*, 191 Wn. App. at 656-657.

In addition, RCW 9.94A.703 authorizes the following condition of community custody: “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals[.]” RCW 9.94A.703(3)(b). However, the two conditions prohibiting Mr. Benson from having contact with minors are not authorized by this provision. (CP 250).

In *Riles*, the defendant, convicted of first degree rape of a 19-year-old woman, challenged a sentencing condition prohibiting him from having contact with minor children. *Riles*, 135 Wn.2d at 349-50, *abrogated on other grounds by Valencia*, 169 Wn.2d at 792. The court struck the sentencing condition, reasoning that the condition was not related to his crime. *Id.* at 350. The court stated that while the applicable statutory provision, former RCW 9.94A.120(9)(c)(ii), “gives courts authority to order offenders to have no contact with victims or a ‘specified class of individuals[.]’” the term “ ‘specified class of individuals’ seems in context to require some relationship to the crime.” *Id.* The court further reasoned “the defendant's freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and the public order[.]” and here, “there has been no showing that children are at risk and thus require special protection from him.” *Id.*; *see also State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (stating that “[c]onditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order.”).

The applicable statute in *Riles*, former RCW 9.94A.120(9)(c)(ii), mirrors the applicable statute here, RCW 9.94A.703(3)(b). *See* RCW 9.94A.703(3)(b); *Riles*, 135 Wn.2d at 350. Thus, the term “specified class of individuals” at issue here requires some relationship to the crime itself. *See* RCW 9.94A.703(3)(b); *Riles*, 135 Wn.2d at 350.

The trial court lacked statutory authority to prohibit Mr. Benson from having contact with minors, because the conditions have no relationship to his offense against an adult victim. (CP 8-9, 259-260; RP 112); RCW 9.94A.703(3)(b); *Riles*, 135 Wn.2d at 349-50.

In addition, because Mr. Benson’s offense did not involve minors, there is no showing that restricting his freedom of association in this manner “is reasonably necessary to accomplish the essential needs of the state and the public order.” *Riles*, 135 Wn.2d at 350; *see also Warren*, 165 Wn.2d at 32.

Therefore, the two conditions prohibiting Mr. Benson from having contact with minors should be stricken.

[7] Do not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030).

The trial court imposed a community custody condition prohibiting Mr. Benson from residing in a community protection zone. (CP 250; RP 432-433). However, this community custody condition is only authorized by statute when the victim of the offense was under age eighteen:

If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), *and the victim of the offense was under eighteen years of age at the time of the offense*, prohibit the offender from residing in a community protection zone[.]

RCW 9.94A.703(1)(c) (emphasis added).

Here, J.A. was 24 years old at the time of these events. (CP 8-9, 259-260; RP 112). Because she was not under age eighteen, this community custody condition prohibiting Mr. Benson from residing in a community protection zone was not authorized by statute and should be stricken. *See* RCW 9.94A.703(1)(c); *Leach*, 161 Wn.2d at 184.

[8] Do not purchase, possess, or view any pornographic material.

The trial court imposed the following community custody condition: “[d]o not purchase, possess or view any pornographic material.” (CP 258). This condition should be stricken, because it is unconstitutionally vague and not crime-related.

First, the condition is unconstitutionally vague, because “it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition[.]” and “it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *Padilla*, 416 P.3d at 715; *see also State v. Alcocer*, 2 Wn. App. 2d 918, 922, 413 P.3d 1033 (2018) (a recent case where this Court found a community custody condition prohibiting use or possession of pornographic materials unconstitutionally vague).

Second, as acknowledged above, “[a]s part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f).

In *Magana*, this Court upheld a community custody condition “regarding sexually explicit materials” as crime-related, and therefore, properly imposed, “[b]ecause [the defendant] was convicted of a sex offense[.]” *Magana*, 197 Wn. at 201. The opinion contains no additional analysis of the connection between the crime itself and sexually explicit materials. *See id.* at 201. Recently, this Court adhered to its position in *Magana*. *See Alcocer*, 2 Wn. App. 2d at 922-924.² In *Alcocer*, this Court stated “we believe it is not manifestly unreasonable for trial judges to restrict access to sexually explicit materials for those convicted of sex offenses.” *Id.* at 924.

Division I has rejected the categorical approach of *Magana*:

To the extent *Magana* stands for either a categorical approach or the broad proposition that a sex offense conviction alone justifies imposition of a crime-related prohibition, we disagree. As previously noted, there must be some evidence supporting a nexus between the crime and the condition.

State v. Norris, 1 Wn. App. 2d 87, 98, 193 P.3d 678 (2017), *review granted*, 190 Wn.2d 1002, 413 P.3d 12 (2018).

² A Petition for Review by the Washington Supreme Court of this decision was filed on April 18, 2018.

The *Norris* court upheld a condition prohibiting possession of sexually explicit materials, because the crime involved sex-related text messages and a photograph. *Id.*

Subsequent Division I cases have followed suit in rejecting the categorical approach of *Magana*. See, e.g., *State v. Bruno*, No. 74647-2-I, 2017 WL 5127781, at *9 (Wash. Ct. App. Nov. 6, 2017); *State v. Santiago*, No. 74421-6-I, 2017 WL 5569209, at *6 (Wash. Ct. App. Nov. 20, 2017); 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).

Mr. Hart respectfully asks this Court to decline to follow *Magana* and *Alcocer*, and instead follow the reasoning of Division I, requiring a connection between the crimes of conviction and sexually explicit materials. See *Norris*, 1 Wn. App. 2d at 98; see also *Bruno*, 2017 WL 5127781, at *9; *Santiago*, 2017 WL 5569209, at *6; GR 14.1(a).

Here, there is no evidence in the record that possessing pornography was related to Mr. Benson's offense. The crime did not involve pornography. Therefore, the trial court erred by imposing this community custody condition, because it was not crime-related.

Accordingly, this court should strike the community custody condition prohibiting Mr. Benson from purchasing, possessing, or viewing any

pornographic material, because it is unconstitutionally vague and not crime-related.

Issue 4: Whether the trial court erred by requiring Mr. Benson to pay costs of incarceration and costs of medical care.

The trial court entered boilerplate findings regarding Mr. Benson’s ability to pay legal financial obligations. (RP 248, 251). The trial court also imposed costs of incarceration and costs of medical care, capping each at \$500. (CP 251; RP 434).

However, the record reflects Mr. Benson does not have the ability to pay these discretionary costs. This case should be remanded for resentencing to strike the unsupported and contrary findings regarding Mr. Benson’s ability to pay legal financial obligations, and the discretionary costs of incarceration and costs of medical care. At a minimum, the case should be remanded to the trial court to reconsider the imposition of the discretionary costs of incarceration and costs of medical care.

a. Mr. Benson requests that this Court review the discretionary costs of incarceration and costs of medical care that were imposed, pursuant to RAP 2.5(a).

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. Benson 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.*

Review of the discretionary costs of incarceration and costs of medical care that were imposed herein under RAP 2.5(a) would be just and proper. 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 834-37. “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.

Because Mr. Benson is unable to pay discretionary costs of incarceration and costs of medical care, totaling up to \$1,000, presently or in the near future, and faces significant difficulties successfully re-entering society with the potentially high financial burden, review of this issue would be appropriate under RAP 2.5(a). *See State v. Leonard*, 184 Wn. 2d 505, 506-08, 358 P.3d 1167

(2015) (reviewing the imposition of costs of incarceration and costs of medical care, raised for the first time on appeal).

b. The discretionary costs of incarceration and costs of medical care that were imposed herein are inconsistent with the trial court’s findings and the record on Mr. Benson’s ability to pay legal financial obligations.

Costs of incarceration and costs of medical care are discretionary costs. *Leonard*, 184 Wn.2d at 506-08. Therefore, “the assessment of . . . costs of medical care must be based on an individualized inquiry into the defendant's current and future ability to pay that is reflected in the record, consistent with the requirements of *Blazina*. *Id.* at 508.

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 also 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 838-39.

Where a trial court does make a finding that the defendant has the ability to pay, “perhaps through inclusion of boilerplate language in the judgment and sentence,” its finding is reviewed under the clearly erroneous standard. *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013) (citing *State v. Bertrand*, 165 Wn. App. 393, 404 n.13, 267 P.3d 511 (2011)). “A finding of fact 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 trial court entered a boilerplate finding that it had considered Mr. Benson’s ability to pay legal financial obligations and found that he had the present or future ability to pay. (CP 248). The trial court also entered a boilerplate findings that Mr. Benson “has the means to pay for the costs of incarceration[,]” and “has the means to pay for any costs of medical care incurred by Yakima County on [his] behalf [.]” (CP 251). These boilerplate findings were

clearly erroneous, considering the record that was made on Mr. Benson's ability to pay. (RP 433). At sentencing, the trial court questioned Mr. Benson regarding his financial status, and determined Mr. Benson had "no immediate assets or that to pay anything." (RP 433). Although the trial court stated Mr. Benson was "employable in the future[,]" the trial court imposed an indeterminate sentence of life, with a minimum term of 60 months, making the possibility of any future employment speculative. (CP 247-248; RP 431). In addition, the trial court only imposed \$800 in mandatory LFOs. (CP 251; RP 433-434).

The court's written boilerplate findings on Mr. Benson's ability to pay and costs of incarceration and costs of medical care are inconsistent with the record at sentencing, and the trial court's imposition of only mandatory costs and the term of incarceration imposed. (CP 247-248, 251; RP 431, 433-434). The boilerplate findings are inconsistent with the record at sentencing, were clearly erroneous, mistaken, and not supported by substantial evidence in the record. (CP 248, 251). Accordingly, Mr. Benson respectfully requests that this court remand to strike these findings and the discretionary costs of incarceration and costs of medical care from his judgment and sentence. At a minimum, the case should be remanded to reconsider the imposition of the discretionary costs of incarceration and costs of medical care. *See Leonard*, 184 Wn.2d at 508 (imposing this remedy).

c. Alternatively, defense counsel's failure to request that the trial court strike its unsupported LFO findings and costs of incarceration and costs of medical care constituted ineffective assistance of counsel.

If this Court is not inclined to reverse the clearly erroneous LFO findings and imposition of costs of incarceration and costs of medical care pursuant to its discretionary authority in RAP 2.5, Mr. Benson argues that this Court should remand due to trial counsel's ineffective assistance. Counsel's performance was deficient where he failed to object to the erroneous LFO findings and the imposition of discretionary costs of incarceration and costs of medical care, and Mr. Benson was prejudiced by this error.

Counsel is ineffective when his performance was deficient and there is a reasonable probability that the error affected the outcome. *Strickland v. Washington*, 466 U.S. 668, 685-87, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). As set forth above, a sentencing court may order a defendant to pay discretionary LFOs, but only if the trial court first considered, on an individualized basis, the defendant's likely present or future ability to pay. *Blazina*, 182 Wn.2d at 834; *see also Leonard*, 184 Wn.2d at 506-08. The court's finding on the defendant's ability to pay must be supported by substantial evidence in the record, or else it is clearly erroneous and should be stricken. *Lundy*, 176 Wn. App. at 105 (citing *Bertrand*, 165 Wn. App. at 404 n.13).

Counsel neglected to object to the court's unsupported findings on Mr. Benson's ability to pay and imposition of discretionary costs of incarceration and costs of medical care. Mr. Benson was deprived his right to effective assistance by counsel's deficient performance. *See State v. Duncan*, 180 Wn. App. 245, 255, 327 P.3d 699 (2014) (recognizing ineffective assistance of counsel may be "an available course for redress" when defense counsel fails to address an indigent defendant's ability to pay LFOs); *see also State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know relevant law).

Counsel's failure to object to imposition of discretionary LFOs and the court's unsupported findings was prejudicial in this case. There is a reasonable probability the outcome would have been different had counsel properly objected. The court likely would not have entered the erroneous boilerplate findings and imposition of medical care and incarceration costs, had counsel properly objected. The record shows Mr. Benson does not have the ability to pay discretionary LFOS: he does not have immediate assets to use to pay LFOs, and his ability to work in the future is speculative, given his indeterminate sentence of life, with a minimum term of 60 months. (CP 247-248; RP 431, 433); *cf. State v. Lyle*, 188 Wn. App. 848, 853-54, 355 P.3d 327 (2015), *review granted, cause remanded*, 184 Wn.2d 1040, 365 P.3d 1263 (2016) (In considering whether defense counsel was ineffective for failing to challenge LFOs, finding the prejudice prong was not met, where "there are no additional facts in the record, such as whether [the

defendant] has additional debt, which would allow us to determine whether the trial court would have imposed fewer or no LFOs if defense counsel had objected.”).

Mr. Benson was prejudiced by his trial counsel’s deficient performance. Mr. Benson’s constitutional right to effective assistance of counsel was violated and resentencing is proper at this time.

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

Mr. Benson 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 (2016), this Court’s General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The trial court questioned Mr. Benson regarding his financial status and concluded he had “no immediate assets or that to pay anything.” (RP 433). An order finding Mr. Benson indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 273-277). To the contrary, Mr. Benson’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Benson remains indigent. His report as to continued indigency shows that his only income is a \$200 per month tribal per capita payment, and that he has an outstanding LFO debt.

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, the trial court imposed only mandatory costs and entered an Order of Indigency, and Mr. Benson's Report as to Continued Indigency demonstrates a continued inability to pay costs. (CP 273-277).

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. Benson met this standard for indigency. (CP 273-277).

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); CP 273-277. "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. Benson to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Benson’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Benson remains indigent.

This Court is asked to deny appellate costs at this time. 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. Benson’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. Benson remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

Mr. Benson's conviction should be reversed and dismissed with prejudice, because there was insufficient evidence of forcible compulsion.

In the alternative, the case should be reversed and remanded for a new trial, because the State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and appealing to the passion and prejudice of the jury.

At a minimum, this matter should be remanded to the trial court to strike or modify the eight community custody conditions challenged above.

Mr. Benson also asks that this Court remand for resentencing to strike the unsupported and contrary findings regarding his ability to pay legal financial obligations, including discretionary costs of incarceration and costs of medical care. At a minimum, the case should be remanded to the trial court to reconsider the imposition of the discretionary costs of incarceration and costs of medical care.

Mr. Benson also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 19th day of June, 2018.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

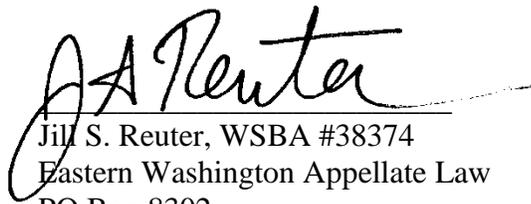
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35611-6-III
vs.) Yakima Co. No. 16-1-01472-39
)
JONATHON A. BENSON) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 19, 2018, 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:

Jonathon A. Benson, DOC #400173
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PO Box 769
Connell, WA 99326

Having obtained prior permission, I also served a copy on the Respondent at David.Trefry@co.yakima.wa.us and appeals@co.yakima.wa.us using the Washington State Appellate Courts' Portal.

Dated this 19th day of June, 2018.


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