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Division III
State of Washington
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NO. 37080-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN RAY EDGAR,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

A person who is safely off the roadway is not guilty of physical control of a vehicle while under the influence. This defense encourages intoxicated drivers to protect public safety by ceasing to drive. Kevin Edgar was asleep in his vehicle in a five-acre parking lot, well removed from the roadway, and not blocking access to buildings, parking spaces, or services.

Because he was safely off the roadway, he cannot be convicted of the offense of physical control while under the influence. Yet the jury found him guilty, despite the evidence he was safely off the road. The admission, over his objection, of unnecessary, prejudicial information from a prior judgment and sentence suggested Mr. Edgar had a propensity to permit similar crimes. This contributed to the jury's verdict.

Finally, the trial court exacerbated the unfairness of this trial by saddling Mr. Edgar with a financial burden \$1680 higher than permitted by law.

B. ASSIGNMENTS OF ERROR

1. The evidence was sufficient to prove the defense of safely off the roadway; his conviction violated due process.
2. The trial court deprived Mr. Edgar of his right to a fair trial by denying his request under ER 402 and 403 to redact irrelevant and prejudicial portions of a prior judgment and sentence from Mr. Edgar's vehicular assault conviction.
3. The trial court erred in ordering Mr. Edgar to pay unauthorized legal financial obligations, in failing to conduct an adequate indigency inquiry, and in failing to make an indigency determination.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state due process clauses protect against convictions where an affirmative defense was proven with sufficient evidence. A person who proves they were "safely off the roadway" may not be convicted of physical control while under the influence. The defense is met when the preponderance of the evidence shows the accused moved the vehicle safely off the roadway prior to being pursued by

the police. Mr. Edgar parked his truck in a large parking lot where he was not blocking others from accessing any part of the property. Was his conviction improper?

2. The right to a fair trial requires that people accused of crimes will be convicted for what they did and not for their prior acts. This rule requires trial courts to screen the jury carefully from prior convictions, which may only be introduced for limited purposes. When the prosecution presented a prior judgment and sentence to the jury to prove an element of the crime charged, the trial court refused to redact irrelevant and prejudicial information under ER 401, 402, and 403. This resulted in the jury learning many irrelevant and prejudicial facts, including that Mr. Edgar was convicted of vehicular assault only three years before and had been ordered to serve a high-end sentence, abstain from alcohol, and undergo substance abuse treatment. Did the court's erroneous admission of details about prior convictions deprive him of a fair trial, requiring reversal?

3. RCW Title 3 and Title 46 provide for several LFOs applicable to DUI and physical control. However, most apply only to misdemeanor cases. Should this Court strike imposition of the LFOs that only apply to misdemeanors?

4. RCW 38.52.430 authorizes collection of documented costs incurred by an emergency response agency in certain types of cases. However, physical control is not one of these types. Should this Court strike imposition of an LFO that does not apply to Mr. Edgar's conviction?

5. RCW 10.01.160(3) prohibits the imposition of discretionary LFOs on indigent individuals and requires courts to conduct an individualized inquiry into indigency before imposing any discretionary costs. Here, the trial court found Mr. Edgar indigent for the purposes of appeal. However, at sentencing, it imposed multiple discretionary LFOs without making a sufficient inquiry regarding Mr. Edgar's financial status or a finding of whether he was indigent or not. Should this Court strike imposition of the LFOs where the trial court failed to conduct an adequate inquiry?

D. STATEMENT OF THE CASE

Mr. Edgar left his house when his son called to ask him to help with a family disturbance. RP 293. It was late, and he was tired, but he wanted to help his son. *Id.* He had had a few beers, but initially thought he was safe to drive. *Id.* However, he changed his mind while on the road. *Id.* Consequently, he pulled into a gas station parking lot to get off the road and call a friend for a ride. *Id.*

He first pulled in front of a gas pump, and then concluded he should get out of the way of anyone else wanting to use the pump, so he pulled forward of the pump. RP 293-94. He put his transmission into park. RP 143, 328. He called his friend Harold to pick him up. RP 294. Where he parked, he left room for other drivers to safely access the gas pumps, the building, and the parking spaces. Ex. 4, video 1 at 1:34.

He fell asleep in the truck while waiting for his ride. RP 295. After he had been in the parking lot for about 20 minutes, the convenience store clerk called the police, uncertain if Mr. Edgar needed help. RP 150-51.

When the police arrived, Mr. Edgar told them he was waiting for his friend Harold to pick him up. RP 169, 293-94. He was arrested and charged with being in physical control of a vehicle while under the influence. This was a felony charge due to a prior vehicular assault conviction. CP 12.

At trial, the court instructed the jury that Mr. Edgar was not guilty if he was safely off the roadway. CP 26.

The prosecutor offered judgment and sentence for Mr. Edgar's previous vehicular assault conviction to prove the element of Mr. Edgar's prior conviction. RP 256-57. She agreed to redact the order by removing the list of convictions in Mr. Edgar's criminal history and the appendix listing instructions regarding substance abuse treatment rules and financial payments. RP 256-57; *see* Ex 2. Mr. Edgar asked the court to further redact the order, objecting to prejudicial and irrelevant sentencing content and community custody conditions under ER 401, 402, and 403. RP 256-58, 261.

The trial court agreed with Mr. Edgar that only the fact of conviction was relevant and that other portions of the order

were prejudicial, but admitted the entire judgment, apart from the portions the prosecutor agreed to remove. RP 258-59, 261, 263; Ex. 6. The remainder of the judgment indicated Mr. Edgar had criminal history that was hidden; he received a jail sentence for the lengthiest term permitted; he was ordered to abstain from alcohol and comply with substance abuse treatment; he was ordered to submit to DNA testing and pay LFOs; and he lost his gun and voting rights. Ex. 6.

The jury convicted Mr. Edgar of physical control. CP 30. At sentencing, the trial court asked Mr. Edgar if he was “someone who has been working.” RP 353. Mr. Edgar answered yes. *Id.* The court asked if Mr. Edgar “owe[d] others a lot of money,” to which Mr. Edgar responded, “I have some bills, yes—” before being cut off by the court. *Id.*

The court stated, “most people do” and began to request a summary of the total of something, before Mr. Edgar’s attorney said “Judge, —don’t believe (inaudible) future ability (inaudible).” The court concluded “All right. Thank you,” and asked no further questions. The court imposed a \$500 crime

victims' assessment, \$200 in court costs, a DUI/physical control fine of \$1,245.50, a booking fee of \$100, and \$135.33 in costs to the police department.

In his notice of appeal, Mr. Edgar's motion for an order of indigency showed he received food stamps, supported three other people, and owed \$24,000 in debt. CP 43-46. The trial court agreed Mr. Edgar was indigent for purposes of appeal.

E. ARGUMENT

1. Mr. Edgar proved he had moved his truck safely off the roadway and his conviction violates due process.

Mr. Edgar proved he had moved his car safely off the roadway. As a matter of due process and fundamental fairness, this Court must reverse his conviction. *See* U.S. Const. amend. XIV; Const. art. I, § 3.

a. Someone who is "safely off the roadway" is not guilty of physical control.

To discourage intoxicated drivers from driving, the Legislature provided an affirmative defense to the charge of physical control of a vehicle while being under the influence. *See* RCW 46.61.504(1)(a), (2). The safely off the roadway

defense is established when, “prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway.” RCW 46.61.504(2). “Once the person [in actual physical control of a vehicle] is safely off the roadway he is no longer posing a threat to the public.” *State v. Votava*, 149 Wn.2d 178, 185, 66 P.3d 1050 (2003) (quoting *State v. Day*, 96 Wn.2d 646, 649 n.4, 638 P.2d 546 (1981)).

A person need only prove the defense by a preponderance of the evidence. *E.g.*, *City of Spokane v. Beck*, 130 Wn. App. 481, 483, 123 P.3d 854 (2005). A “preponderance of the evidence merely means the greater weight of the evidence.” *Id.* at 486; *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608, 260 P.3d 857 (2011) (“more likely than not” or “more than 50 percent”). A conviction may not stand where the defense adequately proves an affirmative defense. *See Beck*, 130 Wn. App. at 486.

While this Court reviews the sufficiency of an affirmative defense by considering the evidence in the light most favorable to the prosecution, this Court must reverse if

no “rational trier of fact could have found that the accused failed to prove the defense by a preponderance of the evidence.” *Id.* at 486 (citing *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996)).

b. No rational trier of fact could have found Mr. Edgar failed to prove his vehicle was safely off the roadway where it was parked in a private parking lot with room for vehicles to pass.

Mr. Edgar’s truck was far from the road and not blocking anyone’s access to anything. His transmission was in park. He was safely off the roadway.

In *Beck*, this Court agreed the defense of being off the roadway was proven. *Beck*, 130 Wn. App. at 483, 486. It thus upheld a dismissal for insufficient evidence that the accused was in actual physical control of a vehicle while under the influence. *Id.* The car was running but parked, taking up two parking spaces, in a convenience store lot. *Id.* at 488. The car was 20 to 30 yards off the roadway. *Id.* The accused did not plan to move the vehicle, and she fell asleep after calling for a ride to pick her up. *Id.* This Court held that no reasonable

jury could have found the accused failed to prove she was safely off the roadway by a preponderance of the evidence. *Id.*

Likewise, in *Day*, our Supreme Court held that a driver on private property posing no threat to the public cannot be considered “on a roadway.” *Day*, 96 Wn.2d at 647-50. The Court found a person could not be guilty of DUI when driving on their family property because it was not “upon [a] highway” or public road. *Day*, 96 Wn.2d at 649-50.

As in *Beck*, Mr. Edgar’s truck was running, but his transmission was in park. *See Beck*, 130 Wn. App. at 488; RP 143, 328. His truck was similarly well off the roadway, in a parking lot. *See Beck*, 130 Wn. App. at 483; RP 160, 296. As in *Beck*, Mr. Edgar was asleep after calling for a ride to pick him up. *See Beck*, 130 Wn. App. at 488; RP 169, 293-94.

Exhibit 4, the police dash cam video, shows that while Mr. Edgar, like Ms. Beck, was not parked neatly in a parking spot, there was ample room for vehicles to drive past him safely and easily. Ex. 4, video 1 at 1:34; *see Beck*, 130 Wn. App. at 488. Mr. Edgar’s transmission was not in drive and

his truck was not blocking access to buildings, parking areas, or gas pumps. *Compare* RP 143, 328 *with City of Edmonds v. Ostby*, 48 Wn. App. 867, 870-71, 740 P.2d 916 (1987).

The police officer's dash camera shows ample room for vehicles to drive past Mr. Edgar's truck to his right:



Ex. 4, video 1 at 1:34.

While no witness testified to the distance from the gas pumps to the truck, the prosecutor consistently estimated the distance at about 20 feet—enough to allow access to the pumps. *See* RP 141, 327. Additionally, Mr. Edgar's truck was well off the roadway, not blocking ingress or egress to the lot.

The prosecutor argued “a vehicle is safely off the roadway when the situation no longer poses a danger for the public,” but claimed Mr. Edger was not sufficiently off the roadway because the “natural inclination” of a person waking up after passing out in a car would be to put the vehicle in gear and drive away. RP 328, 335.

However, this view is inapt. Our Supreme Court has held a person can be safely off the roadway even if there is a possibility they may drive again. *Votava*, 149 Wn.2d at 187. The ability to drive again “goes to the elements of the charge, rather than the defense.” *Id.* “The very nature of this ... defense is that, although the State can prove every element of the ... charge, acquittal is appropriate if the defendant can show ... [they] moved the vehicle safely off the roadway.” *Id.*

Mr. Edger proved his defense by the greater weight of the evidence. This Court should reverse and dismiss Mr. Edgar’s conviction. *See Beck*, 130 Wn. App. at 488.

2. The trial court deprived Mr. Edgar of a fair trial by admitting a prejudicial and mainly irrelevant prior judgment and sentence.

The court deprived Mr. Edgar of his right to a fair trial when it allowed the prosecutor to introduce, over Mr. Edgar's objections, nearly all of judgment and sentence from a recent vehicular assault conviction to establish Mr. Edgar's prior conviction. U.S. Const. amend. XIV; Const. art. I, § 22; ER 103, 401, 402, 403. This violation of Mr. Edgar's right to a fair trial requires reversal of his conviction.

a. Trial courts should prevent inadmissible propensity evidence from being suggested to the jury.

"There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial." *State v. Smith*, 103 Wash. 267, 268, 174 P. 9 (1918). Evidence of a defendant's prior act evidence is not admissible except for limited purposes. *State v. Gunderson*, 181 Wn.2d 916, 921, 337 P.3d 1090 (2014) (citing ER 404(b)); *see also State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009). The presumptive rule of exclusion is grounded on the principle that the accused

must be tried for the crimes charged, not for uncharged acts. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). “[I]f these rules of exclusion are not respected, the defendant is denied a fair and impartial trial.” *Id.*; U.S. Const. amend. XIV; Const. art. I, § 22.

Jury trials must be “conducted . . . so as to prevent inadmissible evidence from being suggested to the jury by any means.” ER 103(c). Irrelevant evidence is always inadmissible. ER 402. For evidence related to past crimes to be relevant, “the purpose for which the evidence is offered ‘must be of consequence to the outcome of the action’, and ... ‘the evidence must tend to make the existence of the identified fact more ... probable.” *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (quoting *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)).

Relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. Though propensity evidence may be otherwise relevant, “the risk that a jury will convict for crimes

other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.” *Old Chief v. United States*, 519 U.S. 172, 180–81, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). Allowing such evidence would “weigh too much with the jury and ... so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Id.* at 181.

A jury is more likely to convict a person when they learn the person has criminal history. Harry Kalven & Hans Ziesel, *The American Jury* 146, 160–69 (1966). It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again. The prejudice is even greater when the prior conviction is similar to the crime for which the defendant is being tried. *State v. Pam*, 98 Wn.2d 748, 760, 659 P.2d 454 (1983) (Utter, J., concurring).

Our Supreme Court has warned that prior act evidence, which includes criminal history, prejudices an accused even if

minimally relevant, “where the minute peg of relevancy [is] entirely obscured by the dirty linen hung upon it.” *Smith*, 106 Wn.2d at 774 (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)).

In cases where the defendant proposes a stipulation to a prior conviction to satisfy an element, the trial court may not refuse it “when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.” *Old Chief*, 519 U.S. at 174. Washington courts follow this rule. *See, e.g., State v. Johnson*, 90 Wn. App. 54, 63, 950 P.2d 981 (1998); *accord State v. Scherbert*, 192 Wn. App. 1033 at *4 (2016) (unpublished; cited pursuant to GR 14.1).

b. The court admitted irrelevant and prejudicial evidence of Mr. Edgar’s prior vehicular assault conviction and sentence.

The prosecution offered a judgment and sentence from Mr. Edgar’s vehicular assault conviction three years earlier. RP 135, 256. The prosecutor had redacted Mr. Edgar’s

criminal history, pursuant to court rule, and agreed to remove the appendix containing conditions of abstinence. RP 256-57.

Mr. Edgar objected to the inclusions of community custody conditions as prejudicial and irrelevant, including conditions to abstain from alcohol, comply with a substance abuse evaluation and treatment, and follow DOC requirements. RP 257-58. He argued the jury could be confused by them and conclude that he was violating the court order by drinking on the date of the physical control charge, and “hold [it] against him that he had to go through — alcohol treatment” on the prior case. RP 257, 261.

The trial court twice agreed only the fact of conviction was relevant and acknowledged the prejudice of other information in the document. RP 258-59, 261. However, it then admitted the entire document, barring the two portions removed by agreement. RP 256-57, 263; *see* Ex. 6.

While the prior conviction was an element the prosecution needed to prove, the rest of the judgement and

sentence, beyond the fact of the conviction, was irrelevant to this case, and unduly prejudicial to Mr. Edgar. ER 402, 403.

The content of Mr. Edgar’s criminal history was clumsily redacted; the partial erasure of a line made it clear some content was missing. That content was easily identifiable by the heading and verbiage that remained:

2.2 Criminal History:						
Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime	DV* Yes
* DV: Domestic Violence was pled and proved. [] Additional criminal history is attached in Appendix 2.2. [] The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525. [] The prior convictions listed as numbers _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525).						

Ex. 6 at 2. The fact that there was obviously history to remove was irrelevant and prejudicial. *See id.*; ER 401, 402, 403.

Additional irrelevant and prejudicial content included the standard range, maximum sentence, and an order for the lengthiest term of imprisonment permitted; orders not to consume alcohol and to undergo evaluation and treatment for

substance abuse; legal financial obligations; references to the jail sentence and release; DNA testing; loss of firearms and voting rights; and further community custody provisions. *See* Ex. 6; ER 402, 403.

Other than proof of the conviction, the content of the judgement and sentence was not relevant to prove the element for which it was admitted, except for the forbidden propensity purpose. *See* ER 402; *Old Chief*, 519 U.S. at 180-81. Though Mr. Edgar had not stipulated to the conviction, the court was aware of the content's limited relevance and unduly prejudicial nature. RP 258-59, 261. Just as it would have a duty to grant a requested stipulation, the court was required to grant Mr. Edgar's request to redact the order to prevent "the risk of a verdict tainted by improper consideration." *Old Chief*, 519 U.S. at 174.

c. Allowing the jury to read Mr. Edgar's prior judgment and sentence deprived Mr. Edgar of his right to a fair trial, requiring reversal.

When jurors learn of prior criminal history, their response to the evidence is more emotional than rational.

State v. Young, 129 Wn. App. 468, 471, 119 P.3d 870 (2005). As such, it is prejudicial for jurors to learn about the underlying criminal convictions, even when it is relevant to an element of the current offense. *Old Chief*, 519 U.S. at 180-81, 191-92.

The court failed to grant Mr. Edgar's repeated, reasonable requests to redact the sentencing order to include only relevant, properly admissible information. *See* ER 103, 401, 402, 403. The prior offense, being recent and similarly hinged on allegations of Mr. Edgar's use of a vehicle following use of alcohol, improperly suggested Mr. Edgar had a propensity to drink and get behind the wheel. *See Old Chief*, 519 U.S. at 180–81; *Johnson*, 90 Wn. App. at 63.

The evidence of a recent high-end sentence for vehicular assault further suggested to the jury that Mr. Edgar's particular crime was especially egregious, even given the egregiousness of the charge. The recent requirements to abstain from alcohol and undergo treatment were highly prejudicial in this case; they suggested alcoholism and

heightened the apparent impropriety of Mr. Edgar's conduct in doing exactly what the court had ordered him not to do.

When the only purpose for evidence is to prove a prior conviction, telling the jury about the conviction is prejudicial; "it raises the risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged." *Young*, 129 Wn. App. at 475.

Under these circumstances, Mr. Edgar could not receive a fair trial. *See Kalven & Ziesel, supra*, at 160–69. This error was not inconsequential to the jury's deliberations, making it easier for the jury to ignore the evidence relating to Mr. Edgar's affirmative defense. *See Old Chief*, 519 U.S. at 180–81; *Young*, 129 Wn. App. at 475. This Court should reverse Mr. Edgar's conviction due to the substantial risk jurors relied on improperly admitted evidence.

3. The trial court erred in imposing impermissible LFOs and conducting an insufficient inquiry into Mr. Edgar’s future ability to pay.

a. The trial court erred in sentencing Mr. Edgar to pay LFOs only permissible in misdemeanor cases.

The trial court imposed LFOs of \$1,245.50 for “DUI fines, fees and assessments.” CP 37. This total comes from the summation provided by Washington Courts’ DUI Sentencing Grid.¹ The underlying statutes make clear that certain of the LFOs apply only to misdemeanor cases in courts of limited jurisdiction. RCW 3.62.090(1-2); RCW 3.62.085. Thus, they are inapplicable in Mr. Edgar’s felony conviction.

All the LFOs related to convictions of DUI and physical control comprising the grid’s total are summarized in the following chart:

¹ Effective June 7, 2018. Available at www.courts.wa.gov/newsinfo/content/duigrd/DUI%20Sentencing%20Grid_201806.pdf

Name	Statutory Basis	Amount	Applicable for felony?	May be waived?
Alcohol violators fee	RCW 46.61.5054(1)	\$250	Yes.	Yes, for verified lack of ability to pay
Additional monetary penalty	RCW 46.64.055(1)	\$50	Yes.	Yes, for indigency.
Penalty schedule fine	RCW 46.61.5055(1)	\$350-5000	No. Felonies exempted.	n/a
PSEA 1 – Public safety & education assessment	RCW 3.62.090(1)	70% of “fine” and “monetary penalty”	No. In district and municipal courts only.	n/a
PSEA 2 – Public safety & education assessment	RCW 3.62.090 (2)	50% of PSEA 1 on “monetary penalty”	No. In district and municipal courts only.	n/a
Criminal conviction fee	RCW 3.62.085	\$43	No. In district and municipal courts only.	n/a

The total permissible LFOs from these items in a felony case is \$300. RCW 46.61.5054(1); RCW 46.64.055(1). As the remainder of these LFOs only apply to misdemeanors, \$945.50 of the \$1,245.50 imposed for “DUI fines” must be stricken from Mr. Edgar’s judgment and sentence order. *See*

CP 37; RCW 46.61.5055 (1); RCW 3.62.090(1-2); RCW
3.62.085.

a. The court erred in ordering recovery of costs for emergency response when no statute authorizes this for physical control convictions.

In certain criminal cases, RCW 38.52.430 authorizes collection of costs incurred by an emergency response agency when documentation of “reasonable” costs is provided prior to sentencing. Recoupment under this statute is only for convictions of DUI (RCW 46.61.502); vehicular assault and homicide (RCW 46.61.522(1)(b), RCW 46.61.520(1)); and operating an aircraft or a boat under the influence of alcohol or drugs (RCW 47.68.220, RCW 79A.60.040). RCW 38.52.430.

Physical control (RCW 46.61.504) is not in this list, and the statute does not provide for the collection of costs in cases of unlisted convictions. RCW 38.52.430.

The trial court imposed \$135.33 in costs, labeled “restitution,” to the Ellensburg Police Department. RP 353; CP 37. No documentation in the record establishes any costs of the police department and nothing in the record establishes

the trial court found this cost to be “reasonable.” But most importantly, RCW 38.52.430 does not authorize collection of costs for convictions of physical control.

The \$135.33 in costs must be stricken from Mr. Edgar’s judgement and sentence order.

b. The court erred in imposing discretionary LFOs after conducting an insufficient inquiry into Mr. Edgar’s future ability to pay.

i. Sentencing courts must conduct a thorough inquiry into the ability to pay discretionary LFOs.

Sentencing courts may not impose discretionary costs on indigent defendants. RCW 10.01.160(3).

Sentencing courts must make an individualized inquiry to “consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay discretionary costs.” *State v. Ramirez*, 191 Wn.2d 732, 738-39, 426 P.3d 714 (2018); *State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015).

Such an inquiry must include consideration of certain itemized factors, including a person’s incarceration, other debts, restitution, past and future employment, income,

assets, financial resources, and living expenses, but may include consideration of any relevant factor. *Ramirez*, 191 Wn.2d at 743-44; *Blazina*, 182 Wn.2d at 839. Absent an individualized inquiry affirmatively establishing a person's ability to pay, RCW 10.01.160(3) prohibits a court from imposing discretionary costs.

Further, courts must seek additional guidance from General Rule 34, which lists the ways a person may prove indigent status to seek a filing fee waiver in civil cases. *Ramirez*, 191 Wn.2d at 734. If a person is indigent under GR 34, "courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. GR 34 indicates, in part, that people are indigent if they are currently receiving food stamps or if "other compelling circumstances" show an "inability to pay." GR 34(3)(A)(v), (D).

The Court of Appeals has found an inquiry inadequate where the court "asked only about [the defendant's] work history and whether there was any reason she could not work," but "failed to inquire at all about other debts," "failed

to examine her financial situation, such as the extent of her assets,” and generally failed to consider other important factors. *State v. Glover*, 4 Wn. App. 2d 690, 695-96, 423 P.3d 290 (2018) (reversing imposition of LFOs and remanding for re-sentencing). In addition, the Court noted a later finding of indigency, presumably for purposes of the appeal, “call[s] into question [the defendant’s] ability to pay” LFOs. *Id.* at 695.

Appellate courts review de novo the adequacy of the trial court’s inquiry. *Ramirez*, 191 Wn.2d at 740-42.

ii. The court conducted an inadequate inquiry, made no indigency determination, and erred in imposing discretionary LFOs.

The trial court sentenced Mr. Edgar to \$600 in discretionary LFOs from four statutes, without conducting an adequate inquiry. RCW 70.48.390 permits a jail to recoup up to \$100 of “actual booking costs” by requesting the court to assess this fee. This cost may not be imposed on indigent defendants. *See* RCW 10.01.160(3). RCW 36.18.020(2)(h) authorizes the superior court to impose a \$200 criminal filing fee that “shall not be imposed” on indigent defendants. RCW

46.64.055(1) permits collection of a \$50 “additional monetary penalty” of from people convicted under Title 46; this may be waived with a finding of indigency. RCW 46.61.5054(1)(a-b) provides for a \$250 “Alcohol violators” fee of that may be suspended for inability to pay.

The court made no affirmative finding Mr. Edgar was not indigent. *See* RP 353; CP 31-41. The limited inquiry the court conducted showed he had debt. Mr. Edgar’s motion for an order of indigency on appeal established he was indigent under RCW 10.101.010 and GR 34, as a food stamp recipient with at least \$24,000 in debt and with little or no discretionary income after monthly expenses supporting his three dependents. RP 353; CP 43-46; RCW 10.101.010 (3)(A); GR 34(3)(A)(v), (D). Further, he had been sentenced to 14 months in prison. CP 34. The court was required to consider these facts during its inquiry; the information “call[s] into question [Mr. Edgar’s] ability to pay.” *Glover*, 4 Wn. App. 2d at 695; *see Ramirez*, 191 Wn.2d at 734.

Although Mr. Edgar said he had been working, the court did not ask about his income. Employment history is but one of the factors courts must consider in determining indigency. *Ramirez*, 191 Wn.2d at 743-44; *Blazina*, 182 Wn.2d at 839. All other details support the conclusion that Mr. Edgar was indigent. The trial court conducted an inadequate inquiry and improperly imposed \$600 in discretionary LFOs.

c. This Court must strike \$1680.83 from Mr. Edgar's judgment and sentence order.

The trial court improperly imposed \$945.50 in DUI fines inapplicable to felony cases; \$135.33 in restitution for law enforcement costs unauthorized for physical control cases; and \$600 in discretionary LFOs without making an adequate inquiry into Mr. Edgar's future ability to pay.

As the trial court lacked the statutory authority to impose \$1680.83 of the total \$2180.83 it ordered, this Court should reverse the imposition of these LFOs and remand for the trial court to strike them. *See Ramirez*, 191 Wn.2d at 749-50 (reversing and remanding for trial court to amend judgment and sentence to strike discretionary LFOs).

F. CONCLUSION

Mr. Edgar proved he was safely off the roadway, undermining his conviction for being in physical control while under the influence. Without the prejudice of the trial court's error, the jury would have been more likely to see the strength of Mr. Edgar's defense. This Court should reverse.

Independently, this Court could strike the improperly imposed LFOs from Mr. Edgar's sentencing order.

Submitted this 1st day of June 2020.

A handwritten signature in black ink, appearing to read 'Marek E. Falk', written in a cursive style.

MAREK E. FALK (WSBA 45477)
Washington Appellate Project (WAP #91052)
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 37080-1-III
)	
KEVIN EDGAR,)	
)	
APPELLANT.)	

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