No. 46768-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DEMAR MICHAEL NELSON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-05090-8
The Honorable Bryan Chushcoff, Judge

OPENING BRIEF OF APPELLANT

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2. The prosecutor improperly commented on Demar Nelson's exercise of his constitutional right to remain silent.

3. The trial court erred in finding that Demar Nelson had the present or future ability to pay discretionary legal financial obligations.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State present sufficient evidence to prove beyond a reasonable doubt the essential element of premeditation, where the facts showed no opportunity to reflect and deliberate and no evidence of actual reflection and deliberation? (Assignment of Error 1)

2. Did the prosecutor improperly comment on Demar Nelson's exercise of his constitutional right to remain silent when it told the jury that it could infer Nelson did not act in self-defense, and was therefore guilty of first degree murder, because he did not immediately tell his friends or the police that he shot the victim in self-defense? (Assignment of Error 2)

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

III. STATEMENT OF THE CASE

On the night of December 27, 2008, two groups of young men met outside of a mutual friends' home because one man from each group wanted to continue a fist fight that began earlier that night at a Tacoma bar. A loud and aggressive James Guillory challenged several bystanders to fight as well, but one of those bystanders shot and killed Guillory. Police had no suspect for several years, but eventually police concluded that the shooter was Demar Michael Nelson. Nelson was charged with murder. He admitted that he shot Guillory, but claimed that he was acting in self-defense. The jury rejected his claim and convicted Nelson of first degree murder.

A. PROCEDURAL HISTORY

The State charged Demar Nelson with one count of first degree premeditated murder (RCW 9A.32.030(1)(a)), and alleged he was armed with a firearm during the commission of the offense (RCW 9.94A.510, .533). (CP 1, 26) Nelson filed a notice informing

the State that he intended to assert the defense of justifiable homicide (self-defense). (CP 25) The jury was instructed on the lesser included offense of second degree murder and on the law of self-defense. (CP 67-69, 74) But the jury convicted Nelson of first degree premeditated murder, and found that he was armed with a firearm when he committed the offense. (CP 80-82; 12RP 1249)[1]

Nelson's criminal history included an assault conviction from King County that was committed after, but tried and sentenced before, his current offense. (CP 86; 13RP 1260) That crime included a jury finding that Nelson was armed with a firearm, and Nelson's sentence included a firearm enhancement. (CP 86; 13RP 1260-61) Because of this prior conviction, the length of Nelson's firearm sentence enhancement in this case was doubled to 120 months. (CP 86; 13RP 1260-61) The trial court imposed a standard range sentence of 361 months, for a total term of confinement of 481 months. (CP 89; 13RP 1289) The trial court ordered that Nelson's sentence in the current case be served consecutive to the sentence imposed in the King County case. (CP 89; 13RP 1289) The court also imposed $3,300 in legal financial obligations (CP 87; 13RP

[1] The transcripts labeled volumes 1 through 13 will be referred to by their volume number (#RP). Any remaining transcripts will be referred to by the date of the proceeding.

1289) Nelson timely appealed. (CP 98)

B. SUBSTANTIVE FACTS

Demar Nelson, Grady Brown and Calvin Davis spent the evening of December 26-27, 2008, together at O'Toole's bar in Lakewood. (4RP 128; 5RP 240, 245-46; 8RP 861) James Guillory, Ryan Blosser, Robert Poeltl, and Jamar Robinson also spent the evening together at O'Toole's. (6RP 322-23; 7RP 577, 647) After the bar closed, Guillory got into an altercation with someone in the parking lot. (6RP 326; 7RP 579, 712) Guillory was punched and fell to the ground. (7RP 579, 649, 712) Joseph Coleman was standing nearby and made a comment about Guillory. (7RP 580) In retaliation, Blosser turned and hit Coleman. (6RP 327; 7RP 580, 712) Because there were several police officers in the area, however, the fight between Blosser and Coleman quickly ended and the two groups of men went their separate ways. (6RP 328, 330, 438-39; 7RP 580)

Both Blosser and Coleman were still upset about the incident and wanted to continue the fight. (6RP 329; 7RP 581, 714) Their mutual friend, Jermillo Larkins, arranged for the men to meet at his house so they could have a "fair fight." (6RP 330-31, 378; 7RP 581-82, 715-16)

Coleman asked Nelson, Davis, and Brown to accompany him to Larkins' house to protect Coleman from being attacked by Blosser's friends. (8RP 867) Coleman drove his white Cadillac and Brown drove the other men in his BMW. (5RP 263)

Guillory, Blosser, Poeltl and Robinson arrived at Larkins' house first and waited on the porch. (6RP 336-37; 7RP 584-85) Coleman, Nelson, Davis, and Brown arrived soon after, and parked in front of Larkins' house. (5RP 266; 6RP 337; 7RP 586) Blosser and Coleman met in the middle of the street, and started circling each other and throwing punches while the other men watched. (5RP 267, 270; 6RP 341-42; 7RP 587, 589-90, 651-52, 722)

Although the specific details of what occurred next vary from witness to witness, the essential facts are consistent. Guillory, who was still extremely upset about being punched in O'Toole's parking lot, was yelling loudly and demanding a "knockout." (5RP 272, 294-95; 6RP 333-34, 387; 9RP 970, 1069; 10 RP 1129) At one point, as he stood on Larkins' porch, Guillory broke a 40-ounce beer bottle and waived it around like a weapon. (6RP 346-47, 383; 7RP 759; 10RP 1127) Guillory came down to the sidewalk and was pacing back and forth, yelling and watching the other men fight. (6RP 386-87; 10RP 1128-29, 1130) Guillory then turned to Nelson, Brown and Davis and

challenged them to a fight. (6RP 344-45, 348, 384, 384, 388; 7RP 679, 690-91; 10RP 1130)

Nelson, Davis and Brown told Guillory to calm down, but Guillory instead tore off his shirt and walked towards them in an aggressive manner as they stood near the BMW. (5RP 269, 274, 275; 6RP 349-50, 387, 389; 7RP 723-24; 8RP 739, 740, 761; 8RP 873, 874, 876, 877-78; 9RP 1003-04; 10RP 1130) Nelson told Guillory to back away, but when he did not, Nelson pulled his semi-automatic handgun out of its hip holster and fired 18 rounds in quick succession.[2] (5RP 315; 6RP 351, 420; 7RP 599, 595-96, 632; 8RP 742, 792, 870; 9RP 1004; 10RP 1115, 1132, 1133)

Guillory was hit numerous times in his chest, back and upper extremities. (8RP 821) Guillory slumped to the ground and died a short time later. (4RP 143; 6RP 357, 426; 7RP 602-03; 8RP 838) Guillory, who stood six feet one inch tall and weighed 235 pounds, was found to have a blood alcohol level of 0.21 at the time of his death. (8RP 842, 843)

Law enforcement found fired bullets and 18 bullet casings

[2] The witness' testimony differed on whether Guillory was still moving towards Nelson when he was shot, and whether Nelson was backing away or walking towards Guillory as he fired. (6RP 349-50, 351; 7RP 599, 632, 633; RP8 751, 892, 1004)

scattered along the front fence-line of Larkins' yard, and a broken bottle on Larkins' porch. (6RP 455, 456, 457, 461, 471; 7RP 548, 549; 8RP 792) The casings were located in the same general area, about 17 feet from the pool of blood where Guillory lay. (6RP 474-75, 497, 498-99)

Nelson testified on his own behalf. He testified that Guillory had broken a bottle and was yelling and acting angry and aggressive. (10RP 1126, 1127) Nelson tried to tell Guillory to "chill" and told Guillory that he was just there to watch the other men fight. (10RP 1130) But Guillory would not calm down, and instead got angrier and angrier, until he ripped off his shirt and moved quickly towards Nelson. (10RP 1130, 1131-32) Nelson told Guillory to back up, but Guillory kept coming. (10RP 1132, 1132) Guillory seemed bigger and stronger than Nelson, and Nelson was afraid that Guillory would seriously injure or even kill him. (10RP 1128, 1132, 1143, 1144) Nelson removed his gun and fired a warning shot, hoping that would stop Guillory's advance. (10RP 1133) When that attempt failed, Nelson fired his weapon repeatedly until the clip was emptied. (10RP 1133) Nelson testified that everything happened quickly, and it was dark so he could not tell if Guillory had a weapon. (RP 10RP 1147, 1163-64)

Nelson, Davis and Brown immediately left. (5RP 277; 8RP 871) In the car, Nelson asked if everyone was all right, and told them that he had asked Guillory to back away. (5RP 285; 8RP 871; 10 RP 1142) Nelson did not call 911 or report the incident because he was scared, and did not know if his life would be in danger if Guillory's friends knew he was responsible. (10RP 1143, 1159)

IV. ARGUMENT & AUTHORITIES

A. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT NELSON ACTED WITH THE PREMEDITATED INTENT TO KILL GUILLORY.

"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.

The jury convicted Nelson of first degree murder pursuant to

RCW 9A.32.030(1)(a), which requires that the State prove "a premeditated intent to cause the death of another." Accordingly, the State is required to prove both intent and premeditation, which are not synonymous. State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

While intent means only "'acting with the objective or purpose to accomplish a result which constitutes a crime'", premeditation involves "'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) and State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)); Brooks, 97 Wn.2d at 876. Premeditation requires a "conscious consideration and planning that precedes an act [or] the pondering of an action before carrying it out." PREMEDITATION, Black's Law Dictionary (10th ed. 2014).

Thus, premeditation must involve "more than a moment in point of time," and mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); Pirtle, 127 Wn.2d at 644. It is therefore possible for a person to act with an intent to kill that is not premeditated. Brooks, 97 Wn.2d at 876. For

this reason, premeditation cannot simply be inferred from the intent to kill. State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984).

In Ortiz, the Court found sufficient evidence of premeditation from the defendant's infliction of multiple wounds, procurement of a weapon from another room, and his prolonged struggle with the victim. 119 Wn.2d at 312-13. But in this case, there was no moment where Nelson left to procure a weapon, and no prolonged struggle.

In State v. Rehak, premeditation was proved where there was evidence showing that the killer "prepared the gun; crept up behind the victim who was sitting quietly in his chair and not in a confrontational stance; and shot three separate times, twice after the victim had already fallen to the floor." 67 Wn. App. 157, 164, 834 P.2d 651 (1992). In this case, the evidence shows that Guillory was "in a confrontational stance" and that Nelson fired only when Guillory approached him demanding to fight, and that Nelson fired his gun without stopping to "prepare" or reload the weapon.

Conversely, in State v. Bingham, an autopsy of the victim indicated that the "cause of death was 'asphyxiation through manual strangulation', accomplished by applying continuous pressure to the windpipe for approximately 3 to 5 minutes." 105 Wn.2d 820, 822,

719 P.2d 109 (1986). The State relied on the length of time required to cause death to support the charge of premeditated murder. 105 Wn.2d at 822. However, on appeal the Court found that "no evidence was presented of deliberation or reflection before or during the strangulation, only the strangulation. The opportunity to deliberate is not sufficient." 105 Wn.2d at 827.

The State argued in this case that it proved premeditation "based on the number of shots, based on the location of the shots, based on the defendant's demeanor both before and after this killing." (11RP 1193) However,

> "[V]iolence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support an inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy."

State v. Ollens, 107 Wn.2d 848, 852, 733 P.2d 984 (1987) (quoting Austin v. United States, 382 F.2d 129, 139 (D.C.Cir.1967)). In this case, the number of shots fired (all in quick succession) and the fact that some of those shots hit Guillory in the back is much more consistent with an intent to kill in the "frenzy" of the moment, than with conscious consideration and planning. Furthermore, Nelson's demeanor *after* the shooting does not shed any light on whether he

premeditated *before* the shooting.

As for his demeanor before the shooting, this also does not show premeditation. Nelson stood by watching the other men fight. (5RP 269; 7RP 652-53; 8RP 876; 10RP 1124, 1125) He was not yelling or challenging anyone to fight. (6RP 355) Nelson did not seek out Guillory, instead Guillory picked a fight with Nelson. (5RP 273, 294-95; 6RP 344-45, 348, 384, 388; 7RP 679, 690, 723 724; 8RP 739-40, 873, 876; 10RP 1128-29, 1130) Then, when Guillory was advancing aggressively towards Nelson, Nelson reacted in the heat of the moment by firing his weapon. (6RP 349-50, 389; 8RP 724-25, 726; 8RP 740, 892; 9RP 1004; 10RP 1131-32, 1133, 1163) There was absolutely no evidence presented of Nelson deliberating, reflecting, or planning before or during the assault on Guillory.

The State must present some evidence that Nelson actually reflected and deliberated and formed a reasoned plan to take Guillory's life. The State failed to offer this evidence. The facts presented cannot sustain a finding that Nelson formed a premeditated intent to kill Guillory, and Nelson's first degree murder conviction must be reversed.[3]

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[3] The reviewing court should reverse a conviction and dismiss 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

B. THE PROSECUTOR IMPROPERLY ENCOURAGED THE JURY TO INFER GUILT FROM NELSON'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

Both the Federal and Washington State constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to remain silent. U.S. Const., amend. V; Wash. Const., art. I, § 9. The State may not comment on a defendant's right to remain silent, including a defendant's prearrest silence. State v. Gregory, 158 Wn.2d 759, 839, 147 P.3d 1201 (2006); State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Lewis, 130 Wn.2d at 707.

However, when defendants take the stand, their prearrest silence may be used to impeach their testimony, but their silence may not be used as substantive evidence of guilt. *See* State v. Clark, 143 Wn.2d 731, 756, 24 P.3d 1006 (2001); Lewis, 130 Wn.2d at 705-06; State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); Jenkins v. Anderson, 447 U.S. 231, 237-38, 100 S. Ct. 2124, 65 L.

97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

Ed. 2d 86 (1980). When the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, § 9 of the Washington Constitution are violated. Lewis, 130 Wn.2d at 706-07.

For example, in State v. Knapp, the defendant was convicted of residential burglary. 148 Wn. App. 414, 199 P.3d 505 (2009). At trial, the prosecutor elicited a detective's testimony about two separate witnesses positively identifying Knapp and Knapp's subsequent reactions: In the first occurrence, Knapp had immediately hung his head and said nothing; in the second, Knapp had displayed no reaction. 148 Wn. App. at 419. Knapp later testified, denying that he had committed the burglary and asserting an alibi. 148 Wn. App. at 418. During closing, the prosecutor argued that the jury should find Knapp guilty because he did not protest his innocence when confronted by the identifying witnesses:

> And another reason to believe that this defendant, Kyle Knapp, did the burglary, both times that it was mentioned to him that Darren Blakeslee identified him and then Officer Harris identified him, what did he do? He put his head down. *Did he say, "No. It wasn't me"?* [sic] *No.*

148 Wn. App. at 420 (emphasis and alterations in original). This Court held that the prosecutor did not properly impeach Knapp's

testimony but instead, impermissibly commented on Knapp's silence. 148 Wn. App. at 421.

In State v. Burke, the 22-year old defendant had intercourse with a 15 year old girl. 163 Wn.2d 204, 206, 207, 181 P.3d 1 (2008). The police subsequently charged Burke with rape of a child in the third degree. 163 Wn.2d at 208. Burke asserted that he reasonably believed the alleged victim to be 16 years old based upon her declarations. 163 Wn.2d at 208. The State sought to undermine this defense based upon the idea that if she had told him she was 16, then he would have made such a comment to police at the first interview or when the victim's sister had called him the next day. 163 Wn.2d at 208-09.

The State made these arguments in its opening and closing arguments to the jury and stressed Burke's silence in both direct examination of the investigating officers and in cross examination of Burke himself. Burke, 163 Wn.2d at 208-09. For example, the prosecutor told the jury:

> And for a time the defendant talked to them [police], freely telling them, yeah, I don't remember what her name was, but it was [Jaime's] sister, and yes, we had sex. . . . [The police] were there to gather the defendant's side of the story. That is all he chose to give them and they left.

163 Wn.2d at 208 (alterations in original). The Court found that by doing so, the State "thus advanced the link between guilt and the termination of the interview. The implication is that suspects who invoke their right to silence do so because they know they have done something wrong." 163 Wn.2d at 222. The Court concluded that the State thereby violated Burke's right to silence.

Here, the State also violated Nelson's right to silence by using the fact that Nelson did not immediately report to his friends or to law enforcement that he acted in self-defense. During cross examination, the prosecutor questioned Nelson:

> Q. You did absolutely nothing in regard to calling the police, telling these guys in the car that you shot in self-defense, none of that?
> A. Correct.
> Q. This is when you are saying that.
> A. Correct.

(10RP 1159)[4] Then in closing arguments, the prosecutor repeatedly told the jury that Nelson's failure to immediately claim self-defense to his friends and law enforcement showed his guilt:

- The **defendant is guilty of Murder in the First Degree** based on the number of shots, based on the location of the shots, **based on the defendant's demeanor both before and after this killing**. (11RP

[4] Before Nelson took the stand, he asked that the State be precluded from questioning him regarding his prearrest silence, but the court rejected the request and ruled that the State could question Nelson about his failure to immediately claim self-defense. (10RP 1078-80, 1107-09)

1193) (emphasis added)

- **Look at what he did afterward**. Rationalize this case, use your common sense in deciding this case, and you will discover of course that **he raised self-defense because that's all he could do**. (11RP 1190) (emphasis added)
- Any person -- I don't care who you are, any person -- **if you act in self-defense**, whether you are scared or not, you are worried, **you are talking**, you are especially talking to the two guys in the car. None of them. **It is cold-blooded murder**. (11RP 1190-91) (emphasis added)

The prosecutor did more than simply use Nelson's silence as impeachment. The prosecutor clearly and unequivocally told the jury that a person who truly acted in self-defense will immediately confess that fact, and that only the guilty remain silent as to such a claim. The prosecutor urged the jury to use Nelson's silence as substantive evidence of his guilt. The prosecutor therefore improperly commented on Nelson's constitutional right to remain silent.

A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State bears the burden of showing the error was harmless. Easter, 130 Wn.2d at 242.

In Burke, the Court found that the error was not harmless because "the trial boiled down to whether the jury believed or disbelieved Burke's story that the victim told him she was 16. Repeated references to Burke's silence had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury's consideration." 163 Wn.2d at 222-23. Similarly, in Knapp, this Court found that the prosecutor's comments were prejudicial and reversible error, because "[t]he case turned on the credibility of Knapp and his alibi witness versus the two witnesses who identified him." 148 Wn. App. at 421, 425.

Here, the outcome of this case similarly turned on the credibility of Nelson and the witnesses who testified that Guillory was aggressive and advancing towards Nelson, that the events unfolded quickly, and that all shots were fired in quick succession; versus the other witnesses who testified to the contrary. There is no way for this Court to say that the outcome would not have been different, and that the jury still would have found Nelson guilty of premeditated murder, if the State had not repeatedly told the jury that Nelson's silence proves his guilt. Nelson's conviction must therefore be reversed.

C. THE RECORD FAILS TO ESTABLISH THAT THE TRIAL COURT ACTUALLY TOOK INTO ACCOUNT NELSON'S FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The trial court ordered Nelson to pay legal costs in the amount of $3,300.00, which included discretionary costs of $2,500.00 for appointed counsel and defense costs. (13RP 1289; CP 87)

The Judgment and Sentence includes 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 86) But there was no discussion on the record regarding Nelson's ability to pay. (See 13RP generally)

RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

> [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. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). The judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay, and the record must reflect this inquiry. State v. Blazina, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). Hence, the trial court was without authority to impose LFOs as a condition of Nelson's sentence if it did not first take into account his financial resources 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 that 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.

Recently, in Blazina, our State Supreme Court decided to address a challenge to the trial court's imposition of LFOs, notwithstanding the defendant's failure to object below, because of "[n]ational and local cries for reform of broken LFO systems" and the overwhelming evidence that the current LFO system disproportionately and unfairly impacts indigent and poor offenders. 182 Wn.2d at 835.[5] The Blazina court also noted that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839. Here, Nelson was found indigent for both trial and on appeal. (CP 111-13)

The record does not establish the trial court actually took into account Nelson's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. And the trial court made no further inquiry into Nelson's financial resources, debts, or future employability. Because the record fails to establish that the trial court individually assessed Nelson's financial circumstances before imposing LFOs, the court

[5] The Blazina Court "exercise[d] its RAP 2.5(a) discretion" to reach the merits of the issue, despite the lack of objection at sentencing. 182 Wn.2d at 835. RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. This Court may also reach the merits of this issue under RAP 2.5(a) despite Nelson's failure to object to the imposition of discretionary costs below.

did not comply with the authorizing statute. Consequently, this Court should vacate that portion of the Judgment and Sentence.

V. CONCLUSION

The State failed to meet its burden of presenting evidence establishing beyond a reasonable doubt that Nelson reflected and deliberated before shooting Guillory, and therefore failed to prove the essential element of premeditation. Nelson's first degree murder conviction must be reversed. Furthermore, the prosecutor improperly encouraged the jury to consider Nelson's decision to remain silent as proof of his guilt. This improper comment on Nelson's exercise of his constitutional right also requires that his conviction be reversed. In addition, Nelson's case should be remanded so that the trial court can properly consider his ability to pay LFOs.

DATED: July 31, 2015

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Demar Michael Nelson

CERTIFICATE OF MAILING

I certify that on 07/31/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Demar M. Nelson, DOC# 358568, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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