No. 33073-7-III (consolidated)

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
October 8, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID R. JOHNSON,
Defendant/Appellant.

APPEAL FROM THE ASOTIN COUNTY SUPERIOR COURT
Honorable Scott D. Gallina, Judge

BRIEF OF APPELLANT DAVID R. JOHNSON

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove the appellant was armed with a firearm for the first degree burglary conviction.

2. The court erred in entering a portion of Finding of Fact 11, "[Mr. Gustafson] described the gun as a pistol … ." (CP 101)

3. The court erred in entering Conclusion of Law 4, "That during the commission of the crime and/or during the immediate flight therefrom David R. Johnson was armed with a firearm." (CP 103)

4. The evidence was insufficient to prove the appellant was armed with a firearm during commission of the crimes of first degree burglary and first degree robbery.

5. The court erred in entering Conclusion of Law 6, "That Mr. Johnson is guilty of the crimes [of] Burglary in the 1st Degree and Robbery in the 1st Degree, both committed while armed with a firearm." (CP 103)

6. The court erred in imposing firearm enhancements on the burglary and robbery convictions.

7. The record does not support the finding appellant has the current or future ability to pay the imposed legal financial obligations.

8. The trial court erred in ordering appellant to pay a $100 DNA-collection fee.

9. The trial court erred when it ordered appellant to submit to another DNA collection under RCW 43.43.754.

Issues Pertaining to Assignments of Error

1. Whether appellant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where there was insufficient evidence the gun was capable of firing projectiles by an explosive, the statutory definition of a "firearm," requiring reversal of the firearm enhancement on each conviction? (Assignments of Error 1, 2, 3, 4, 5 and 6)

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into appellant's current and future ability to pay before imposing LFOs? (Assignment of Error 7)

3. Does the mandatory $100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine? (Assignment of Error 8)

4. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, does the trial

court abuse its discretion when it orders a defendant to submit to yet another DNA collection? (Assignment of Error 9)

B. STATEMENT OF THE CASE

David R. Johnson was convicted following a bench trial of first degree burglary and first degree robbery as charged. CP 83–84, 103. The court entered written amended findings of fact (CP 98–103):

> 1. That on June 10, 2014, defendant David Johnson and his partner Ralph Whitlock went to the home of Tanya Routt, at 708 7th Street, Clarkston, Washington, during the early morning hours. (CP 98)
>
> 2. That they were taken to that location by Jacob Gustafson where they were dropped off in front of the residence. Thereafter they circled around behind the residence and approached the house through the backyard. Jacob Gustafson went to a nearby convenience store and then returned with the vehicle to the back of Tanya Routt's home where he waited for David Johnson and Ralph Whitlock. (CP 98–99)
>
> 3. Upon approaching the rear of the house Mr. Johnson and Mr. Whitlock were met on the back porch by Lisa Jones and Damien Hester. They engaged in conversation and smoked cigarettes. Lisa Jones was familiar with Ralph Whitlock but did not know David Jones [sic]. (CP 99)
>
> 4. Mr. Whitlock asked to come inside and retrieve some personal property. Ms. Jones told him that he would have to wait until Tanya Routt had returned home as Ms. Jones had no authority to allow Mr. Whitlock to take any property. Ms. Jones went back in the house and lay down with her daughter. A short time later, Damian Hester reentered the residence and was followed in by Ralph Whitlock. Damien Hester offered Mr. Whitlock a glass of water. Mr. Whitlock and [sic] living room and asked to use the

restroom. He then tried to open the door to Tanya Routt's room which was locked. It was at this time that Mr. Whitlock advised Lisa Jones to take her daughter and leave the house. Ms. Jones complied. Ms. Jones was not able to positively identify David R. Johnson as the individual who accompanied Mr. Whitlock that night and testified that she had never seen before. (CP 99)

5. Crista Ansel related that Damien Hester came downstairs, woke her up, and advised her Ralph Whitlock was in the house and that he had a crowbar (Hester denies having seen crowbar). This information was upsetting Crista Ansel. She went upstairs to find out why Ralph was at the house. Ralph and Crista were well acquainted with one another and referred to one another as brother and sister although this was a fictive [*sic*] rather than blood relationship. Prior to entering the kitchen, Lisa Jones advised Crista Ansel be careful because the man with Ralph had a gun. The conversation took place between Ralph and Crista. Ralph told Crista that if he had known she were there, he would not have come to the house. Crista Ansel was angry with Ralph and there was a loud verbal exchange. (CP 99)

6. Ms. Ansel also saw that David R. Johnson was in the kitchen by this time. She noticed that Mr. Johnson was holding what appeared to be a pistol which was silver in color. Mr. Johnson told Crista Ansel not to do anything stupid. (CP 99–100)

7. At that point, Mr. Whitlock had decided to force entry into Tanya Routt [sic] room. Ms. Ansel testified that Mr. Whitlock had a crowbar which he intended to use to open the bedroom door. Ms. Ansel grabbed Mr. Whitlock's arm in an attempt to stop them [sic] from damaging the door and was elbowed in the face. She characterized this contact as accidental rather than intentional. Crista Ansel had a key to the room which she used [to] open the bedroom door in order to avoid having the door broken open. Mr. Whitlock looked into the room and then resumed looking through the rest of the house. (CP 100)

8. Ms. Ansel accompanied Mr. Whitlock downstairs and showed him the TVs in the house. He remarked that that was not why he was there. Ms. Ansel implored Mr. Whitlock to abandon his

efforts but was told it was too late and he shut her in her bedroom. Ms. Ansel was unable to open the bedroom door and believed that someone was holding it shut from the outside. At this point, she believes Ralph Whitlock went back upstairs and stole the video monitor, DVR, and safe from Tanya Routt's bedroom. She sent texts to Tanya Routt advising her that her house was being robbed and that she needed to return home. (CP 100)

9. During the time Mr. Whitlock was looking at Tanya Routt's room, Mr. Johnson had gone downstairs where he flipped on the lights, briefly looked around, and went back upstairs. This was witnessed by Damien Hester who was hiding in the darkened hallway and holding a baseball bat. Mr. Hester remained downstairs and did not see anyone remove anything from the home although he testified that he heard tools being used upstairs which he now associates with the items being removed from Tanya Routt's bedroom. (CP 100)

10. When Mr. Hester was advised that Mr. Whitlock and Mr. Johnson were no longer present he went back upstairs where he saw that Ms. Routt's bedroom door was open and that her large black video monitor was missing. (CP 100)

11. After leaving Ms. Routt's residence, Mr. Whitlock and Mr. Johnson took the stolen items out through the backyard where they met up with Mr. Gustafson who had returned with the car. Mr. Gustafson observed Mr. Whitlock to be [sic] a safe and Mr. Johnson to be carrying a TV and a gun. He described the gun as a [handgun][1] and was able to see its silhouette in Mr. Johnson's hand. (CP 101)

12. The two men placed the stolen items in the trunk of the car. The two men got in the car with Mr. Gustafson and Mr. Whitlock instructed Mr. Gustafson to keep his mouth shut. Mr. Gustafson drove them to Kelly McDonough's house where they unloaded the stolen items and took them inside. (CP 101)

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[1] Assignment of Error 2. The court's factual finding is that he described the gun as a pistol. The record reflects Mr. Gustafson believed the gun to be a "handgun." 12/9/14 RP 385.

13. Meanwhile, Tanya Routt returned home. Upon returning home, she called the police and advised all occupants in the house that the police were coming and anyone not wishing to have contact with law enforcement should leave. Crista Ansel left with Damien Hester and Bridget Yarborough at that time. They went to Kelly McDonough's house where Crista Ansel was informed that Ralph Whitlock and David Johnson had already been to Mr. McDonough's home that morning. The testimony of Mr. McDonough confirmed this fact as well as the fact that Mr. Johnson and Mr. Whitlock had brought a black TV and a safe into Mr. McDonough's home that morning. They had left prior to Ms. Ansel's arrival and had taken the stolen items with them when they left. (CP 101)

14. 2 days later, Ms. Ansel was at Tanya Routt's house when Mr. Whitlock and Mr. Johnson returned. Ms. Route [sic] would not allow them into the home and called the police. Ms. Ansel hid when the police came because she knew she had warrants for her arrest. Following this incident, Ms. Ansel testified that she had threats made against her by various persons which resulted in her secreting herself from law enforcement. (CP 101)

15. Mr. Johnson was subsequently arrested and charged with burglary in the 1st degree and robbery in the 1st degree. (CP 101)

16. At trial, Robert Anderson testified regarding a note which had been passed to him in the jail by Mr. Gustafson with instructions to deliver it to Mr. Whitlock. Mr. Gustafson denied authoring the note and the circumstances described by Mr. Anderson necessitate that little weight be given to his testimony. (CP 102)

17. There were also vigorous attacks on the veracity of the most current version of events given by Mr. Gustafson and Ms. Ansel given the inconsistencies with prior statements. However their explanations for the inconsistencies are credible and their testimony at trial is in convergence with that of other witnesses [sic] versions of events. Ms. Ansel and Mr. Hester with [sic] the 2 witnesses [sic] the greatest ability to perceive and relate the events of that night as they occurred. There [sic] respective versions of events are all corroborative of one another. Ms. Ansel's testimony

regarding a firearm [sic] corroborated by the testimony of Mr. Gustafson. The testimony of Mr. Gustafson, Mr. McDonough, and Ms. Ansel, are all corroborative with respect to the defendants having shown up at Mr. McDonough's house with the stolen property. (CP 102)

18. Mr. Johnson's testimony that he had been unsuccessful in regaining the key to Tanya Routt's car and had walked over to her house with Mr. Whitlock at 2 o'clock in the morning in order to advise her of that fact makes no sense. His version of events is not in accord with that [sic] nearly every other percipient witness that [sic] testified at trial. (CP 102)

19. The testimony as it relates to a crowbar possessed by Mr. Whitlock is too conflicting for the court to find beyond a reasonable doubt that its existence has been proven. In addition, there was no testimony from any witness that a crowbar, if present, had been used for anything other than its intended purpose. There was also little or no testimony that the firearm possessed by Mr. Johnson had been used to specifically assault or threaten a particular person. (CP 102)

From these findings, the court made the following conclusions of law (CP 103):

1. That on June 10, 2014, David R. Johnson entered the residence of Tanya Routt at 708[] 7th Street, Clarkston, Washington, with intent to commit a crime therein.

2. That regardless of whether or not [sic] he was invited in or whether his entrance into the home was simply by passive acquiescence of the persons present, his remaining in the residence while committing a crime was unauthorized and unlicensed.

3. The property of Tanya Routt was stolen in the presence of Crista Ansel and Damien Hester against those persons' will by force, intimidation, and/or fear of injury.

> 4. That during the commission of the crime and/or during the immediate flight therefrom, David R. Johnson was armed with a firearm.
>
> 5. [Sic] Court does not find based upon the testimony of the witnesses, that Mr. Johnson or Mr. Whitlock were armed with a deadly weapon other than a firearm.
>
> 6. That Mr. Johnson is guilty of the crimes [sic] Burglary in the 1st Degree and Robbery in the 1st Degree, both committed while armed with a firearm.

Mr. Johnson was sentenced within the standard range to 180 months, inclusive of the two 60-month firearm enhancements. CP 161, 164.

The court imposed discretionary costs of $2,028[2] and mandatory costs of $800[3], for a total Legal Financial Obligation ("LFO") of $2,828. CP 162. The Judgment and Sentence contained the following 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 the 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 fiinancial obligations imposed herein.

[2] $200 sheriff service fees, $78 witness costs, $750 court-appointed attorney recoupment, and $1,000 fine (RCW 9A.20.021). CP 162.

[3] $500 victim assessment, $200 criminal filing fee, and $100 DNA collection fee. CP 162.

CP 161. The court did not inquire into Mr. Johnson's financial resources or consider the burden payment of LFOs would impose on him. 12/22/14 RP 81–83. The court ordered Mr. Johnson to pay $50 or more per month commencing sixty days after his release from custody. CP 162. The court found Mr. Johnson indigent for purposes of this appeal. CP 186–87.

This appeal followed. CP 175.

C. ARGUMENT

1. This Court should reverse and dismiss the firearm enhancements because the State presented insufficient evidence the gun was a "firearm" under RCW 9.41.010.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). While circumstantial evidence is no less reliable than direct evidence, *State v.*

Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983). A reviewing court should reverse a conviction or enhancement for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the State, could have found the elements of the crime or enhancement allegation charged beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421–22, 894 P.2d 403 (1995); *State v. Wade*, 98 Wn. App. 328, 338, 989 P.2d 576 (1999).

RCW 9.94A.533(3) creates a mandatory five-year sentence enhancement for a class A felony if the offender is armed with a firearm as defined in RCW 9.41.010. A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder." RCW 9.41.010(9); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.10.01 (3d Ed). For a firearm sentence enhancement to apply, the prosecution must prove beyond a reasonable doubt that the offender was armed with a firearm in fact, that is, a real gun, as opposed to a gun-like replica or toy. *State v. Anderson*, 94 Wn. App. 151, 159, 971 P.2d 585 (1999), *overruled on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000); *State v. Faust*, 93 Wn. App. 373, 379–81. 967 P.2d 1284 (1998); see also *State v. Pam*, 98

Wn.2d 748, 659 P.2d 454 (1983) and *State v. Tongate*, 93 Wn.2d 751, 613 P.2d 121 (1980) (distinguishing between a toy gun and a gun "in fact").

In cases where the actual weapon was not recovered, there has been testimony from eye-witnesses who were able to describe the alleged weapon in detail. In *State v. Mathe*, 35 Wn. App. 572, 668 P.2d 599 (1983), *aff'd on other grounds*, 102 Wn.2d 537, 688 P.2d 859 (1984), the court held that the State had provided sufficient proof of a real gun via circumstantial evidence consisting of the two robbery victims' detailed descriptions of the gun used by Mathe during the robberies. 35 Wn. App. at 574–75. In *State v. Bowman*, 36 Wn. App. 798, 678 P.2d 1273, *rev. denied*, 101 Wn.2d 1015 (1984), the court held the record contained sufficient circumstantial evidence to support the jury's firearm and deadly weapon findings where an eyewitness described the gun in detail and on cross-examination stated "there was no question in my mind whatsoever" that it was a real gun. *Bowman*, 36 Wn.2d at 803.

In *State v. McKee*, 141 Wn. App. 22, 167 P.3d 575, *rev. denied*, 163 Wn.2d 1049, 187 P.3d 751 (2008), a real gun was recovered but it did not match the rape victim's initial description and she was unable to provide a detailed description of the gun at trial. The court held there was

sufficient circumstantial evidence of a real gun where the victim testified she knew the gun was real because of the weight and feel of the steel and the way the defendant was holding it, and her testimony that she saw a "peripheral something to my head" and did not bite the defendant's penis during the rape because of the gun to her head, combined with evidence the defendant had a real gun and had access to other guns. *McKee*, 141 Wn. App. at 31.

Here, the circumstantial evidence was insufficient to establish beyond a reasonable doubt that Mr. Johnson was armed with a real gun during the commission of these crimes. The fact-finder found "Ms. Ansel's testimony regarding a firearm [was] corroborated by the testimony of Mr. Gustafson." Finding of Fact 17 at CP 102. Ms. Ansel testified she saw Mr. Johnson "in the corner of the kitchen with what looked like a pistol … ." RP 310. She described it as "hand size" and guessed laughingly it was "probably my hand [size]." RP 311. She responded "Silver?" when asked what color it was. RP 311. From a distance of fifteen feet Mr. Gustafson saw Mr. Johnson come out of the house with "what I believed to be a handgun" because "I could see the silhouette, kinda with the way the lighting was in the back[yard]." RP 385. He described it as a "pretty standard size." RP 385–86. When asked what

color it was, he responded "it was more, it was a silhouette, so it really, it could have been … black, it could have been [another color] … you know?" RP 386.

The eyewitnesses testified they saw what looked like a pistol or a silhouette of a handgun that was hand size or standard size, and was black or silver or some other color. These attributes are generic and could apply equally to real guns or gun-like replicas or toy guns or guns that have been rendered permanently inoperable[4]. The limited testimony provides no detailed descriptions from which a fact-finder could conclude beyond a reasonable doubt that the gun-shaped object in Mr. Johnson's hand was in fact a real gun.

In this case there is neither a detailed description by a witness nor recovery of the actual gun. The firearm enhancements should be reversed and dismissed for insufficient evidence.

[4] See *State v. Padilla*, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999) ("At the same time, 'may be fired' indicates legislative intent that a gun rendered *permanently* inoperable is not a firearm under the statutory definition here at issue because it is not ever capable of being fired.." (Emphasis original)).

2. Since the directive to pay LFOs was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Johnson's current and future ability to pay before imposing LFOs.

a. *This court should exercise its discretion and accept review*.

Mr. Johnson did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand … reach[ing] the merits … ." *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does

little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court's remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court's decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the

thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Johnson's case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd*., 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.") (citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 344 P.3d at 685. Mr. Johnson's sentencing occurred before the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Johnson respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument.*

There is insufficient evidence to support the trial court's finding that Mr. Johnson has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay without proof the defendant has the ability to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia,* 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by

the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he 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). 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. *Blazina*, 344 P.3d at 685. "This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id*. The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id*.

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id*. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id*. (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty

guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id*.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id*. at 915-16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a biolerplate statement that the trial court has "considered" Mr. Johnson's present or future ability to pay legal financial obligations. CP 740. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165

Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in the judgment and sentence, the record does not show the trial court took into account Mr. Johnson's financial resources and the potential burden of imposing LFOs on him. 12/22/14 RP 81–83. The court was aware Mr. Johnson had been unemployed for about one year, his living arrangements were unstable, he had no car and either walked or depended on others for transportation, and it was hard for him to get a job due to his having a felony record. RP 477, 481–84, 493–94. The court was further aware Mr. Johnson's criminal history included grand thefts and burglaries, which are types of crimes likely to generate significant LFOs including restitution. Yet, knowing these facts and despite finding him indigent for this appeal, the Court

failed to inquire and "conduct on the record an individualized inquiry into [Johnson's] current and future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under GR 34" as is required by *Blazina*. Washington Supreme Court orders dated August 5, 2015, pp. 1–2, in *State v. Mickle* (90650-5/31629-7-III) and *State v. Bolton* (90550-9/31572-6-III) (granting Petitions for Review and remanding cases to the superior court "to reconsider the imposition of the discretionary legal financial obligations consistent with the requirements" of *Blazina*).

The boilerplate finding that he has the present or future ability to pay LFOs is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Johnson's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

3. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory $100 DNA collection fee.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process

of law. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Id.* at 218–19. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. *Nielsen,* 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.* Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test "is not a toothless one." *Mathews v. DeCastro*, 429 U.S. 181,

185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. *Id.*

Here, the statute mandates all felony offenders pay the DNA-collection fee. RCW 43.43.7541[5]. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the

[5] RCW 43.43.7541 provides:

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability or likely future ability to pay. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d 827, 344 P.3d at 684. When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate that trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the $100 DNA collection-fee is such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of all other legal financial obligations included in the sentence." RCW 43.43.7541. Thus, the fee is paid only after restitution, the victim's compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by an indigent defendant.

Additionally, the defendant will be saddled with a 12% rate on his

unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See, *Blazina*, 182 Wn.2d 827, 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State's interest in funding the collection, testing, and retention of an individual defendant's DNA. Therefore, RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Johnson's indigent status, the order to pay the $100 DNA collection fee should be vacated.

4. <u>The trial court abused its discretion when it ordered Mr. Johnson to submit to another collection of his DNA</u>.

A trial court abuses its discretion if its decision is "manifestly unreasonable," based on "untenable grounds," or made for "untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775

(1971). "A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

RCW 43.43.754(1) requires a biological example "must be collected" when an individual is convicted of a felony offense. RCW 43.43.754(2) provides: "If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted." Thus, the trial court has discretion as to whether to order the collection of an offender's DNA under such circumstances.

It is manifestly unreasonable for a sentencing court to order a defendant's DNA to be collected pursuant to RCW 43.43.754(1) where the record discloses that the defendant's DNA has already been collected. The Legislature recognizes that collecting more than one DNA sample from an individual is unnecessary. It is also a waste of judicial, state, and local law enforcement resources when sentencing courts issue duplicative DNA collection orders.

Here, Mr. Johnson's DNA was previously collected pursuant to the statute. He had four three prior Washington felony convictions sentenced

in 2002 or later. CP 160–61. These prior convictions each required collection of a biological sample for purposes of DNA identification analysis pursuant to the current statute. RCW 43.43.754(6)(a); Laws of 2008 c 97 § 2, eff. June 12, 2008; Laws of 2002 c 289 § 2, eff. July 1, 2002. Since the prior convictions occurred in 2002 or later, Mr. Johnson was assessed $100 DNA collection fees at the time of these prior sentencings. There is no evidence suggesting his DNA had not been collected as ordered in the prior judgments and sentences and placed in the DNA database. Mr. Johnson fell within the parameters of RCW 43.43.754(2) and a subsequent DNA sample was not required. Under these circumstances, it was manifestly unreasonable for the sentencing court to order him to submit to another collection of his DNA. CP 146. The collection order must be reversed.

D. CONCLUSION

For the reasons stated, this Court should reverse the two firearm enhancements and vacate the orders to pay the $100 DNA collection fee and to submit an additional biological sample for DNA identification. The matter should further be remanded to make an individualized inquiry into Mr. Johnson's current and future ability to pay before imposing LFOs.

Respectfully submitted on October 8, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 8, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant David R. Johnson:

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