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Court of Appeals
Division III
State of Washington
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No. 36488-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

NATHAN BRICK NAVE,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in imposing a $200 criminal filing fee

Issue Pertaining to Assignment of Error

Whether the court erred in imposing a $200 criminal filing fee, where Mr. Nave was indigent.

B. STATEMENT OF THE CASE

At trial in October 2018, Danielle Valentine testified she is the 37-year-old mother of then 16-year-old daughter I.V. (victim in this case, date of birth: 6/2/2002) and twin 9-year-old daughters A.V. and M.V. RP[1] 46, 87. Mrs. Valentine and the defendant, Nathan Brick Nave (date of birth: 5/26/1981), married in 2010 and he is the father of A.V. and M.V. RP 88. The four of them had lived in a house in Spokane Valley, Washington, for eight to nine years. RP 88. In 2017, Nave had a vehicle, was working at Umpqua Bank and was the primary provider of the family's income. RP 90.

I.V. first met Nave when she was about five years old, and she described the relationship with her stepfather as good, "kind of close," and

[1] References are made to the one volume transcript prepared by court reporter Heather Gipson, which covers the trial days (October 1–3, 2018) and the sentencing hearing (November 16, 2018) in sequentially numbered pages.

said he was a father figure to her. RP 48, 62. I.V. testified she has never been married to anybody. RP 48.

The upstairs of the family home had a living room, kitchen, two bathrooms and three bedrooms. RP 88. A play room, another living room and I.V.'s bedroom were located downstairs. RP 88–89. For about three years before he moved out due to the circumstances involved in this case, Nave had been sleeping on the couch in the downstairs living/entertainment center room. RP 50, 89. Mrs. Valentine and her twin daughters typically did not spend very much time in the downstairs area. RP 62, 88–89.

I.V. described the first time Nave touched her inappropriately, when she was eleven[2] years old, saying they were on opposite sides of the couch in the entertainment center room watching a movie. She had fallen asleep but wakened to him massaging her upper thigh under her shorts. RP 50–51. I.V. didn't say anything to him and got up and went to bed. RP 51.

[2] This event at age eleven and the event in the next paragraph at age thirteen occurred prior to the charging period for the three counts alleged in the Information. CP 1–2. Pre-trial, after discussion, the court granted the State's motion in limine regarding the expected testimony subject to timely defense objection, on the basis it does go to lack of accident, mistake, misunderstanding, state of mind of the victim, and the charged aggravating factor of ongoing pattern of sexual abuse. RP 6–11.

I.V. said a similar event occurred in that room when she was about thirteen years old, but on a different couch the family had gotten by then. She again woke up to him touching her, but now on her vagina. I.V. resisted his pulling her back, and went to her room saying it's a school night and she had to get back to bed. RP 52.

The next event I.V. could remember occurring took place late at night in her bedroom sometime in 2017. RP 53–54. She woke up to him massaging her legs, rubbing her back and rubbing her vagina; she could then feel his fingers go inside her vagina "because it was painful." RP 54–57. I.V. stated the same thing happened again, maybe three or four times a week for several months. RP 56–57.

There were times in 2017 I.V. would wake up to his fingers inside her. RP 57. She didn't remember the first time that it happened, but thought it had been happening for a few months before she eventually told her mother. RP 57.

I.V. stated he didn't rub around her vagina every night that he came into her bedroom, and instead sometimes—but not often— would just massage her legs or lift up her shirt and unclip her bra and touch her front chest all over by reaching over her side, including her breasts. RP 58–59. Usually when he came into her room, he would touch her vagina and rub

her legs. RP 59. Sometimes he'd come in her room more than once in a night, doing "just the same thing" or sometimes "he'd just watch me sleep." RP 59. I.V. never said anything to him or let him know that she was awake, but sometime she moved her body closer to the wall while he was in there touching her. RP 59. Sometimes he'd stop; sometimes he'd keep touching her. RP 60. I.V. said she usually fell asleep on her side or her stomach, always facing the bedroom wall and away from the door. RP 54, 58, 79. Whenever she heard him come in, I.V. would cover her head with her bed covers because she didn't want him to see that she had woken up. RP 67. She knew he was watching her "sleep" at times because she could just hear him. RP 76.

When asked what was going through her head when he would come in at night and touch her this way, I.V. stated she wanted to say something but couldn't because she was just too scared; after he'd leave her room I.V. would usually cry herself to sleep or stay up. RP 60.

On an undisclosed date, Nave uncharacteristically took I.V. to a business called Wake Up Call and, after getting her a coffee, he stopped at a stop sign. RP 63. "He said about last night, one of three things could happen. One, you don't tell anyone and I keep doing it; two, you don't tell anyone and I stop; three, you feel like you have to tell someone." RP 63.

When he said this, I.V. responded “two, for him to stop.” RP 63. The touching did not stop after that conversation and instead continued for a couple months. RP 63–64.

During the months the touching had happened, I.V. thought about telling her mother. The pros included never having to see him again and “none of that stuff would ever happen to me or anyone that I was close with.” RP 65. The cons included that she “wouldn’t have a father figure and neither would my sisters and everything would fall apart, and my sisters would probably have to go to foster care or something like that.” RP 65–66. These are the reasons I.V. hadn’t told her mom. RP 66.

The very last time I.V. recalled “this” happening was on May 12, 2017, when really early in the morning “he just touched my vagina and legs.” RP 60. I.V. remembered the date because it was the day she told her mom because she just couldn’t handle it anymore. RP 60, 85. Earlier she had balked at cleaning her room as directed by her mother, and Nave—who was working from home—came upstairs yelling at her and told her to go clean her room. I.V. began to comply while crying and thinking about what he did to her and that it just doesn’t stop, Nave kept asking her why she was sobbing, and finally as he got louder and more frustrated with her,

I.V. retorted “you know what you did,” and when her mom called her upstairs I.V. told her Nave had “raped” her. RP 66–67, 90.

Danielle Valentine talked briefly with I.V. asking if she was sure and did she know what that means, then sent her out on the patio when Nave came upstairs. RP 91. After talking briefly, Mrs. Valentine told him he needed to leave and go to his mom’s. Nave packed his bags and left. RP 91.

Mrs. Valentine delayed calling crime check until the following morning because she “wanted to get to the bottom of everything.” RP 91–92. Spokane County Deputy Sheriff Beau Vucinich responded to the reported rape, confirmed Nave was not there, and took statements from mother and daughter. RP 126-28. That day he contacted Nave’s mother but was unable to locate Nave. RP 129.

Detective Brandon Armstrong of the Spokane County Sheriff’s Office was assigned to the case on May 16, 2017. The detective followed up on a missing person report regarding Nave dated May 14. He did not attempt to search for Nave’s vehicle because the detective had information that it was at a known location——an auto dealership. He didn’t attempt to locate Nave at this place of employment because he had information that Nave had not been there, and they had been inquiring about him. The

detective ultimately determined that Nave was in New York City, and closed out the report on May 18. RP 105–107. Over an approximate two hour video recorded interview on May 23, the detective spoke with the mother and daughter. RP 108–09. I.V. identified the person that had sexually abused her as “Nathan Nave”. RP 109.

Mrs. Valentine testified to her knowledge Nave had no family in New York nor did he travel for business on behalf of Umpqua Bank. RP 96. After Nave left the house on May 13, she had seen his car in the parking lot of the auto liquidator dealership and had not observed Nave with that car after that time. RP 94–96. She stated Nave called her from New York the day she took I.V. in to give a statement to Detective Armstrong (May 23). RP 96.

Nave testified he lived with I.V. and the family at the Spokane Valley house during the time period of January 1, 2017 to May 12, 2017. RP 139. Since June 2017, Nave had lived in Idaho Falls, Idaho at his cousin’s house. RP 135–36. He testified that on May 12, 2017, when he was told to leave the family house, he went to his mother’s house. RP 139, 146. He travelled to New York the following day. RP 146. He’d sold his car and notified his employed that he would no longer be “present” at his job. RP 146–47.

Nathan Nave denied having any inappropriate sexual contact with I.V. RP 136. He stated he first learned of the charges when marshals came to the Idaho Falls house with a warrant and said there were charges in Washington State. RP 136. They took him to a jail in Bonneville County and he posted bond. RP 137. Within days he travelled to Spokane and reported directly to the court where he had a scheduled court date. RP 137–38.

The jury found Nave guilty as charged of committing during the timeframe of "on or about between [*sic*] January 1, 2017 and May 12, 2017" second degree rape[3], rape of a child in the third degree[4], and child molestation in the third degree[5]. CP 1–2, 95, 97, 99.

The jury answered "yes" to the special verdict forms, which inquired whether each respective crime "was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time." CP 96, 98, 100.

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[3] The "to convict" instruction regarding count I, rape in the second degree, added non-WPIC language that "the elements proved must be a separate and distinct act on a separate date and time from counts II and III. CP 80, Instruction No. 8.

[4] The "to convict" instruction regarding count II, rape of a child in the third degree, added non-WPIC language that "the elements proved must be a separate and distinct act on a separate date and time from counts I and III. CP 83, Instruction No. 11.

[5] The "to convict" instruction regarding count III, child molestation in the third degree, added non-WPIC language that "the elements proved must be a separate and distinct act on a separate date and time from counts I and II. CP 85, Instruction No. 13.

The trial court entered judgment and sentence on November 16, 2018. RP 223–24. Relying on the aggravating factors found by the jury, the court imposed the high end of the standard ranges and community custody on count 1 (second degree rape, an indeterminate minimum term[6] of 194 months, followed by community custody for any period of time the defendant is released from total confinement before the expiration of the statutory maximum (life)); count 2 (rape of a child in the third degree, sentence of 60 months and zero months of community custody so as not to exceed the statutory maximum (60 months)); and count 3 (child molestation in the third degree, sentence of 54 months, followed by six months of community custody so as not to exceed the statutory maximum (60 months)—all to run concurrently. RP 224; CP 154–55.

The sentencing court did not inquire as to Nave's current or future ability to pay legal financial obligations. *See* RP 205–224. The court imposed a $500 mandatory victim assessment, a $100 felony DNA collection fee, and a discretionary $200 criminal filing fee. CP 157.

Nave now appeals. CP 169. A Spokane County Public Defender was initially appointed by the court to represent Nave at trial. CP 8. Private counsel subsequently filed a notice of appearance. CP 9. After sentencing

[6] Sentenced under RCW 9.94A.507.

the trial court entered an Order of Indigency, based on his certification that he is unemployed (incarcerated), receives no money from any source, has support obligations to three individuals other than himself, owns no real property or vehicle, has zero dollars in checking/savings accounts, and has zero dollars in stock, bonds, or other investments. CP 172, 174–76.

C. ARGUMENT

The trial court erred in imposing the $200 criminal filing fee, where Mr. Nave was indigent.

House Bill 1783, which became effective June 7, 2018, modified Washington's system of legal financial obligations. *State v. Ramirez,* 191 Wn.2d 732, 426 P.3d 714 (2018). It amended former RCW 10.01.160(3) to expressly prohibit trial courts from imposing discretionary LFOs on defendants who are indigent at the time of sentencing as defined in RCW 10.101.010(3)(a)-(c). LAWS OF 2018, ch. 269, § 6(3); *Ramirez,* 191 Wn.2d at 746.

The cost of the criminal filing fee which formerly was mandatory has become a discretionary cost and must not be imposed on a criminal defendant who is indigent. LAWS OF 2018, ch. 269, § 17(2)(h); RCW 36.18.020(2)(h); *Ramirez,* 191 Wn.2d at 746. This change to the criminal filing fee statute is now codified in RCW 36.18.020(2)(h):

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

Id.

The trial court may not impose discretionary LFOs without conducting an individualized inquiry into the defendant's ability to pay. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Here, the trial court did not make any individualized inquiry into Nave's ability to pay. Further, Nave's case is on direct appeal and accordingly, the change in law applies to his case.

> House Bill 1783 amends former RCW 10.01.160(3) by expressly prohibiting the imposition of discretionary LFOs on defendants like Ramirez who are indigent at the time of sentencing; the amendment conclusively establishes that courts do not have discretion to impose such LFOs. And, like the defendants in *Blank*, Ramirez's case was on appeal as a matter of right and thus was not yet final under RAP 12.7 when House Bill 1783 became effective. Because House Bill 1783's amendments pertain to costs imposed upon conviction and Ramirez's case was not yet final when the amendments were enacted, Ramirez is entitled to benefit from this statutory change.

Ramirez, 191 Wn.2d at 749.

The trial court found him indigent, and Nave has no money or assets and his lengthy term of incarceration will keep him impecunious

with an annual income of less than 125% of the federal poverty rate. RCW 10.101.010(3)(c). The discretionary criminal filing fee of two hundred dollars should be stricken in accordance with RCW 10.01.160(3) and *Ramirez*.

D. CONCLUSION

For the reasons stated, the criminal filing fee should be vacated and the matter remanded to the trial court with instructions that it be stricken.

Respectfully submitted on July 8, 2019.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 8, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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