No. 92605-1

No. 45374-6-II
(Consolidated Case)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ZYION D. HOUSTON-SCONIERS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-04161-1
The Honorable John Hickman, Judge

OPENING BRIEF OF APPELLANT HOUSTON-SCONIERS

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Zyion Houston-Sconiers' confrontation rights by admitting hearsay statements pursuant to the excited utterance exception, because the statements were testimonial and the speaker did not testify at trial and was never subject to cross-examination.

2. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Zyion Houston-Sconiers assaulted Axsaulis Guice.

3. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Zyion Houston-Sconiers was armed with a firearm when he conspired to commit robbery.

4. Zyion Houston-Sconiers was denied his constitutional right to a fair trial by repeated instances of prosecutorial misconduct.

5. The trial court erred in finding that Zyion Houston-Sconiers had the present or future ability to pay discretionary legal financial obligations.

6. Under Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and its antecedents, RCW 13.04.030(1)(e)(v)(A), our state's "automatic decline" statute, is unconstitutional in violation of the Eighth Amendment and due process, both in isolation and when coupled with mandatory consecutive, "flat-time" sentencing enhancements imposed on adults. Our Supreme Court's decision upholding "automatic decline" many years ago in In re Boot, 130 Wn.2d 553, 925 P.2d 560 (1996), is no longer good law.

7. The State failed to present sufficient evidence to support the imposition of firearm enhancements.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court violate Zyion Houston-Sconiers' confrontation rights by admitting hearsay statements pursuant to the excited utterance exception, where the statements were

testimonial and the speaker did not testify at trial and was never subject to cross-examination? (Assignment of Error 1)

2. Were excited utterances nevertheless testimonial hearsay, where the incident spoken of had ended, where there was no indication that the speaker remained in any danger, and where the speaker was describing past events in order to assist law enforcement in apprehending and prosecuting the offenders? (Assignment of Error 1)

3. Was the improper admission of testimonial hearsay not harmless error, where the remaining evidence relating to that charge was minimal, vague, and not overwhelming? (Assignment of Error 1)

4. Did the State fail to meet its constitutional burden of proving beyond a reasonable doubt that Zyion Houston-Sconiers assaulted Axsaulis Guice, where there was no testimony that Guice feared for her safety, and no reasonable juror could infer from Guice's behavior that she feared for her safety? (Assignment of Error 2)

5. Did the State fail to meet its constitutional burden of proving beyond a reasonable doubt that Zyion Houston-Sconiers was armed with a firearm when he conspired to commit robbery, where the nature of the offense of conspiracy is an agreement, and there is no rational connection between an agreement and a firearm? (Assignment of Error 3)

6. Did the prosecutor commit misconduct where he: made prejudicial statements to the jury that were not sustained by the record; repeatedly implied that Zyion Houston-Sconiers committed additional uncharged and unproved crimes; made remarks to the jury disparaging defense counsel; and expressed his personal belief regarding the credibility of a witness and Houston-Sconiers guilt? (Assignment of Error 4)

7. Did the repeated instances of prosecutorial misconduct deny Zyion Houston-Sconiers his constitutional right to a fair trial? (Assignment of Error 4)

8. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations as part of Zyion Houston-Sconiers' sentence, where there was no evidence that he has the present or future ability to pay? (Assignment of Error 5)

9. Is Zyion Houston-Sconiers' challenge to the validity of the legal financial obligation order ripe for review? (Assignment of Error 5)

10. Is remand for resentencing the appropriate remedy when the trial court improperly orders discretionary legal financial obligations in violation of RCW 10.01.160(3). (Assignment of Error 5)

11. Is reversal and remand for further proceedings required because the automatic decline statute violates the Eighth Amendment and due process and the holdings to the contrary in Boot are no longer good law, and because any sentencing scheme that fails to consider the differences between adults and juveniles in imposing a sentence violates the proportionality principles of the Eighth Amendment? (Assignment of Error 6)

12. Is the State required to prove that a firearm was actually capable of shooting a projectile at the time that the crimes are committed when alleging that a defendant was armed for the purpose of a firearm sentence enhancement and, if so, did the State fail to meet that burden in this case? (Assignment of Error 7)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Zyion Dontice Houston-Sconiers with seven counts of first degree robbery (RCW 9A.56.190, .200), one count of second degree assault (RCW 9A.36.021), one count of

conspiracy to commit first degree robbery (RCW 9A.28.040), and one count of unlawful possession of a firearm (RCW 9.41.040), all arising from four incidents occurring on the night of October 31, 2012. (CP 1-4, 17-22) The State also alleged that Houston-Sconiers was armed with a firearm during the commission of the robberies, the assault, and the conspiracy. (CP 17-22)

At the close of the State's case in chief, Houston-Sconiers moved to dismiss all of the charges for lack of sufficient proof.[1] (RP 1959-70) The State agreed that it failed to present any evidence to support the robbery charged in count VIII, so the trial court dismissed that charge. (RP 1943-44) But the trial court denied Houston-Sconiers' motion to dismiss the remaining counts. (RP 1980-83)

The jury found Houston-Sconiers guilty as charged, and answered affirmatively that he was armed with a firearm during commission of five of the six robberies, assault and conspiracy.[2] (RP 2370-72, CP 206-21)

At sentencing, the prosecutor requested that the trial court impose an exceptional sentence downward. Because of the manner

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[1] Houston-Sconiers did not challenge the unlawful possession of a firearm charge, and stipulated that he was ineligible to possess a firearm on October 31, 2012. (Exh. P34)

[2] The jury was not asked to find whether Houston-Sconiers was armed with a firearm during the robbery alleged in count IX. (RP 2390-91)

in which Houston-Sconiers was charged, a standard range sentence followed by seven consecutive firearm enhancements would result in a term of confinement that even the prosecutor thought was excessive, given the nature of the crimes and the fact that Houston-Sconiers was just 17 years old at the time of the offenses. (CP 225-27; RP 2386-87, 2390) Houston-Sconiers was facing a standard range sentence of 501-543 months (41.75-45.25 years), with 372 of those months (31 years) to be served as "flat time." (CP 227, 236, 263-64; RP 2390) The prosecutor recommended that the court impose no time for the crimes themselves, and impose just the mandatory firearm sentence enhancements, for a total term of confinement of 372 months. (RP 2386, 2390; CP 228) The trial court adopted the State's recommendation, and imposed a term of confinement of 372 months (31 years), plus both mandatory and discretionary legal financial obligations. (RP 2403; CP 230-31, 239) This appeal timely follows. (CP 247)

B. SUBSTANTIVE FACTS

Brothers Andrew and Steven Donnelly were trick-or-treating in Tacoma's North End on Halloween night of 2012. (RP 988, 1124, 1125) Then 19-year-old Andrew was dressed in a graduation gown

and red devil mask, and 13-year-old Steven was dressed as a ninja.[3] (RP 348, 986, 988, 989, 1122, 1124) Around 9:30 PM, three young men approached them on the street. (RP 468, 991, 345) The young men wore dark hoodies and one had a bandana around his mouth. (RP 922, 1130, 1131) Andrew thought one of the men also wore a white hockey mask, but Steven did not remember any of the young men wearing a mask. (RP 1004, 1130) Andrew testified that all three men looked African-American, and that they were all about the same height, with one young man being slightly shorter than the other two. (RP 1004-05)

One young man held a silver gun, which he pointed at Steven then demanded their bags of candy. (RP 993, 1131, 1132, 1133) The young men grabbed Andrew's bag and Steven's backpack, then the young men ran away. (RP 354, 993, 996-97, 1334-35) The young men also took Andrew's red devil mask. (RP 1000, 1138, 354) Andrew and Steven then walked to their grandparents' house and called the police. (RP 998, 345)

Officer Wendy Haddow-Brunk responded, and obtained statements from Andrew and Steven. (RP 344, 346, 348) They told

[3] To avoid confusion, Andrew and Steven Donnelly will be referred to by their first names. No disrespect is intended.

Officer Haddow-Brunk that the young man who held the gun was about 18 years old and approximately five feet eight inches tall, with a medium build, wearing a black jacket and pants and a white hockey mask. (RP 351-52) They thought the second young man was approximately the same age, height and build, and wearing similar clothing. (RP 352) And the third young man appeared to be younger, shorter and thinner than the other two young men, but also dressed in dark clothing.[4] (RP 353)

A short time later, 15-year-old friends Destinae Peterson-Mims, Axsaulis Guice, Edward Bradley, and Isaiah Greene were also trick-or-treating in the North End, when they were approached by three young men. (RP 770, 773, 774, 775, 814, 815, 818, 866, 867-68, 870, 949, 950, 954, 955) The young men wore dark clothing and hoods over their heads, and their faces were covered by a white mask, a red mask, and a bandana. (RP 780, 804, 819, 820, 832, 835, 871, 955-56, 957) One young man pointed a silver gun at the friends, and said "this is a robbery." (RP 785-86, 820, 822-23, 829, 870, 872, 954, 957) The young man demanded their bags of candy and cellular phones. (RP 786) Peterson-Mims relinquished her

[4] The first degree robbery offenses charged in counts I and II arise from this incident. (CP 17-18)

pillow case and Bradley relinquished his backpack, but Guice hid her candy bag and walked away. (RP 786, 822-23, 821, 837, 869, 873, 958-59) The young men took the bags and ran away. (RP 786, 837, 876)

The three young men were all different heights, and one was significantly shorter than the other two. (RP 839, 872, 879, 959-60) Peterson-Mims testified that she is five feet eight inches tall, and all three young men were shorter than her. (RP 796) Bradley testified the young men were African-American. (RP 871) Guice testified that she could not tell their age or race, but that the young man holding the gun sounded like Zyion Houston-Sconiers, who she once heard talking at a party they both attended.[5] (RP 824, 849-50)

The friends did not call the police, but later Peterson-Mims' parents called 911 to report the incident. (RP 857, 922) Officer Jared Tiffany responded and obtained statements from Peterson-Mims and Guice. (RP 896, 900-01)

At 10:24 PM, Officer Rodney Halfhill responded to a 911 call from James Wright reporting another robbery in the area. (RP 1067, 1071) Wright told Officer Halfhill that the suspects ran in a southerly

[5] The first degree robbery offenses charged in counts III, IV and V, and the second degree assault conviction charged in count VI, arise from this incident. (CP 18-20)

direction, so the Officer immediately called dispatch and requested that officers set up a containment operation in the area. (RP 1067, 1069, 1071) Then he took a statement from Wright, who said he had been walking through the adjacent apartment complex and talking on his cellular phone, when he was approached by four or five young black men. (RP 1073) The young men demanded Wright's cellular phone, so he handed it to them. (RP 1073) He noticed the young men were wearing dark clothing, and one wore a white hockey mask and held a silver gun.[6] (RP 1073)

Several officers responded to the area to set up a containment operation. (RP 363, 669, 903) Because the suspects fled on foot, police also deployed a K9 tracking team. (RP 364, 728, 734) The tracking dog led officers down an alley, and to a Cadillac parked on the back lawn of residence. (RP 738) The officers shone flashlights inside the Cadillac, and saw several people inside. (RP 738-39) The officers ordered the occupants to come out of the car, and they complied. (RP 740)

Five young African-American males exited the Cadillac and were taken into custody. (RP 741) Those young men were Zyion

[6] The first degree robbery offense charged in count IX arose from this incident. (CP 21)

Houston-Sconiers, Treson Roberts, Zion Johnson, LeShawn Alexander, and Amancio Tolbert. (RP 370, 670, 907, 1562)

Houston-Sconiers was 17 years old, and five feet nine inches tall, and was wearing a gray vest, a dark thermal shirt and a hat that looked like the hood of a sweatshirt. (RP 381-82) Roberts was 16 years old, and was also wearing dark clothing and had a blue bandana in his pocket. (RP 672, 673) Johnson was 13 years old and five feet two inches tall, and was wearing dark clothing and carrying a dark blue bandana. (RP 374, 375, 378) Alexander was five feet eight inches tall and wearing gray clothing. (RP 905-06)

The owner of the property, Dorothy Worthey, came outside to see what was going on. (RP 1155, 1228-29) Worthey told the officers they could search the Cadillac, which belonged to her son and had been parked in the yard for some time because it needed to be repaired. (RP 1156, 1171, 1186, 1224, 1229, 1231) Inside the Cadillac, police found several cellular phones, two backpacks, a red devil mask, a white hockey mask in the glove box, and a silver handgun under the front passenger seat. (RP 530, 537-38, 539, 542, 545, 547, 553, 559-60, 592-93, 1152, 1154, 1158)

Andrew and Steven identified one of the backpacks found in the car as the one taken from Steven that night. (RP 996, 1137) The

trial court also admitted, over defense objection, a short video taken on a cellular phone over two weeks before the incident, showing what appears to be Houston-Sconiers sitting in a car that resembled the Cadillac, holding a gun that resembled the gun police found during the search. (RP 1612-14,1655-56; Exh. P3)

Johnson was charged with five counts of first degree robbery but pleaded guilty to just two counts and was given immunity so that he could testify as a witness for the State. (RP 210, 1088, 1093-94) He testified that he did not commit the crimes and answered "I don't know" to most of the questions he was asked on the stand. (RP 1088, 1091-93)

Charges filed against Tolbert were dismissed, and he was granted immunity so that he could testify against Houston-Sconiers and Roberts. (RP 126, 128, 1821) He testified that he was too drunk on Halloween to remember the details of the evening, but he did not rob anyone or see anyone with a gun. (RP 1817-18, 1821, 1859) When asked about a proffer that he made to the prosecutor before he was granted immunity, wherein he implicated Houston-Sconiers and Roberts, he testified that he read LeShawn Alexander's statement and memorized it so that he would also have a "get out of jail free" card. (RP 1823)

All charges filed against LeShawn Alexander were also dismissed, and he was also granted immunity so that he could testify as a State's witness. (RP 80, 1518, 1532-33) According to Alexander, he met up with Houston-Sconiers, Johnson, Tolbert and Roberts on Halloween night, and they smoked marijuana and drank vodka together. (RP 38-39) Eventually, Alexander and Tolbert left to go buy some food. (RP 1441, 1442-43) Before the group split up, Alexander noticed that Houston-Sconiers had a white hockey mask. (RP 1447) When they met up again later, Roberts had a red devil mask. (RP 1448)

According to Alexander, Roberts and Houston-Sconiers ran down an alley, then returned with a cellular phone. (RP 1451) Later, as the group walked through an apartment complex, they saw a man talking on a cellular phone. (RP 1452) According to Alexander, Houston-Sconiers and Roberts ran up to the man, and Houston-Sconiers pointed a silver gun at him and demanded his phone. (RP 1454) The man gave them the phone, then they all ran down an alley and to the Cadillac. (RP 1456, 1457-58) They got inside, and started eating candy from a backpack that Johnson was carrying. (RP 1457-58, 1459) The police arrived soon after and arrested the group. (RP 1464)

IV. ARGUMENT & AUTHORITIES

A. THE ADMISSION OF JAMES WRIGHT'S STATEMENT AS AN EXCITED UTTERANCE VIOLATED HOUSTON-SCONIERS' CONFRONTATION RIGHTS BECAUSE THE STATEMENT WAS TESTIMONIAL AND BECAUSE WRIGHT DID NOT TESTIFY AT TRIAL AND WAS NEVER SUBJECT TO CROSS-EXAMINATION.

The State alleged in count IX that Houston-Sconiers robbed James Wright. (CP 21) After the State experienced difficulties securing Wright's presence to testify at trial, the prosecutor sought permission to introduce the statement Wright made to Officer Halfhill describing the incident. (RP 1023-24, 1045-46) Houston-Sconiers repeatedly objected, arguing that admission of the statement would violate his Sixth Amendment right to confrontation. (RP 1044-45, 1057, 1968-70) The trial court ignored this constitutional hurdle and admitted the statement, through Officer Halfhill's testimony, as an excited utterance under ER 803(a)(2). (RP 1062-63, 1072-74, 1968-70) James Wright never testified.

Under the Sixth Amendment, an accused has a right to confront witnesses against him. Crawford v. Washington, 124 S. Ct. 1354, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness, the confrontation clause prohibits admission of "testimonial" statements of a witness who does not take

the witness stand at trial. Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford, 541 U.S. at 53-54. Nontestimonial hearsay, on the other hand, is admissible under the Sixth Amendment subject only to the rules of evidence. State v. Pugh, 167 Wn.2d 825, 831-32, 225 P.3d 892 (2009) (citing Davis, 547 U.S. at 821).

Under ER 803(a)(2), a statement is not excluded as hearsay if it is an excited utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." But excited utterances can still be testimonial. State v. Ohlson, 162 Wn.2d 1, 17, 168 P.3d 1273 (2007).

Statements made in the course of a police interrogation are nontestimonial if they were made under circumstances objectively indicating that the primary purpose of interrogating the speaker was "to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822. But they are testimonial if circumstances "objectively indicate that there [wa]s no such ongoing emergency" and "the primary purpose of the interrogation [wa]s to establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822. Factors to consider include: (1) whether the

speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation. Davis, 547 U.S. at 827. "Statements taken by officers in the course of investigations are almost always testimonial." State v. Tyler, 138 Wn. App. 120, 127, 155 P.3d 1002 (2007).

For example, in State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009), the Supreme Court found that statements given by a robbery victim to responding police officers were testimonial, even though the suspect was still at large. In reaching that conclusion, the Koslowski Court first noted that the statement described past events because the suspects "had completed the robbery and left [the victim's] residence and there is no evidence of any ongoing situation or relationship with [the victim] that might suggest she was still in danger from them... Although the time that had elapsed was evidently short, she was describing past events and not events as they were actually happening." 166 Wn.2d at 422.

The Koslowski Court also concluded that the victim was not

facing an ongoing emergency: "the statements were made after police had arrived ... nothing in the record indicates there was any reason to think that she faced any further threat after the robbers left ... and the police arrived and were present to protect her ... a reasonable listener would conclude that the danger had passed." 166 Wn.2d at 423.

The Koslowski court also rejected the State's argument that the victim's statement was necessary to resolve a present emergency situation, and therefore nontestimonial, because the suspects were at large and the responding officer relayed the information he learned from the victim to officers in the field. 166 Wn.2d at 427. The Court noted:

> If merely obtaining information to assist officers in the field renders the statements nontestimonial, then virtually any hearsay statements made by crime victims in response to police questioning would be admissible—a result that does not comport with Crawford and Davis. The interrogation here involved learning about the crimes that had occurred and obtaining information to apprehend the suspects, not to acquire information necessary to resolve any current emergency.

166 Wn.2d at 427.

As in Koslowski, the circumstances surrounding Wright's statement to Officer Halfhill show that his statement was clearly

testimonial. Officer Halfhill arrived on the scene and contacted Wright minutes after Wright called to report the incident. (RP 1048) When Officer Halfhill first saw Wright, he was waiving and pointing south, and told Officer Halfhill that the suspects ran in that direction. (RP 1048, 1049) With this information, Officer Halfhill immediately requested that other officers in the area set up a containment perimeter. (RP 1049) Once Officer Halfhill was satisfied that a containment operation was being established, he shifted his attention to Wright. (RP 1049) He tried to calm Wright down, and questioned him about the details of the incident. (RP 1049-50)

At this point, there was no ongoing emergency because the incident as it related to Wright had ended, and Wright was in no immediate danger. And the purpose of Wright's statement was not to seek assistance or protection during an ongoing incident. Instead, the interaction between Officer Halfhill and Wright "involved learning about the crimes that had occurred and obtaining information to apprehend the suspects, not to acquire information necessary to resolve any current emergency." Koslowski, 166 Wn.2d at 427. Thus, like the victim's statement in Koslowski, Wright's statement here was "testimonial" under Crawford. Because the statement was "testimonial," and Wright did not testify at trial and was not subject to

cross-examination by Houston-Sconiers, the trial court should have ruled this statement inadmissible and excluded it from the jury's consideration. See Koslowski, 166 Wn.2d at 430-31.

Alleged confrontation clause violations are reviewed de novo. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). "If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless." Koslowski, 166 Wn.2d at 431-32.

In this case, it cannot be said that the error was harmless. Wright's statement was the primary evidence presented to prove the robbery charged in count IX. The only other possible evidence came from Alexander, who testified that Houston-Sconiers and Roberts approached a man who was talking on a cellular phone and demanded that the man give them the phone. (RP 1452, 1454) The man gave them the phone, and then Houston-Sconiers and Roberts ran away. (RP 1456-57) But there was no evidence that Wright was the same man that Houston-Sconiers and Roberts approached. Accordingly, because the untainted evidence of guilt for this charge

is far from overwhelming, the error in admitting the statement is not harmless and this robbery conviction must be reversed and dismissed.

B. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT HOUSTON-SCONIERS ASSAULTED AXSAULIS GUICE OR THAT HOUSTON-SCONIERS WAS ARMED WITH A FIREARM WHEN HE CONSPIRED TO COMMIT ROBBERY.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.[7]

The reviewing court should reverse a conviction and dismiss

[7] At the close of the State's case, Houston-Sconiers moved unsuccessfully to dismiss this charge on the same grounds argued here on appeal. (RP 1958, 1966-70) Denial of a mid-trial motion to dismiss is reviewed under the same standard as an appeal claiming insufficiency of the evidence. State v. Athan, 160 Wn.2d 354, 379 fn. 5, 158 P.3d 27 (2007).

the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

1. *The State failed to prove that Axsaulis Guice feared imminent bodily injury because Guice never testified that she was afraid, and no rational juror could infer from Guice's testimony or behavior that she in fact felt any fear.*

The State charged Houston-Sconiers with second degree assault of Axsaulis Guice, pursuant to RCW 9A.36.021(1)(c).[8] (CP 17) Because assault is not defined by the criminal statutes, courts use the common law definition. *See* State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263 (1988). Here, jury instruction 33 stated:

> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and **which in fact creates in another a reasonable apprehension and imminent fear of bodily injury** even though the actor did not actually intend to inflict bodily injury.

(CP 183, emphasis added).

Guice testified that she and her friends were crossing the

[8] RCW 9A.36.021 states, in relevant part: (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . Assaults another with a deadly weapon[.]

street when they were approached by a group of young men. (RP 819) The men first asked for directions, then one of them held out a gun, said "this is a stickup" and asked for "everything." (RP 820-21) Guice testified that she "froze" and hid her bag of candy at her side. (RP 821) She stood still for a "couple of seconds," then walked away without giving the men her bag of candy. (RP 821, 844, 846) She said she thought the incident was "unbelievable." (RP 826) She did not testify that she was scared or frightened, or that she believed that the young men might hurt her. In fact, the only thing she testified she feared was having to call the police. (RP 856, 860) And the officer who eventually responded to this incident described Guice's demeanor as calm. (RP 899, 900)

Guice simply hid her bag of candy and walked away. These are not the actions of someone who was, in fact, afraid for her safety. No reasonable juror could conclude that Guice felt a "reasonable apprehension and imminent fear of bodily injury." The State therefore failed to prove that Houston-Sconiers' committed a second degree assault, and this conviction and its firearm sentence enhancement must both be reversed and dismissed.[9]

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[9] If an offense is vacated, the associated firearms enhancement must also be vacated. See State v. Davis, 177 Wn. App. 454, 465 fn.10, 311 P.3d 1278 (2013).

2. *The State failed to prove a connection between the firearm and the crime of conspiracy, and therefore failed to prove that Houston-Sconiers was armed with a firearm during the commission of that offense.*

The State charged Houston-Sconiers in count X with conspiracy to commit robbery, and alleged that he was armed with a firearm when he committed this crime. (RP 21-22) A person is potentially subject to a deadly weapon enhancement if armed with a firearm while committing a crime. RCW 9.94A.533(3), (4). "A person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." State v. Eckenrode, 159 Wn.2d 488, 492-93, 150 P.3d 1116 (2007) (citing State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). But there must also be a "nexus between the defendant, the crime, and the weapon." State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007); State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366 (2006).

Accordingly, the jury was instructed that, in order to find that Houston-Sconiers was armed with a firearm:

> [t]he State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. **The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime**. **In determining whether these connections existed, you should consider**, among other factors, **the nature of the crime** and the circumstances

surrounding the commission of the crime[.]

(CP 195, emphasis added)

The State does not have to produce direct evidence of a defendant's intent to use the firearm to further the charged crime, so long as the facts and circumstances support an inference of a connection between the weapon, the crime, and the defendant. Easterlin, 159 Wn.2d at 210. The weapon must have some rational connection to the charged crime. State v. Holt, 119 Wn. App. 712, 728, 82 P.3d 688 (2004). There were no facts presented in this case from which a juror could infer a connection between the gun and the crime of conspiracy.

A person is guilty of conspiracy "when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." RCW 9A.28.040(1). Conspiracy is an inchoate crime that focuses on "the conspiratorial agreement, not the specific criminal object or objects." State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610 (2000). The conspiracy exists independent of any crimes actually committed pursuant to the agreement or conspiracy. State v. Varnell, 162 Wn.2d 165, 170, 170 P.3d 24 (2007). Thus, the

"nature of the crime" of conspiracy is the agreement, or the meeting of the minds, not the crime discussed or agreed upon.

Even if the participants discussed or agreed to use a firearm during the commission of a future crime, that does not make any of them "armed with a firearm" for the purposes of that discussion or agreement. The firearm may have been "available for use" for the eventual agreed upon crime, but it cannot logically be "available for use" in furtherance of the actual agreement.

The state may argue that possession or use of the firearm to commit the crimes was a substantial step in furtherance of the agreement, and therefore proves a connection between the conspiracy and the firearm. This would be incorrect, however, as proof of a substantial step is required simply to ensure that the State does not punish mere words or hyperbole.[10] This factual requirement does not change the nature of the crime.

Rather, "'[t]he gist of the crime is the confederation or combination of minds.'" State v. Dent, 123 Wn.2d 467, 475, 869 P.2d

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[10] The purpose of the "substantial step" requirement is to "manifest 'that the conspiracy is at work,' and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." State v. Dent, 123 Wn.2d 467, 475, 869 P.2d 392 (1994) (quoting Yates v. United States, 354 U.S. 298, 334, 77 S. Ct. 1064, 1085, 1 L. Ed. 2d 1356 (1957) (internal quotation marks omitted)).

392 (1994) (quoting State v. Casarez–Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987) (quoting Marino v. United States, 91 F.2d 691, 693-98, 113 A.L R. 975 (9th Cir.1937))). But a confederation of minds cannot be armed with a firearm. There is simply no rational connection between the firearm and the agreement.[11] This firearm sentence enhancement should be stricken.

C. REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT DENIED HOUSTON-SCONIERS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutors have a duty to see that those accused of a crime receive a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of his right

[11] Under this interpretation, a defendant's procurement of a gun as a step in furtherance of the agreement, or use of gun in commission of the agreed upon crime, would not necessarily go unpunished. The State could still charge a defendant, as it did in this case, with unlawful possession of a firearm and/or allege as a sentence enhancement that the defendant was armed with a firearm during the commission of the agreed-upon offense.

to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'" State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); State v. Reed, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984)). Thus, in the interest of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. Charlton, 90 Wn.2d at 664.

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Prejudice is established where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)); State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

Absent a proper objection, a defendant is required to show the misconduct was so flagrant and ill-intentioned that no curative

instruction would have obviated the prejudice. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). In this case, the defense objected to numerous instances of misconduct, but did not object to other instances. However, the cumulative effect of repeated instances of misconduct may be so flagrant that no instruction can erase the error. State v. Henderson, 100 Wn. App. 794, 805, 998 P.2d 907 (2000).

First, it is improper and misconduct for a prosecutor to "make prejudicial statements that are not sustained by the record." Dhaliwal, 150 Wn.2d at 577; *see also* State v. Belgarde, 110 Wn.2d 504, 516-17, 755 P.2d 174 (1988). For example, in State v. Boehning, this Court found that the prosecutor's repeated references to several dismissed rape counts and suggestions that the victim's out-of-court statements supported those charges were "uncalled for and impermissibly asked the jury to infer that Boehning was guilty of crimes that had been dismissed and were not supported by trial testimony." 127 Wn. App. 511, 522, 111 P.3d 899 (2005) (citing State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976)). The Court held that "such argument improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds. This error alone compels reversal." Boehning,

127 Wn. App. at 522.

Similarly here, the prosecutor repeatedly implied that other uncharged and unproved crimes were committed by Houston-Sconiers and the other men, when he stated:

- We know that Mr. Houston-Sconiers, on the 14th of October, was in that same Cadillac displaying and holding the same firearm that was used in the robbery. (RP 2234, objection at RP 2234)
- [T]hese crimes occurred, the ones that we know about, in this location and general area. (RP 2229)
- [G]uess what, there's two backpacks in that car that can't be identified ... How did those get in there and why are they in there? (RP 2342-43, objection at RP 2343)
- It's so incredibly unlucky that [Houston-Sconiers] chose to make phone calls to his buddies and say ["]niggas be snitching. I'm not telling you to do something . . . but what happens to that happens to him.["] Oh, no, that's not a threat. Who is he talking about? Money, by name. Is it a surprise that Money [Tolbert] takes the stand after that, don't remember, don't remember, don't remember. (RP 2350, objection at 2351)

Though the interior of the vehicle and the firearm resembled the Cadillac and the silver gun later found under the seat, there was no testimony that they were in fact the same. (RP 1612-15, 1655-56, 1701-02; Exh. P3) The State also presented no evidence that the group committed robberies other than the three incidents charged in this case, so it was improper for the prosecutor to imply that there may have been more.

It was also highly improper for the prosecutor to imply that

Tolbert feigned ignorance because he was afraid or had been threatened. The recordings were admitted, over strenuous objection, for the specific and limited purpose of showing Houston-Sconiers' "consciousness of guilt." (RP 312-13, 320-21, 1619, 1627-29, 1637, 1640-41, 1654; Exhs. 49C, 49D) Houston-Sconiers was not charged with witness tampering or intimidation, nor was any evidence presented either to the judge or the jury showing that Houston-Sconiers, or anyone acting at his direction, ever threatened or intimidated Tolbert. By using the substance of the recordings to imply that Houston-Sconiers was attempting to influence Tolbert's testimony, the prosecutor flagrantly and intentionally violated the trial court's ruling admitting the evidence for a limited purpose, and improperly "appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds." Boehning, 127 Wn. App. at 522.

Next, a prosecutor should refrain from personally attacking defense counsel, impugning the character of the defendant's lawyer, or disparaging defense lawyers in general as a means of imputing guilt to the defendant. *See* State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984); United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980). Comments that permit the jury "to nurture suspicions

about defense counsel's integrity" can deny a defendant's right to effective representation. State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725 (1988).

In this case, the prosecutor made several comments disparaging defense counsel, including the following:

- Defense counsel just argued against herself in regard to the standard of proof in this abiding belief [instruction]. She said that she hears prosecutors say frequently that this abiding belief issue is you have to believe it now, two weeks from now, five years now. And she suggested it's a difficult concept. One, it is not a difficult concept, and it is what it says it is. She did not completely tell you what that sentence says and what it applies to. (RP 2335-36)
- Now, I want to directly address some of the things that defense counsel for Mr. Houston-Sconiers said that I absolutely 100 percent disagree with her statement as to what witnesses said and what the evidence was in this case. And some of the issues that were woven in there as if they're premises, [as if] they're true things, [as if] the foundation of what she's saying is true. (RP 2338)
- After defense counsel challenged the lack of forensic evidence that would indicate that the hockey mask was worn by a person wearing glasses, as Houston-Sconiers does (RP 2330), the prosecutor states: We don't know, based on the forensics analysis, whether this hockey mask, so to speak, had nicks on it from her client's glasses, okay. What's the premise involved in that? What's the misrepresentation based on the evidence about that? And that is that the defendant wears glasses at all. He's in the video with the gun, no glasses. Nobody mentioned that he wears glasses, the officers, et cetera, but he has glasses on in the courtroom. (RP 2345, objection at 2345)

And the prosecutor also implied that, contrary to defense counsel's role, his role is to elicit the truth:

> • I treated [defense witness Shantell Bush] with respect. You may disagree. But I was strong for a reason because when individuals get on the stand, my job is to challenge the evidence so that you can ultimately decide whether somebody's credible or not. (RP 2346)
> • So in order to get to that point, my job [in] the process as an advocate [and] as a person, as I said, to challenge the evidence is not to take what Ms. Bush says and just, okay, Ms. Bush, open-ended question, what's your answer to this? Thank you very much. It's to challenge it. And that's the only way you discover, for instance, that she's been talked to during her testimony by somebody[.] (RP 2348)

These arguments disparaged the role of defense counsel in general, and Mr. Houston-Sconiers' defense counsel in particular, and urged the jury to disregard the defense because counsel's motives were suspect and impure.

Prosecutorial misconduct also occurs when the prosecutor expresses a personal belief as to the credibility of a witness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). "Whether a witness has testified truthfully is entirely for the jury to determine." Ish, 170 Wn.2d at 196. It is also improper for the prosecutor to express an independent, personal opinion as to the defendant's guilt. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

In this case, the prosecutor expressed his personal opinion about Tolbert's credibility when he reminded Tolbert that he could be charged with perjury, after Tolbert repeatedly stated that he did not remember the events of Halloween night and said he lied in his proffer to police. (RP 1822, objection at RP 1829) Then the prosecutor positioned himself directly behind Houston-Sconiers and Roberts at the defense table, pointed straight to the defendants, and demanded to know if Tolbert was "present when any robbery was committed."[12] (RP 1859, 1861, 1867; CP 66) And in closing arguments, the prosecutor stated: "We know from that evidence there is no issue that Mr. Houston-Sconiers is guilty of every crime charged, period." (RP 2235)

The prosecutor clearly expressed his personal opinion that Tolbert was lying on the stand and was hiding his knowledge of and involvement with the robberies. The prosecutor clearly expressed his personal belief that Roberts and Houston-Sconiers committed the robberies, and that Houston-Sconiers was guilty, "period."

The repeated acts of misconduct in this case were prejudicial

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[12] The defense strenuously objected to this behavior, and requested a mistrial. (RP 1822, 1861-62; CP 66-69) The trial court agreed that the prosecutor acted improperly, but did not believe that his actions would impact the jury's determination of the case. (RP 1867-69)

to Houston-Sconiers' right to a fair trial. The prosecutor's antics and improper arguments clearly conveyed to the jury that he personally believed Houston-Sconiers was guilty, that he personally believed that certain witnesses were credible and others were not, and that Houston-Sconiers was a dangerous criminal who committed more than just the charged crimes. Because the evidence in this case was entirely circumstantial, and the descriptions of the suspects varied, it cannot be said that the outcome of trial would have been the same had the prosecutor acted properly throughout the trial.[13]

The cumulative effect of these repeated instances of misconduct could not have been cured by a simple instruction. Houston-Sconiers' convictions must therefore be reversed and he must be given a new, fair trial free of such pervasive prosecutorial misconduct.

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[13] Misconduct materially affects the outcome of trial if the evidence of guilt is not overwhelming. Henderson, 100 Wn. App. at 805.

D. THE TRIAL COURT'S FAILURE TO CONSIDER HOUSTON-SCONIERS' ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED ON DIRECT APPEAL.

1. *The record fails to establish that the trial court actually took into account Houston-Sconiers' financial circumstances before imposing discretionary LFOs.*

At sentencing, Houston-Sconiers asked the court to waive all discretionary legal financial obligations (LFOs):

> Mr. Houston-Sconiers has no ability to pay any financial or legal obligations. I think the Court can find, as a matter of law, that he does not. He does not. He's never worked. He is, you know, as poor as a church mouse. And so with the exception of the absolute mandatory LFOs, we're asking the Court not to impose any legal and financial obligations. He has no ability whatsoever to pay.

(RP 2396) But the trial court ordered Houston-Sconiers to pay legal costs in the amount of $1,300.00, which included discretionary costs of $500 for appointed counsel, stating only: "I am going to reduce the [DAC recoupment] down to $500 since I think there's some minimum amount that needs to be paid back to the taxpayers for your defense." (RP 2403) That will be the ruling of the court." (CP 237; RP 2403) In the Judgment and Sentence, the trial court entered the following boilerplate language:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total

> amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

(CP 236) There was no check-box for the trial court to mark on the pre-printed sentencing form, and the trial court made no contemporaneous statements at sentencing regarding Houston-Sconiers' ability to pay. (CP 236; RP 2403)

RCW 10.01.160(3) provides:

> [t]he court **shall not** order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court **shall** take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160 (3) (emphasis added). The word "shall" means the requirement is mandatory.[14] State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). Hence, the trial court was without authority to impose LFOs as a condition of Houston-Sconiers' sentence if it did not first take into account his financial resources

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[14] Comparatively, RCW 9.94A.753 (a statute which addresses restitution) merely provides:

> The court **should** take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(emphasis added).

and the individual burdens of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant's individual financial circumstances and made an individualized determination he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The record does not establish the trial court actually took into account Houston-Sconiers' financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing Houston-Sconiers' ability to pay or ask it to make a determination under RCW 10.01.160 when it asked that LFOs be imposed.[15] (RP 2390) The trial court made no inquiry into Houston-Sconiers' financial resources, debts, or employability. There was no specific

[15] It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

evidence before the trial court regarding Houston-Sconiers' past employment or his future educational opportunities or employment prospects. There was simply no discussion at the sentencing hearing regarding Houston-Sconiers' financial circumstances. (RP 2403) In ordering the DAC recoupment, the trial court was concerned only with what the taxpayers were entitled to, not with what Houston-Sconiers was able to pay.

The only part of the record that even remotely suggests the trial court complied with RCW 10.01.160(3) is the boilerplate finding in the Judgment and Sentence. (CP 236) However, this finding does not establish compliance with RCW 10.01.160(3)'s requirements.

A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of the necessary facts); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir.2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

The Judgment and Sentence form used in Houston-Sconiers'

case contained a pre-formatted conclusion that he had the ability to pay LFOs. It does not include a checkbox to register even minimal individualized judicial consideration. (RP 236) Rather, every time one of these forms is used, there is a pre-formatted conclusion that the trial court followed the requirements of RCW 10.01.160(3), regardless of what actually transpired. This type of finding therefore cannot reliably establish that the trial court complied with RCW 10.01.160(3).

In sum, the record fails to establish the trial court actually took into account Houston-Sconiers' financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should vacate that portion of the Judgment and Sentence.

2. *Houston-Sconiers' challenge to the LFO order is ripe for review.*

The State may argue that the issue raised herein is not ripe for review because the State has not yet attempted to collect the costs. This argument should be rejected, however, because it fails to distinguish between a LFO challenge based on financial hardship grounds (arguably not ripe) and a challenge attacking the legality of the order based on statutory non-compliance (ripe).

Although there is a line of cases that holds the relevant or meaningful time to challenge an LFO order is after the State seeks to enforce it, these cases address challenges based on an assertion of financial hardship or on procedural due process principles that arise in regard to collection.[16] By contrast, this case involves a direct challenge to the legal validity of the order on the ground the trial court failed to comply with RCW 10.01.160(3). As shown below, this issue is therefore ripe for review.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. State v. Bah, 164 Wn.2d, 739, 751, 193 P.3d 678 (2008). Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of

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[16] See, e.g., Lundy, 176 Wn. App. at 108-09 (holding "any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review" until the State attempts to collect); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) (determining defendant's constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce LFO order); State v. Phillips, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (holding defendant's constitutional objection to the LFO order based on the fact of his indigence was not ripe until the State sought to enforce the order); State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (concluding the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

withholding court consideration. Bah, 164 Wn.2d at 751.

First, as discussed above, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160 prior to issuing the order. As such, Houston-Sconiers meets the first prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. As explained above, Houston-Sconiers is challenging the sentencing court's failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue (the statute and the sentencing record) are fully developed.

Although the Valencia court previously suggested LFO challenges require further factual development, 169 Wn.2d at 789, Valencia does not apply here. Valencia involved a constitutional challenge to a sentencing condition regarding pornography. In assessing the second prong of the ripeness test, the Court compared Valencia's challenge to the court-ordered proscription on pornography with a hypothetical challenge to a LFO order. The Court suggested the former did not require further factual development to

support review, while the latter did.

It appears, however, that the Valencia Court's hypothetical LFO challenge was predicated upon the notion that the order would be challenged on factual financial hardship grounds, rather than on statutory non-compliance grounds. For example, the Court stated:

> [LFO orders] are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement.

169 Wn.2d at 789. This statement certainly may be true if the offender is challenging the validity of the LFO order asserting current financial hardship. However, this statement is not accurate if an offender is challenging the legal validity of the LFO order based on non-compliance with RCW 10.01.160.

Either the sentencing court complied with the statute prior to imposing the order, or it did not. If it did not, the order is not valid, regardless of the particular circumstances of attempted enforcement. This demonstrates Valencia likely never contemplated the issue raised herein and, therefore, is distinguishable. As explained above, no further factual development is needed here, and the second prong of the ripeness test is met.

Third, the challenged action is final. Once LFOs are ordered,

that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing that debt in the first place is not subject to change. In other words, while the defendant's obligation to complete payment of LFOs that have been ordered may be "conditional," the original sentencing order imposing LFOs is final.[17] As such, the third prong of the ripeness test is met.

Next, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant and non-payment may subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at a 12% rate. RCW

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[17] Division I previously concluded a trial court's LFO order is "conditional," as opposed to final, because the defendant may seek remission or modification at any time. State v. Smits, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009). However, it did so in the context of reviewing a denial of the defendant's motion to terminate his debt on the basis of financial hardship pursuant to RCW 10.01.160(4). Thus, Division I's analysis was focused on the defendant's conditional obligation to pay rather than on the legal validity of the initial sentencing order. Smits, 152 Wn. App. at 523.

10.82.090.

The hardships that might result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people LFOs result in:

> …reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnarling some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).[18]

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on the remission process to correct the error imposes its own hardships.

First, during the remission process, the defendant is saddled

[18] This report can be found at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013). The defendant is not required to disprove this. See, e.g. State v. Ford, 137 Wn. App. 472, 482, 973 P.2d 452 (1999) (stating the defendant is "not obligated to disprove the State's position" at sentencing where it has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains with the State.

Second, an offender who is left to fight his erroneously ordered LFOs through the remission process will have to do so without appointed legal representation. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given the petitioner's financial hardships, he will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se.

For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. *See* Legal Financial Obligations in Washington State at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties. Legal Financial Obligations in Washington State at 46-47. Permitting a challenge to an erroneous LFO order on direct appeal would enable an offender to challenge his or her debt with the help of counsel and before the financial burden grows to overwhelming proportions.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that may otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See, State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial

resources). Allowing the matter to be addressed on direct appeal will emphasize the importance of undertaking the necessary factual consideration when imposing LFOs in the first place and not rely on the remission process to remedy errors.

For the reasons stated above, this Court should hold Houston-Sconiers' challenge to the legal validity of the LFO is ripe.

3. *Because the record does not expressly demonstrate the sentencing court would have imposed the LFOs had it undertaken the required considerations, the remedy is remand.*

Where the sentencing court fails to comply with a sentencing statute when imposing a sentencing condition, remand is the remedy unless the record clearly indicates the court would have imposed the same condition anyway. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)).

The record does not expressly demonstrate the trial court would have found sufficient evidence of Houston-Sconiers' ability to pay the LFOs. At sentencing, the State failed to point to any evidence establishing Houston-Sconiers' past or future educational and employment prospects. At the time of sentencing, Houston-Sconiers was just 18 years old. (RP 2395) If the sentence imposed

stands, he will be released from prison when he is 49 years old, with little or no real-world employment experience. (CP 239)

There was no evidence that remotely suggests Houston-Sconiers' employability once he is released. Finally, the record shows Houston-Sconiers did not proceed with retained counsel but relied on appointed counsel, indicating a lack of personal resources. (CP 237)

Based on the foregoing, it cannot be said this record expressly demonstrates the sentencing court would have imposed the same LFOs if it had actually taken into account Houston-Sconiers' individual financial circumstances. As such, the remedy is remand for resentencing. Parker, 132 Wn.2d at 192-93.

E. REVERSAL AND REMAND IS REQUIRED UNDER MLLER V. ALABAMA[19] BECAUSE HOUSTON-SCONIERS WAS TRIED AS AN ADULT WITHOUT A DECLINE HEARING AND NO CONSIDERATION WAS GIVEN AT SENTENCING TO THE FACT THAT HE WAS A JUVENILE AT THE TIME THE OFFENSES WERE COMMITTED.

Houston-Sconiers was 17 years old at the time of the alleged crimes, but was charged and tried in adult court without the benefit of a decline hearing, under RCW 13.04.030(1)(e)(v)(A). (CP 1-4, 17-22) The trial court imposed no time for the substantive crimes, but

[19] Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

was given no discretion and was bound by statute to sentence Houston-Sconiers to seven statutorily mandated, flat-time, consecutive sentencing enhancements, totaling 372 months (31 years) of incarceration. (RP 2403; CP 230-31, 239)

Pursuant to RAP 10.1(g)(2), Houston-Sconiers hereby incorporates by reference the arguments and authorities in Section D.1 of co-appellant Treson Roberts' opening brief.[20] The claimed error and prejudice discussed in co-appellant Roberts' brief applies equally to Houston-Sconiers in his case.

F. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENTS.

Houston-Sconiers was charged with firearm sentence enhancements for counts I thru X, and the jury found that he was armed with a firearm during commission of four robbery offenses, the assault offense, and the conspiracy offense. (CP 17-22; 207, 209, 211, 213, 215, 217, 220) Pursuant to RAP 10.1(g)(2), Houston-Sconiers hereby incorporates by reference the arguments and authorities in Section D.3 of co-appellant Treson Roberts' opening brief. The claimed error and prejudice discussed in co-appellant Roberts' brief applies equally to Houston-Sconiers in his case.

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[20] RAP 10.1(g)(2) allows a party in a consolidated case to "adopt by reference any part of the brief of another" party.

V. CONCLUSION

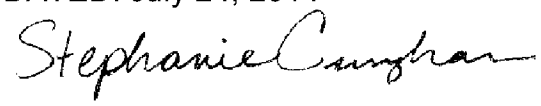
Even though Wright's statement may have been an excited utterance, the court should not have admitted it because the statements were testimonial and Wright did not testify at trial and was never subject to cross-examination. The improper admission of this testimonial hearsay was not harmless because the remaining evidence relating to that charge was minimal, vague, and certainly not overwhelming. The State also failed to present sufficient evidence to prove that Guice feared for her safety, and therefore failed to prove that Houston-Sconiers committed second degree assault. These errors require that these two convictions be reversed and dismissed with prejudice.

Next, the State also failed to present sufficient evidence to prove that Houston-Sconiers was armed with a firearm when he conspired to commit robbery, because the nature of that offense concerns what a person thinks, says and agrees to, not what actions a person subsequently performs. And one's thoughts, words and agreements cannot possess a firearm. Additionally, the State must prove that the firearm used in the charged incidents was operable, and failed to do so here. Accordingly, all of the firearm special verdicts should be stricken. The trial court also failed to comply with

RCW 10.01.160(3) when it imposed discretionary legal financial obligations as part of Houston-Sconiers' sentence. These errors require that Houston-Sconiers case be remanded for resentencing.

Finally, the prosecutor's repeated acts of misconduct, including making prejudicial statements to the jury that were not supported by the record, repeatedly implying that Zyion Houston-Sconiers committed additional uncharged and unproved crimes; making remarks to the jury disparaging defense counsel, and expressing his personal belief regarding the credibility of a witness and his personal belief that Houston-Sconiers was guilty, all combined to deny Houston-Sconiers his constitutional right to a fair trial. This misconduct requires that Houston-Sconiers' convictions be reversed.

DATED: July 24, 2014



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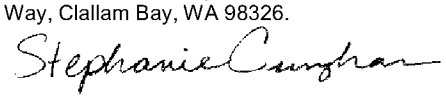
CERTIFICATE OF MAILING

I certify that on 07/24/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Zyion D. Houston-Sconiers #368944, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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