

70928-3

70928-3

No. 70928-3-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

ALEXANDER ARNOLD, Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred instructing the jury on all three statutory alternative means of committing robbery in the first degree as set forth explicitly in the information notwithstanding the omission of the numerical citation to the statutory code subsection of the third alternative mean.
2. Whether Arnold can challenge the imposition of legal financial obligations for the first time on appeal pursuant to RAP 2.5 when Arnold did not object to the imposition of a discretionary jury demand fee of \$250.00 below, where Arnold invited and waived any error pertaining to the \$600.00 appointed counsel reimbursement fee by specifically asking the sentencing court to impose that amount instead of the \$2,700.00 fee the state was seeking.

C. FACTS

1. Procedural facts

Alexander Arnold was charged with one count of "Robbery in the First Degree While Armed with a Deadly Weapon". CP 2-3. On September 11th 2013 the information was amended, changing the date of the offense from July 3rd to July 2nd 2013 to conform to the evidence. CP 6-7. A jury found Arnold guilty of Robbery in the first degree but declined to find beyond a reasonable doubt he was armed with a deadly weapon at the time of the offense. CP 43-44. Arnold was given a 31 month

standard range sentence. CP 46-57. As part of his sentence, Arnold was ordered to pay \$600 costs for appointed counsel and a \$250 jury demand fee. CP 49. Arnold now timely appeals his conviction and the imposition of these discretionary legal financial obligations. CP 60-72.

2. Substantive Facts

On July 2nd 2013 at approximately 11 p.m. Adriana McDowell stopped at a gas station at the corner of Hannegan and Pole road in rural Whatcom county to put gas in her truck. 2RP 26. After getting gas, McDowell went around her truck to gather some garbage from the passenger floorboard area. 2RP 28. Suddenly, a man later identified at Arnold, forcefully grabbed McDowell around the neck from behind and threw her to the ground. 2RP 29, 34. Despite screaming and waiving her arms, Arnold pulled McDowell to the ground and told her to quiet down. RP 29. Arnold then stood over McDowell holding a knife, told her to “shut the fuck up” and asked where her purse was. 2 RP 30. Eventually McDowell got up and when Arnold again asked where her money was, she motioned toward the cab of her truck. 2RP 31. McDowell then went into the cab of her truck and grabbed her purse from the passenger floorboard, pulled approximately \$64.00 out of it and gave it to Arnold. 2 RP 32. After McDowell asked Arnold if there was anything else he wanted, Arnold asked for her cell phone. 2 RP 33. McDowell then

retrieved her phone from the cab of her truck and gave it to Arnold. 2 RP 34. Arnold then told McDowell to get in her truck, drive away and not look back or he would “fucking kill” her. 2 RP 34. According to McDowell, Arnold grabbed forcefully enough that her jaw ached and was starting to bruise the next morning. 2 RP 35.

McDowell did as Arnold said and drove away, driving to the next gas station where she stopped, borrowed a phone to call her husband and eventually, 911. 2 RP 43, 53. Approximately 45 minutes after McDowell called the police, the police located McDowell’s phone and Arnold. 2 RP 70, 76. McDowell identified Arnold as the person who grabbed her around her neck and took her to the ground to rob her. 2 RP 49, 76. Police recovered McDowell’s cell phone, four dollars and clothes consistent with what McDowell reported Arnold was wearing during the robbery in Arnold’s backpack. 2 RP 138, 134, 142.

Arnold admitted he robbed McDowell but denied having a deadly weapon, a knife or using force. He also asserted he only took \$4.00 from McDowell, not the \$64 dollars McDowell reported. 2 RP 148, 159, 196-197. Following trial, the jury convicted Arnold of robbery in the first degree but found the state did not prove beyond a reasonable doubt that Arnold was armed with a deadly weapon during the commission of the robbery. CP 43-44, 46-57.

D. ARGUMENT

1. **The jury was properly instructed on all alternative means of committing robbery in the first degree as set forth explicitly in the charging information notwithstanding the omission of the numerical citation of the statutory code relating to the third alternative mean.**

Arnold argues the trial court erred instructing the jury on all three statutory means of robbery in the first degree over his objection because the information only cited to two of three of the numerical code subsections of the robbery statute. He argues therefore, the trial court could only instruct the jury on the two alternative means that listed the corresponding code subsections in the information notwithstanding the remaining plain language contained in the information that set forth all of the essential elements of all three statutory means by which Arnold was accused of committing the crime of robbery in the first degree. Br. of App.at 6.

The crime of which a jury may be instructed is limited to the offense charged in the information. In re Brockie, 178 Wash. 2d 532, 309 P.3d 498 (2013). When a statute sets forth alternative means by which a crime may be committed, the information may charge one or more of the alternatives, provided that the alternatives are not repugnant to each other. State v. Bray, 52 Wash. App. 30, 34, 756 P.2d 1332 (1988). It is error for

a trial court to instruct a jury on uncharged alternative means. In re Brockie, 178 Wash. 2d 532.

The first degree robbery statute states:

A person is guilty of robbery in the first degree if:

- (a) In the commission of a robbery or of immediate flight therefrom, he or she:
 - (i) is armed with a deadly weapon; or
 - (ii) displays what appears to be a firearm or other deadly weapon;
 - (iii) inflicts bodily injury.

RCW 9A.56.200. “Robbery” is defined as:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking
...

RCW 9A.56.190. “The statutory elements of robbery are: (1) a taking of personal property; (2) from the person or in one’s presence; (3) by the use or threatened use of such force, or violence, or fear of injury; (4) such force or fear being used to obtain or retain the property.” State v. Phillips, 98 Wash. App. 936, 943, 991 P.2d 1195 (2000). Robbery also includes

the non-statutory element that the property taken belonged to someone other than the defendant. Id. at 944.

The charging document in this case advised Arnold he was charged with robbery in the first degree while armed with a deadly weapon as follows:

That on or about the 2nd day of July, 2013, the said defendant, Alexander C. Arnold then and there being in said county and state, within intent to commit theft, did unlawfully take personal property that the defendant did not own from the person or in the presence of Adriana McDowell, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another and in the commission of said crime and in immediate flight therefrom, the Defendant ***was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon and/ or inflicted bodily injury upon Adriana McDowell*** in violation of RCW 9A.56.200(1)(a)(i) and (ii), RCW 9A.56.190 and RCW 94A.53333, which is a class A felony.

CP 2, 3, 6, 7 (emphasis added).

As this charging information reveals, Arnold was placed on notice that the state was seeking to convict him of robbery based on one of three statutory alternative means notwithstanding the omission of the cite to the specific numerical code subsection pertaining to the alternative mean of committing robbery by 'inflicted bodily injury.'

A charging document is required to describe the essential elements of a crime with reasonable certainty such that the accused may prepare a defense. State v. Leach, 113 Wash. 2d 679, 782 P.2d 552 (1989). An

essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Ward, 148 Wash. 2d 803, 811, 64 P.3d 640 (2003). The essential elements rule requires that the information allege facts supporting every element of the offense, in addition to identifying the crime charged. Leach, 113 Wash. 2d at 689. The purpose of the essential elements rule is to apprise the defendant of the charges against him as to allow the accused to properly prepare a defense. State v. Vangerpen, 125 Wash. 2d 782, 787, 888 P.2d 1177 (1995).

In In re Brockie, 178 Wash. 2d 532, our supreme court determined that when a defendant claims the trial court erred instructing the jury on an uncharged alternative means, the claim is appropriately considered as an error in jury instructions, not an error of the charging document pursuant to the Kjorsvik/Leach line of cases. In analyzing this issue as an alleged jury instruction error the reviewing court must determine whether the information put Arnold was on notice that all three statutory alternative means were charged such that the trial court did not err instructing the jury on all three statutory alternative means of committing robbery in the first degree. *Id* at 538. Under this standard, Arnold cannot demonstrate the trial court erred.

The charging information did place Arnold on notice that the state was seeking a conviction predicated on one of three alternative means of committing robbery. Prior to trial Arnold's attorney advised the trial court "The state has indicated that they are going to try and show that this is a robbery in the first because she was injured." RP 8 (September 10th 2013). This statement confirms the charging information placed Arnold on notice that the state was seeking a conviction on all three alternative means listed in the information.

Additionally, discovery provided to Arnold prior to trial included evidence to support a finding Arnold committed the robbery of McDowell by inflicting bodily injury. 2 RP 175-176, 1 RP 8. Arnold was therefore not prejudiced, notwithstanding later arguments and objections he made throughout his trial seeking to limit or precluding the state from offering evidence to show McDowell was injured when Arnold grabbed her and threw her to the ground during the robbery. See, 2 RP 61. (Arnold's trial attorney cross examines McDowell regarding her injuries; confirming she neither sought medical treatment nor was taken to the hospital.) Finally, the 'to convict' instruction language is consistent with the language in the charging document, neither adding or omitting any of the essential elements of each alternative means for robbery in the first degree.

The record further reflects that Arnold's trial attorney didn't seek a bill of particulars to clarify which alternative means the state was relying on to obtain a conviction likely because there was no confusion as to the state's theory of the case based on the charging document and discovery provided by the state. While there was a technical omission regarding the numerical subsection cite in the charging document, Arnold's trial attorney nonetheless prepared and asked questions throughout trial specific to the third alternative mean- in an effort to demonstrate the evidence wasn't sufficient to support that Arnold inflicted bodily injury when he robbed McDowell, in addition to arguing he didn't have or use a knife to commit this robbery. Arnold's argument prior to instructing the jury and now on appeal that he was unaware the state was seeking a conviction on all three of the statutory means set forth in the information because the information omitted the numerical statutory citation to one of the three alternative means is without merit.

If analyzed, as Arnold essentially argues, as to the sufficiency of the charging document challenged at trial, Arnold's argument should still be rejected. See, Br. of App. at 8. A strict construction review of Arnold's charging information demonstrates the essential elements of all three statutory alternative means of robbery in the first degree were written out placing Arnold on notice of the three means by which the state was

accusing him of committing robbery in the first degree. State v. Taylor, 140 Wash. 2d 229, 996 P.2d 571 (2000). The state's failure to cite to one of three of the numerical statutory subsections in light of the fact that the language of all of the essential elements of the statutory alternatives for committing robbery in the first degree were set forth in the information does not render the charging document insufficient such that dismissal or reversal is warranted. CrR2.1(1) states in part:

...Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

See also, Vangerpen, 125 Wash. 2d, 787-788(error in the citation of an information are not grounds for reversal if the error did not prejudice the defendant.), State v. Hopper, 118 Wash. 2d 151, 822 P.2d 775 (1992)(a technical defect in the information, such as citing to the wrong statute, is not grounds for dismissal or reversal where no prejudice is established), Leach, 113 Wash. 2d, 696. (“[T]echnical defects not affecting the substance of the charged offense do not prejudice the defendant and thus do not require dismissal.”)

Similarly, where the charging information sufficiently sets for the essential elements of all of the statutory alternative means of committing an offense, the state should not be precluded from instructing the jury as to

all of the alternatives set forth, notwithstanding a technical omission of a numerical subsection pertaining to one of the alternative means. If Arnold was confused as to which alternative means the state was seeking to rely on to prove the robbery charge, in light of the substantive language of the information setting out three alternative means in conjunction with the fact that only two citations to the corresponding statutory code subsections were listed, he could and should have sought a bill of particulars to clarify the issue. Typically, a defendant may not challenge an information for vagueness on appeal if he didn't make a request for a bill of particulars. Leach, 113 Wash. 2d at 687(a charging document that states the statutory elements of a crime but is vague as to some other significant matter, may be corrected by a bill of particulars); *accord*, State v. Winings, 126 Wash. App. 75, 84, 107 P.3d 141 (2005).

As the record reflects, Arnold didn't seek a bill of particulars because he was fully aware and on notice that the state was seeking a conviction predicated on one of all three alternative means charged, including by "inflicting bodily injury" based on the fact that all of the essential elements of all three statutory alternative means of committing robbery were set forth in the charging information. 2 RP 61. Arnold consistently strategically attacked and sought to undermine the state's

assertion that Arnold committed the robbery by threatening McDowell with a knife and or, by injuring her in the commission of the robbery. Under these circumstances, there was no instructional error in this case. Arnold's argument should be rejected.

2. Arnold may not challenge the imposition of legal financial obligations for the first time on appeal pursuant to RAP 2.5.

For the first time on appeal, Arnold asserts the trial court erred procedurally by failing to follow the statutory provision in RCW 10.01.160(3) that requires pursuant to Arnold's argument, the sentencing court to Order an offender to pay legal financial obligations only if the sentencing court has first considered Arnolds individual financial circumstances and concluded he has the ability, or likely future ability, to pay. Br. of App. at 11. Arnold contends he may assert this error for the first time on appeal as an erroneous sentencing condition. Id.

- a. Arnold may not challenge LFO's as an erroneous sentencing condition for the first time on appeal when the face of his judgment and sentence reflects no error and where Arnold invited error as to the attorney fee cost provision by asking the sentencing court to impose a cost of \$600.00.*

A trial court may only impose a sentence provided by law. “When a sentence has been imposed for which there is no authority in law, the trial court has the power and the duty to correct the erroneous sentence when the error is discovered.” In re Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980). For example, a “sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice” and as such constitutes an erroneous sentence subject to correction. In re Goodwin, 146 Wash. 2d 861, 50 P.3d 618 (2002). To invoke the analysis set forth in Goodwin however, a defendant must show on appeal that an error of fact or law exists within the four corners of his judgment and sentence. State v. Ross, 152 Wash. 2d 220, 95 P.3d 1225 (2004), *citing* Goodwin at 875-76. Arnold cannot meet this burden.

Courts may require defendants to pay court costs and other financial assessments associated with bringing a case to trial. RCW 10.01.160. A jury demand fee of \$250.00 may be ordered within the discretion of the sentencing court as a cost of bringing the proceeding. *See*, RCW 10.01.160(2), 10.46.190, 36.18.016(3)(b). The attorney reimbursement fee, on the other hand, is also discretionary but in this case Arnold specifically requested the court impose a cost of \$600.00 dollars at sentencing. *See*, RP 11 (September 17, 2013 Sentencing hearing Arnold specifically requests the attorney fee reimbursement amount be reduced

from \$2,700 dollars to \$600.00, which the sentencing court then granted.) To the extent Arnold is alleging error pertaining to the attorney reimbursement cost ordered by the court because it failed to affirmatively on the record consider Arnold's current or future ability to pay, the alleged error was both invited and waived when Arnold failed to object and instead requested this cost be imposed. Ross, 152 Wash. 2d 220, In re Goodwin, 146 Wash. 2d 861.

As for the remaining discretionary cost ordered by the court, nothing within the four corners of the judgment and sentence demonstrates that, as a matter of law, the imposition of \$250 jury demand fee exceeded the court's legal sentencing authority. The Judgment and sentence reflects the court considered his ability or future ability to pay legal financial obligations in section 2.5 of his judgment and sentence. Arnold is not asserting the record does not support this finding/inclusion of this language. Arnold's sentence was therefore not legally erroneous and not subject to challenge for the first time on appeal.

Arnold's reliance on State v. Moen, 129 Wash. 2d 535, 919 P.2d 69 (1996) to assert this court may consider a sentencing court's failure to comply with a sentencing statute for the first time on appeal, is misguided. In Moen, the court entered a restitution order after the statutory deadline for entering such an order had passed. The reviewing court determined

where a sentencing court acts without statutory authority in imposing a sentence, the alleged sentencing error may be addressed for the first time on appeal. In Moen, the sentencing error was reflected on the face of the judgment and restitution order itself. Here, there is nothing to support Arnold's contention that the sentencing court acted without statutory authority. The sentencing court was authorized to impose LFO's and language in the judgment reflects the court considered Arnold's ability and or future ability to pay as required by RCW 10.01.160. Arnold is not alleging the court erred legally by not making factual findings. Therefore, Arnold's asserted error does not render his judgment legally erroneous such that this court should review this issue for the first time on appeal.

Arnold can only have this alleged error reviewed for the first time on appeal if he can demonstrate the failure of the sentencing court to affirmatively consider Arnold's ability to pay such costs at the time of sentencing, notwithstanding the inclusion of the language in section 2.5 in the judgment and sentence, constitutes a manifest error of constitutional magnitude pursuant to RAP 2.5(a).

b. The sentencing error Arnold alleges, that the sentencing court failed to legally comply with RCW 10.01.160(3), is not a manifest error of constitutional magnitude subject to review pursuant to RAP 2.5.

The imposition of discretionary legal financial obligations is within

the sound discretion of the trial court. State v. Curry, 118 Wash. 2d 911, 916, 829 P.2d 166 (1992). In imposing such obligations, the sentencing court is not constitutionally required to enter formal, specific findings regarding the offender's ability to pay prior to imposing such costs. *Id.* There is no requirement that a court make a specific finding regarding the defendant's ability to pay so long as there is a mechanism for a defendant who cannot pay to have the judgment modified or remediated, which there is. *Id.*; *see also*, RCW 10.01.160 (1)(2), State v. State v. Smits, 152 Wash. App. 514, 216 P.3d 1097 (2009), *citing* State v. Baldwin, 63 Wash. App. 303, 309, 818 P.2d 1116 (1991) amended, 837 P.2d 646 (Wash. Ct. App. 1992).

Because of these provisions, a defendant's indigent status at the time of sentencing does not preclude the imposition of court costs as a defendant's inability to pay is best addressed at the time the State attempts to enforce collection. Smits, 152 Wash. App. 514, State v. Crook, 146 Wash. App. 24, 27, 189 P.3d 811 (2008).

Notwithstanding Curry, RCW 10.01.160(3) states:

The 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.

Arnold argues, predicated on RCW 10.01.160(3), the trial court exceeded

its authority by ordering the imposition of discretionary legal financial costs without considering his current or future ability to pay costs as statutorily is required. Br. of App. at 11. The sentencing court's inclusion of the language in section 2.5 of the judgment and sentence stating it has considered Arnolds present and future ability to pay financial obligations complies with RCW 10.01.160(3). Even if the inclusion of such language without affirmative findings or considerations on the record is construed as factually erroneous, the error is not subject to review for the first time on review as a manifest error of constitutional magnitude and does not otherwise render Arnold's judgment erroneous.

In State v. Blazina, 174 Wash. App. 906, 301 P.3d 492 review granted, 178 Wash. 2d 1010, 311 P.3d 27 (2013), *review granted*, 178 Wn.2d1010(2013), the Court of Appeals declined to review a objection to the imposition of legal financial obligations raised for the first time on appeal pursuant to RAP 2.5(a) because Blazina had not raised the issue below at the time the financial obligations were imposed where the record reflected there was similar boiler plate language regarding ability to pay in the judgment and sentence but no specific affirmative findings or considerations of Blazina's ability to pay were otherwise placed on the record. *See also*, State v. Lundy, 176 Wash. App. 96, 308 P.3d 755 (2013), State v. Parmelee, 172 Wash. App. 899, 292 P.3d 799 (2013),

State v. Calvin, 316 P.3d 496 (Wash. Ct. App. 2013), as amended on reconsideration (Oct. 22, 2013),.

In order to assert an error for the first time on appeal, it is Arnold's burden to demonstrate the error alleged is a manifest error of constitutional magnitude. RAP 2.5(a). "Manifest" means a showing that actual prejudice has occurred. State v. Lynn, 67 Wash. App. 339, 345, 835 P.2d 251 (1992). Arnold cannot show the error he alleges constitutional in nature or manifest such that it has resulted in sufficient prejudice to warrant review. Curry, 118 Wash. 2d, 915. State v. State v. Woodward, 116 Wash. App. 697, 703, 67 P.3d 530 (2003) (defendants who claim indigency must do more than claim poverty in general terms in seeking remission or modification of LFO's because compliance with financial obligations imposed under a judgment and sentence is an important aspect of holding a defendant responsible for his crimes).

The sentencing court's failure to affirmatively consider on the record an offenders ability to pay pursuant to RCW 10.01.160(3) beyond the inclusion of language in section 2.5 of the judgment and sentence is also not constitutionally required. It is enough to comply with RCW 10.01.160(3) to include language that the sentencing court considered ability to pay in imposing LFO's.

Moreover, even if this court determines the sentencing court erred ,

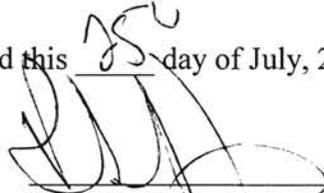
the remedy to the extent this Court chooses to review this issue on appeal for the first time pursuant to RAP 2.5(a), should be to strike the erroneous finding (in this case only the jury demand fee since Arnold requested the \$600.00 attorney reimbursement fee) and to remand to the sentencing court for consideration of this issue: to consider Arnold's current or future ability to pay to support the discretionary imposition of the jury demand fee. *See, State v. Ford*, 137 Wash. 2d 472, 973 P.2d 452 (1999)(remedy to correct an erroneous sentence is to remand to the sentencing court to correct the error.

Where disputed issues have been fully argued to the sentencing court, the State should be held to the existing record and the court should excise the unlawful portion of the sentence. But where the defendant fails to raise the issue to the attention of the sentencing court, remand for an evidentiary hearing to litigate the issue). Here, Arnold neither raised this issue nor did the trial court specifically address ability to pay this fee for the jury demand fee beyond the inclusion of the language in 2.5 of the judgment and sentence. Under these circumstances, if reviewable, this matter should be remanded to the sentencing court to litigate the imposition of the contested jury demand fee in light of RCW 10.01.160(3) issue for the first time.

E. CONCLUSION

The State respectfully requests this Court to deny Alexander Arnold's appeal and affirm his conviction for robbery in the first degree.

Respectfully submitted this 25th day of July, 2014.



KIMBERLY THULIN, WSBA #21210
Appellate Deputy Prosecutor
Attorney for Respondent
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CERTIFICATE

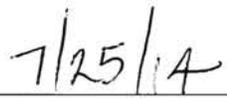
I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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Date