No. 47277-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHASE McCRACKEN

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Chase McCracken was homeless, freezing, high, and hungry, when he entered an empty home through the dog door, ate some food, drank some juice, and spent the night. When authorities later connected him to the crime, he immediately expressed a desire to plead guilty to residential burglary and malicious mischief. He was embarrassed and wanted to take responsibility for his actions.

A week later, however, the State amended the charges to add allegations that Mr. McCracken committed the crimes with sexual motivation. The State did so because Mr. McCracken had masturbated while in bed. Mr. McCracken moved to dismiss the allegations because he did not commit any crime with sexual motivation and did not think it fair that he would have to register as a sex offender if convicted. A specially qualified psychologist also concluded this crime was not sexually motivated. The court nevertheless denied the motion, and found Mr. McCracken guilty as charged following a stipulated facts bench trial.

Mr. McCracken committed residential burglary, but he did not act with malice or with sexual motivation. This Court should reverse the malicious mischief conviction and remand with instructions to strike the sexual motivation finding from the burglary conviction. LFOs should also be stricken, because Mr. McCracken is impoverished and cannot pay.

B. ASSIGNMENTS OF ERROR

1. The conviction for malicious mischief violates Mr. McCracken's right to due process under the Fourteenth Amendment, because the State presented insufficient evidence to prove malice beyond a reasonable doubt.

2. The trial court's findings of fact are insufficient to support its conclusion that Mr. McCracken is guilty of malicious mischief.

3. The State presented insufficient evidence that Mr. McCracken acted with sexual motivation when he committed residential burglary.

4. The prosecutors erroneously believed they lacked discretion to withdraw the sexual motivation allegations.

5. The imposition of legal financial obligations is improper because Mr. McCracken lacks the ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict a person of malicious mischief, the State must prove beyond a reasonable doubt that the accused person acted with malice, which is "an evil intent, wish, or design to vex, annoy, or injure another person." Here, the stipulated facts show that Chase McCracken was homeless, high, freezing, and hungry when he entered an empty home, ate some food, got into bed, masturbated, and slept. The State charged him

with malicious mischief for masturbating in the bed. Did the State fail to prove evil intent, requiring reversal and dismissal of the charge?

2. Did the State fail to prove the burglary was sexually motivated because there was no evidence that Mr. McCracken had a purpose of sexual gratification when he entered the home and stole juice and candy?

3. The State wrongly believed it did not have discretion to withdraw the sexual motivation allegations. If this Court does not reverse the sexual motivation findings for insufficiency of the evidence, should it remand so that the prosecutors may exercise their discretion in determining whether to retain or withdraw the special allegations?

5. RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and the Supreme Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Here, the trial court recognized that Mr. McCracken was impoverished and that his crime was caused, in part, by homelessness, but the court imposed LFOs without mention of Mr. McCracken's inability to pay. Should this Court remand with instructions to strike LFOs?

D. <u>STATEMENT OF THE CASE</u>

Chase McCracken started using both marijuana and methamphetamines when he was just eleven years old. CP 50. As a young adult, he had difficulty recovering from his drug addiction, and was unemployed and homeless by the fall of 2013. CP 50; RP (12/23/13) 4.

In November of that year, Mr. McCracken was cold and hungry, so he entered an empty house through a large animal door. CP 32, 51. He had heard that the owner was frequently out of town, and he thought (correctly) that she would be gone that night. CP 32, 51. Mr. McCracken drank some juice, ate some candy, and went to bed. CP 32. While he was in bed, he masturbated. *Id.*

Mr. McCracken was gone by the time the homeowner returned, and the house was apparently in order with the exception of a stain on the bedding. The homeowner contacted the authorities, who took a sample from the sheets and discovered a DNA profile that matched Mr. McCracken. CP 30-31, 35.

The State charged Mr. McCracken with one count of residential burglary and one count of malicious mischief. CP 1-2. Mr. McCracken felt terrible about the crime and wanted to accept responsibility and plead guilty right away. RP (12/23/13) 4; RP (2/26/15) 15, 24. He was not permitted to do so at first appearance, however. RP (12/23/13) 4.

At arraignment a week later, the State filed an amended information adding sexual motivation allegations to both counts. RP 8-9; RP (1/2/14) 2. Although Mr. McCracken had wanted to plead guilty to the original charges a week earlier, he entered "not guilty" pleas to the new charges because he did not believe he was a sex offender. RP (1/2/14) 2-3.

Mr. McCracken filed a motion to dismiss the sexual motivation allegations pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). CP 11-20. At the hearing on the motion, the prosecutor argued against dismissal, and also stated that the statute precluded him from withdrawing the allegations without the court's permission. RP (2/27/14) 6. The court found sufficient evidence to support a prima facie case of sexual motivation, and denied the motion. RP (2/27/14) 12.

The case proceeded to a stipulated-facts bench trial, at which Mr. McCracken again acknowledged committing residential burglary, but argued the State failed to prove malicious mischief or sexual motivation. RP (8/27/14) 1-25; CP 22-36, 48-54. The stipulated evidence included the police reports setting forth the facts described above, as well as the report of a psychologist and certified sex offender treatment provider who determined that the crime was not sexually motivated, that Mr.

McCracken did not need sex offender treatment, and that he did not need to be labeled as a sexual offender. CP 22-36, 48-54.

The court nevertheless found Mr. McCracken guilty on both counts with sexual motivation as charged. CP 66-67. At sentencing, the Department of Corrections submitted a report agreeing with the psychosexual evaluator's conclusion that Mr. McCracken does not need sex offender treatment. CP 55-65.

Mr. McCracken moved to arrest judgment on the sexual motivation findings, but the court denied the motion. CP 38-43; RP (2/26/15) 1-12. The court did grant Mr. McCracken's motion for an exceptional sentence below the standard range. CP 69. In so doing, the court recognized that Mr. McCracken's conduct was caused by drug addiction and homelessness, and that Mr. McCracken wanted to take responsibility at the outset. RP (2/26/15) 24-25.

Despite recognizing that Mr. McCracken was impoverished, the court imposed $800 in legal financial obligations, with no discussion of Mr. McCracken's ability to pay. RP (2/26/15) 14-30; CP 73-74. The court also advised Mr. McCracken that he would be required to register as a sex offender. CP 77-79.

E. ARGUMENT

1. The State presented insufficient evidence to prove malicious mischief beyond a reasonable doubt.

a. Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Vasquez*, 178 Wn. 2d 1, 6, 309 P.3d 318 (2013). In evaluating a conviction following a bench trial, this court reviews challenged findings of fact for substantial evidence, then determines *de novo* whether the surviving

findings support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). As explained below, the State presented insufficient evidence to prove malicious mischief, and the trial court's findings do not support its conclusion that Mr. McCracken committed the crime. This Court should accordingly reverse the conviction on count two.

b. The State failed to prove the malice element.

The State charged Mr. McCracken with third-degree malicious mischief, alleging that he "did knowingly and maliciously cause physical damage in an amount not exceeding $750.00 to the property of another; contrary to [RCW] 9A.48.090(1)(a)." CP 9. The definitional statute describes the mens rea for the crime as follows: " 'Malice' and 'maliciously' shall import an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12). The statute also provides a permissive inference: "Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." *Id.*; *State v. Ratliff*, 46 Wn. App. 325, 330, 730 P.2d 718 (1986).

For statutes containing permissive inferences, it is important to ensure that the inference is not treated as a mandatory presumption. A

mandatory presumption instructs the factfinder that it must infer the element has been proved if it finds the predicate fact has been proved. *Ratliff*, 46 Wn. App. at 330. Mandatory presumptions violate due process because they relieve the State of its burden to prove every element beyond a reasonable doubt. *See State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Thus, "when a permissive inference is the sole and sufficient proof of an element, the presumed fact must flow beyond a reasonable doubt from the proven fact, so that the prosecution does not circumvent its burden of proof." *State v. Drum*, 168 Wn.2d 23, 35-36, 225 P.3d 237 (2010) (internal quotations omitted).[1]

Here, the trial court improperly treated the permissive inference as a mandatory presumption, and assumed that proof of the predicate fact equated to proof of the element. The court found the following regarding the mens rea for malicious mischief:

> As to the Malicious Mischief, that's slightly more complex [than the burglary], but I do find Mr. McCracken guilty beyond a reasonable doubt of malicious mischief as well. The facts stipulated to are that *for reasons of his own at the time*, he took off his clothes and got into bed *with what intent we don't know*, that he proceeded to masturbate which led to ejaculation and that that got onto some bedding.

[1] In contrast, where the inference is only part of the state's proof, the presumed fact must flow more likely than not from a proven fact. *Id.* at 36.

> [discussion of actus reus and damage]
>
> So, he masturbated with the effect of ejaculation and that was a willful disregard of the rights of another, privacy rights among other things. Definitively would be vexing and annoying and injurious. He knowingly and willfully did it and it was wrongfully done without lawful excuse, so beyond a reasonable doubt he's guilty of Malicious Mischief, under $750.00.

RP (8/27/14) 28-29 (emphases added).

In other words, the trial judge found that Mr. McCracken acted in willful disregard of the rights of another by masturbating in the bed (and that he acted wrongfully without just cause or excuse), and from that finding the judge concluded Mr. McCracken was guilty of the crime. *See id.* But "willful disregard" and "wrongfully without just cause or excuse" are merely predicate findings from which the mens rea *may* be inferred; they are not themselves the mens rea of the crime. Malice is the mens rea, and malice means evil intent. RCW 9A.48.090(1)(a); RCW 9A.04.110(12). Thus, the findings of fact do not support the conclusions of law, and reversal is required. *See Stevenson,* 128 Wn. App. at 193.

Furthermore, the State did not present sufficient evidence from which the judge could have made the requisite finding of malice. To be sure, the stipulated facts support the predicate finding that Mr. McCracken acted with willful disregard of the rights of another. *See* CP 22-36, 48-53. However, a factfinder is permitted to infer evil intent from willful

disregard of the rights of another only if either: (1) a finding of evil intent necessarily flows, beyond a reasonable doubt, from a finding of willful disregard; or (2) a finding of evil intent more likely than not flows from a finding of willful disregard, *and* the State has presented additional evidence of evil intent beyond acting in willful disregard of another's rights. *See Drum*, 168 Wn.2d at 35-36. On the facts of this case, proof of the element does not flow from proof of the predicate fact under either standard. Although the State presented sufficient evidence that Mr. McCracken engaged in a volitional act of masturbation, there was no evidence that he had the intent – evil or otherwise – to damage somebody's property through that act.

The evidence to which the parties stipulated was that Mr. McCracken was addicted to methamphetamines and had been using it intravenously for a year and a half. CP 31. He was high and freezing and hungry, so he entered the empty home through the dog door, ate some candy, drank some juice, and used the bathroom and bed. CP 23, 32. While he was in bed, he masturbated. CP 23-24. The State presented no other evidence of mental state at all. CP 22-36. Thus, the State failed to prove beyond a reasonable doubt that Mr. McCracken acted with malice. The conviction for malicious mischief cannot stand.

c. The remedy is reversal of the malicious mischief conviction and remand for dismissal of the charge with prejudice.

The remedy for insufficiency of the evidence is to reverse and remand to the trial court with instructions to vacate the conviction and dismiss the charge. *State v. Engel*, 166 Wn. 2d 572, 581, 210 P.3d 1007 (2009). Mr. McCracken respectfully requests that this Court reverse the conviction on count two and remand for dismissal of the charge with prejudice. *See State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (Double Jeopardy Clause prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence.

2. The State presented insufficient evidence that Mr. McCracken acted with sexual motivation when he committed residential burglary.

The State also presented insufficient evidence to prove that the residential burglary was committed with sexual motivation. Accordingly, that finding should be stricken from the judgment.

A person commits the crime of residential burglary if he enters or remains in a home with the intent to commit a crime therein. RCW 9A.52.025(1). "Sexual motivation" means "that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.030(48).

In the trial court, the parties argued about whether the act of masturbation was sexually motivated, but this is beside the point. It is not enough for the prosecutor to show that a defendant masturbated for the purpose of sexual gratification. Rather, "the State must prove beyond a reasonable doubt that the defendant *committed the crime* for the purposes of sexual gratification." *State v. Vars*, 157 Wn. App. 482, 494, 237 P.3d 378 (2010) (emphasis added); *cf. State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (accomplice liability must be based on *the* crime charged, not any crime or noncriminal act). The trial court found that because Mr. McCracken committed malicious mischief with sexual motivation, he necessarily committed burglary with sexual motivation. RP (8/27/14) 31. But as explained above, insufficient evidence supports the malicious mischief conviction.

There is still sufficient evidence of burglary because the stipulated facts show that Mr. McCracken entered and remained unlawfully with intent to commit theft of food and drink, but there is no evidence that this crime was sexually motivated. *See* CP 22-36, 48-53 (entirety of stipulated facts); *contrast State v. Halstien*, 122 Wn. 2d 109, 129, 857 P.2d 270 (1993) (sufficient evidence that burglary was committed with sexual motivation where defendant broke into victim's home and stole only a vibrator and condoms). Accordingly, Mr. McCracken asks this Court to

reverse and remand with instructions to strike the sexual motivation finding.

3. The State erroneously believed it lacked discretion to withdraw the sexual motivation allegations.

Another problem with the sexual motivation findings is that the State erroneously believed it lacked the discretion to withdraw the allegations. The prosecutor told the court, "this statute as far as I know is the only place in the criminal law where any kind of crime or special allegation is the prosecutor *is actually not allowed to dismiss it* without the court specifically making certain findings." RP (2/27/14) 6 (emphasis added). The prosecutor made this claim based on the statutory language, which is as follows:

> (1) The prosecuting attorney ***shall file a special allegation of sexual motivation*** in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.
>
> (2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the

> crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.
>
> (3) The prosecuting attorney ***shall not withdraw the special allegation of sexual motivation*** without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

RCW 9.94A.835 (emphases added).

The prosecutor's reading of the text is understandable, but the Supreme Court recently construed the language differently in order to avoid constitutional separation-of-powers problems. *See State v. Rice*, 174 Wn.2d 884, 888-89, 279 P.3d 849 (2012). The Court held that in this instance the word "shall" is not mandatory, and that "a prosecutor's broad charging discretion is part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington State Constitution." *Id.* at 804. Furthermore, "a prosecuting attorney's charging discretion necessarily includes whether to charge an available special allegation – a decision that will depend upon the facts and circumstances of each case and the prosecutor's own policies and priorities." *Id.* at 902. As particularly relevant here, the authority of the prosecuting attorney to exercise his or her charging discretion includes "the authority to be merciful and to seek individualized justice." *Id.* at 903.

The prosecutor must be given the opportunity to be merciful and seek individualized justice in this case. The sexual motivation statute "was enacted to fill a perceived gap in the criminal code not covered by existing sex offense crimes and to mandate treatment for such offenders in an effort to prevent them from later committing more serious sex offenses." *Halstien*, 122 Wn.2d at 121. Charging Mr. McCracken with sex offenses is inconsistent with the purpose of the statute. The psychosexual expert and the Department of Corrections agreed that Mr. McCracken does *not* need sex offender treatment. CP 48-65. He committed a property crime and he needs drug treatment. *See id.*

The expert also explained that requiring Mr. McCracken to register as a sex offender would be contrary to the purpose of the statute:

> By adding the aggravator of sexual motivation to his crime, and if this resulted in conviction, it would require Mr. McCracken to register as a sexual offender. *Sex offender registration should serve the purpose to warn the community about individuals who are at risk to repeatedly engage in illegal sexual behavior. Mr. McCracken does not meet this description*. He has no prior sex offense crimes, notwithstanding a long criminal history. Indeed, there appear to be multiple times in Mr. McCracken's life where he has been so influenced by drugs, that he has shown very little control over his impulses. If Mr. McCracken had serious sexual behavior issues, it is likely that such behaviors would have been manifest time and time again in his past. The fact that his past does not contain sex offense behaviors suggests that sexual issues are not a primary problem with him.

CP 53 (emphasis added). The sex offender registry will become less effective if it is diluted with low-level drug and property criminals like Mr. McCracken.

Thus, had the State realized it had the discretion to withdraw the sexual motivation allegations, it may well have done so. *See also* RCW 9.94A.411 ("A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law."). In sum, if this Court does not order the findings stricken based on the first two arguments above, it should remand for further proceedings and an opportunity for the State to exercise its discretion to withdraw the sexual motivation allegations. *See Rice*, 174 Wn.2d at 907 n.1 (suggesting such a remedy would have been available to defendant if prosecutor had not exercised discretion); *State v. Pettit*, 93 Wn.2d 288, 294-96, 609 P.2d 1364 (1980) (reversing where prosecutor failed to exercise discretion and instead followed a mandatory charging policy).

4. The legal financial obligations should be stricken because Mr. McCracken lacks the ability to pay.

a. The trial court recognized that Mr. McCracken was homeless and indigent, but imposed legal financial obligations with no analysis of ability to pay.

The sentencing court recognized that Mr. McCracken's crime was the result of drug addiction and homelessness. RP (2/26/15) 25. Mr. McCracken stated that he wanted drug treatment and that he wanted to change his life. RP (2/26/15) 18. He asked the court not to impose sex-offender treatment both because he does not need it and because it's "way expensive and you're gonna see me in front of this court all the time because you already do for my fines that I can't even barely keep, you know what I mean." RP (2/26/15) 18. Mr. McCracken had been unemployed for some time, and his criminal history made it difficult to obtain work. RP (12/23/13) 4; CP 49. He lamented that he is "stuck in this cycle," whereby he's "struggling trying to keep those [LFO's] paid and every time I get picked up I do 30 days [in jail] …." RP (2/26/15) 18-19.

The court nevertheless imposed $800 in legal financial obligations, including a $500 "Victim Assessment," $200 "Criminal Filing Fee," and $200 "DNA collection fee." CP 73-74. The judgment and sentence includes a boilerplate finding that "the defendant has the ability or likely

future ability to pay the legal financial obligation imposed herein." CP 70. The parties and the court did not discuss this finding at all.

b. The imposition of LFO's on an impoverished defendant is improper under the relevant statutes and court rules, and violates principles of due process and equal protection.

The legislature has mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on

finances." *Id.* at 837; *see also* CP 49 (Mr. McCracken explains his criminal history has hampered his employment prospects). All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Mr. McCracken's poverty, because the statutes in question use the word "shall" or "must." *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(h) (convicted criminal defendants "shall be liable" for a $200 fee); RCW 43.43.7541 (every felony sentence "must include" a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which, as explained above, requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, ___ Wn.2d ___, ___ P.3d ___, No. 90782-0, 2015 WL 4760487, at *4 (filed Aug. 13, 2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[2]

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants

[2] The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). Indeed, when listing the LFOs imposed on the two defendants at issue, the court cited the same LFOs Mr. McCracken challenges here: the Victim Penalty Assessment, DNA fee, and criminal filing fee. *Id.* at 831 (discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition cots). *See id.* If the

Court were limiting its holding to a minority of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

Indeed, it does not appear that the Supreme Court has ever held that the DNA fee and "criminal filing fee" are exempt from the ability-to-pay inquiry. And although this Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 *with Blazina,* 182 Wn.2d at 830-39.

It would be particularly problematic to require Mr. McCracken to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants.[3] This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, *supra*, at *3 ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because

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[3] This Court can take judicial notice of the fact that King County courts never impose this cost on indigent defendants. In the alternative, Mr. McCracken would be happy to provide the Court with representative judgments from King County.

"the error, if permitted to stand, would create inconsistent sentences for the same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties); *and see* RCW 9.94A.010 (3) (stating that a sentence should "[b]e commensurate with the punishment imposed on others committing similar offenses").

GR 34, which was adopted at the end of 2010, also supports Mr. McCracken's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay $50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Id.* at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." *Id.* at 529. Given Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837; CP 49.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply here. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be

waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the "criminal filing fee" across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar,* 177 Wn.2d at 528-29 (noting that "principles of due process or equal protection" guided the court's analysis and recognizing that failure to require waiver of fees for indigent litigants "could lead to inconsistent results and disparate treatment of similarly situated individuals"). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller,* the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because "incarceration would result only if failure to pay was willful" and not due to indigence. *Id.* at 241. Unfortunately, this assumption was not borne out. As indicated in the record in Mr. McCracken's case, as well as significant studies post-dating *Blank*, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. *See* RP (2/26/15) 18-19 ("I'm struggling trying to keep those [LFO's] paid and

every time I get picked up I do 30 days [in jail] ....."); Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay).[4] In other words, the risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. McCracken concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like Mr. McCracken is not rationally related to the

[4] Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

c. This Court should reverse and remand with instructions to strike legal financial obligations.

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. The stipulation includes a statement that upon conviction, certain LFOs "will be imposed by the sentencing court," CP 26, and trial counsel stated that he was "not in a position to object to any of the standard LFOs." RP (2/26/15) 15. But this occurred before the Supreme Court decided *Blazina*, which mandated consideration of ability to pay before imposing LFOs. Prior to *Blazina*, the trial court would have been bound by this Court's decision in *Lundy*, so any objection would have been futile and contrary to the goal of judicial efficiency. *See State v. Robinson*, 171 Wn. 2d 292, 305, 253 P.3d 84 (2011) (granting relief even though issue not raised below, where trial court would have been bound by precedent that was abrogated post-trial).

In sum, because *Blazina* clarified that sentencing courts must consider ability to pay before imposing LFOs, and because the record demonstrates Mr. McCracken's extreme indigence, this Court should remand with instructions to strike legal financial obligations, and strike the boilerplate finding that Mr. McCracken has the ability to pay.

F. CONCLUSION

Mr. McCracken asks this Court to reverse and remand for dismissal of the malicious mischief conviction, vacation of the sexual motivation finding, and striking of all legal financial obligations.

Respectfully submitted this 1st day of September, 2015.

/s Lila J. Silverstein
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. CHASE MCCRACKEN, Appellant.	)	NO. 47277-5-II

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