No. 33183-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JD MILLER,

Defendant/Appellant.

Appellant's Brief

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C. STATEMENT OF THE CASE

JD Miller was charged and convicted by a jury of first degree assault for stabbing Christopher Bennett with a knife. CP 1, 43, RP[1] 73. On the evening of the incident, Bennett and his ex-wife, Stacy, had just returned to her house in Clarkston, Washington, from visiting a friend. RP 132-33. They notice a white BMW parked in front of the next-door residence with the motor running and someone sitting in the driver's seat. RP 133. The next-door residence was a single-wide trailer in great

[1] Citations to the record designated "RP" refer to the transcript of the trial and sentencing. Citations to other hearings will include the date of the hearing.

disrepair and filthy with a ramshackle fence and an unkempt yard full of weeds. RP 125-26. There were frequent comings and goings of visitors who stayed only briefly, indicating the owner, Markham Welch, was likely a drug dealer. RP 132, 169. The Bennett's relationship with Welch had been rocky at best. There had been a number of verbal altercations and Stacy had called the police on several occasions to complain about the garbage, the noise and Welch's pit-bull. RP 131-32.

When Chris Bennett saw the BMW, he figured it was another drug deal going down. He walked over to the car and confronted the driver, later identified as Dustin Pearson. He asked Pearson what he was doing there and told him to leave or he would call the police. RP 172-73. After an exchange of yelling with profanities, Bennett testified he walked over to his truck, retrieved his cell phone, and walked back toward Pearson's car. RP 173-74. Pearson then drove away. Pearson testified he thought Bennett had a gun or knife in his hand. RP 206-07.

At that point, Miller came out onto the porch of the trailer. He had heard and seen the altercation between Bennett and Pearson and had also seen Bennett walk over to his truck and head back toward Pearson's car. RP 174, 368-69. Miller yelled at Bennett who yelled back telling Miller to

go back inside the trailer. Miller thought Bennett seemed aggressive and hostile like he'd been drinking. RP 369-70.

Miller came down off the porch and Bennett walked quickly towards Miller. Miller said he was scared so he pulled out a utility knife from his pocket that he had used earlier that day installing a car stereo. Miller thought Bennett had grabbed a gun out of his truck earlier. Bennett came at Miller as if to grab or punch him so Miller stabbed Bennett with the utility knife. RP 368-72. Bennett denied making any threatening or aggressive movements. RP 174. Bennett stopped and walked back to Stacy's house. Bennett thought he had been punched in the stomach. He didn't realize he had been stabbed until he was inside the house. RP 174-76.

Miller left the trailer, called a friend to come pick him up and went home. He was unable to get hold of Pearson. RP 374-77.

Police located the white BMW that same evening and arrested Pearson who eventually came out of his girlfriend's house after hiding in a basement crawlspace. RP 80-88, 227-30. The Court overruled Miller's objection under ER 403 and ER 404(b) to evidence of Pearson's arrest as well as weapons found inside the BMW. RP 208-16, 228. Miller also objected to reference to the weapons found in Pearson's car and why

Pearson needed them during the prosecutor's opening statement. RP 57-58. The items found in the car included a tire iron, a Buck knife, a second knife, brass knuckles, and a starter pistol. RP 208-16. The prosecutor argued this evidence was relevant to show Pearson had no reason to be scared of Bennett. RP 216.

Pearson was called as a State's witness. RP 194. Much of the direct examination by the prosecutor was confrontational and consisted of a lot of impeachment by prior inconsistent statements as well as Pearson's criminal history. RP 195-97, 207-31.

At the start of the morning session after Pearson's testimony, the Court reversed its prior ruling admitting the weapons found in Pearson's car (the white BMW) finding any relevance was outweighed by undue prejudice. The Court indicated it would advise the jury not to consider the presence of weapons in the car. RP 255-56. Miller then moved for a mistrial. He argued the jury had already seen and even handled the weapons so it would be guilt by association. RP 256-57. After hearing argument back and forth, the Court denied the motion for a mistrial and said it would allow the State to finish its case before deciding whether or not to admit evidence of the weapons. RP 257-61.

Ultimately, the Court stuck to its earlier ruling admitting evidence of the weapons over continued objections by Miller. RP 208-16, 321-29. The State argued its theory of the case was that Miller and Pearson went to Welch's residence to settle a drug debt or to take something and the presence of the weapons bolstered that theory. RP 257-58. In closing argument, the prosecutor argued this same theory. RP 424-32.

The Court also allowed testimony of a TV found in the bushes in the backyard of Welch's residence and a note Welch left for Stacy Bennett stating Welch thought Miller was in the process of stealing his TV. Miller moved to exclude this evidence prior to trial and objected to its admission during the trial. As an offer of proof, Miller elicited testimony from Welch outside the presence of the jury that Welch later learned someone other than Miller was responsible for removing his TV. RP 144-45, 268-77, 288-89, 317-18; 8/21/14 RP 20-21. Welch was away from his residence the night of the assault. RP 271.

Miller was sentenced as a persistent offender to life without possibility of parole. CP 170. At issue was whether a prior Idaho conviction for aggravated assault was comparable to Washington's second degree assault to count as a strike. RP 480-90. The Court found the Idaho

conviction was legally comparable to the second degree assault. RP 493-95.

The Court imposed discretionary costs of $1350 and mandatory costs of $800[2], for a total Legal Financial Obligation (LFO) of $2150. CP 168. The Judgment and Sentence contained the following language:

> ¶ 2.5 Financial Ability. 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 is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 168.

The Court commented that Mr. Miller's "ability to pay is not much ability at all." RP 497. The Court did not inquire further into Mr. Miller's financial resources. RP 495-97. The Court ordered Mr. Miller to begin making payments as funds become available while incarcerated. CP 169.

This appeal followed. CP 179.

[2] $500 Victim Assessment, $200 criminal filing, and $100 DNA fee. CP 168.

D. ARGUMENT

1. The trial court abused its discretion in allowing irrelevant evidence of other acts contrary to ER 401, ER 403 and ER 404(b).

ER 404(b) prohibits evidence of other crimes to show that the defendant acted in conformity with that character--had a propensity to commit this crime. But evidence of other crimes may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To admit evidence of other crimes under ER 404(b), the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude that the evidence is relevant to prove an element of the crime charged; and, finally, (4) balance the probative value of the evidence against its prejudicial effect. *State v. Williams*, 156 Wn. App. 482, 490, 234 P.3d 1174 (2010) (citing *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). A trial court's decision to admit evidence of a defendant's [other] acts will be reversed upon showing an abuse of the court's discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A trial court must determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such

evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b); *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). When considering misconduct which does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used to avoid prejudice. *State v. Myers*, 49 Wn. App. 243, 247, 742 P.2d 180 (1987) (*citing* 5 K. Tegland, Wash.Prac., Evidence, Comment 404, at 258 (2d ed. 1982)). " 'In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.' " *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (*quoting State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

a. Evidence of the details of Pearson's arrest and the weapons found in Pearson's BMW should not have been admitted pursuant to ER 404(b).

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401; *State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Under this definition, Pearson's arrest is irrelevant. Pearson was

not present when the assault occurred and had no involvement in the assault. He had already driven away. He did not pick up Miller after the incident and Miller did not go to the house where Pearson was arrested. The prosecutor and the Court seemed to forget throughout the trial that Pearson was not a co-defendant in this case. Thus, the fact that Pearson was hiding from the police is not evidence of flight or any other incriminating activity pertaining to Miller's case.

The only purpose of this evidence, as well as the evidence of Pearson's prior convictions, was to show Pearson was a criminal type. Ergo, since Miller was hanging out with Pearson, Miller must also be a criminal type having the propensity to commit the underlying offense. This guilt by association is exactly the type of character evidence prohibited by ER 404(b) and ER 403.

Even more egregious was the Court's ruling admitting the weapons found inside the BMW. Again, this evidence was totally irrelevant to this offense. The prosecutor argued this evidence was relevant to show Pearson had no reason to be scared of Bennett. RP 216. How is that relevant to the alleged assault by Miller? The relevant mental state is that of Miller not Pearson. Even assuming Miller was aware of the weapons in

the BMW, both Pearson and the weapons were gone before the assault occurred. Therefore, the weapons have no relevance to the assault charge.

The State also argued its theory of the case was that Miller and Pearson went to Welch's residence to settle a drug debt or to take something and the presence of the weapons bolstered that theory. There was no evidence of any drugs presented at trial and Miller was not charged with burglary or theft of the TV. Moreover, the alleged assault occurred as a result of a confrontation between Miller and Bennett. It was not the result of Bennett catching Miller in the act of stealing something or committing some other crime. Therefore, the weapons have no relevance to the assault charge.

This evidence had no probative value and was highly prejudicial. Its sole purpose was to show Miller was a criminal type and therefore had the propensity to commit the underlying offense. This evidence is prohibited by ER 404(b) and ER 403 and should have been excluded.

b. Evidence of the TV and Welch's note should not have been admitted pursuant to ER 404(b).

Since Miller was not charged with burglary or theft, this evidence was irrelevant to any element of the assault charge. In addition, there is insufficient evidence that any misconduct by Miller actually occurred in that regard. Welch was away from his residence the night of the assault.

RP 271. While Welch testified he wrote the note stating he thought Miller was in the process of stealing his TV, he also testified he later learned someone else was responsible and Miller had nothing to do with it. RP 268-70.

Thus, evidence of this other incident is not essential to make the existence of any fact that is of consequence to the current charge more probable or less probable than it would be without the evidence. Instead, the evidence of the other crime only shows that Miller acted in conformity with that character exhibited in the other incident and had the propensity to commit this crime. This is precisely the type of evidence prohibited by ER 404(b). The probative value of this evidence was minimal or nonexistent and was far outweighed by its prejudicial effect. Therefore, the trial court abused its discretion in allowing this evidence as well as the other evidence previously mentioned.

c. Admitting the improper ER 404(b) evidence was not harmless error.

It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error. *State v. Gresham*, 173 Wash. 2d 405, 433, 269 P.3d 207, (2012). The question is whether, " 'within reasonable probabilities, had the error not occurred, the outcome of the trial would

have been materially affected.' " *Id*. (*quoting State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

Here, the erroneous admission of evidence regarding the details of Pearson's arrest, the weapons found in the BMW, the TV, and the note from Welch was not harmless error. Without that evidence, this case boils down to a credibility contest between Miller and Bennett. Miller thought Bennett had grabbed a gun out of his truck earlier and said Bennett came at Miller as if to grab or punch him. RP 368-72. Bennett denied making any threatening or aggressive movements. RP 175. The jury could have easily been swayed in favor of Miller's version had it not been influenced by the erroneously admitted 404(b) evidence.

Based on the admission of the 404(b) evidence, the State was able to argue in closing that Miller and Pearson went to Welch's residence to commit a crime. RP 424-32. The State would not have been able to make that argument if the Court had properly excluded the 404(b) evidence. It is within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Therefore, the error was not harmless.

2. Miller was improperly sentenced as a persistent offender under the Persistent Offender Accountability Act (POAA) because his prior Idaho conviction for aggravated assault is not legally or factually comparable to a Washington most serious offense.

Under the Persistent Offender Accountability Act (POAA), codified at RCW 9.94A.570, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release. RCW 9.94A.570. A "persistent offender," as applicable in the present case, is an individual who has been convicted in this state of a most serious felony offense, and

> [h]as, before the commission of the offense … been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted….

RCW 9.94A.030(38).

A "most serious offense," as applicable herein, is defined as:

> (a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
> (b) Assault in the second degree…

(o) Robbery in the second degree….

RCW 9.94A.030(33).

Washington convictions for most serious offenses, obviously, will be applied toward a sentencing court's analysis of criminal history for purposes of sentencing under the POAA. However, foreign convictions from another state or federal court may only count as a most serious offense if the Court is able to find that the offense is legally or factually comparable to a Washington most serious offense. *In re: Personal Restraint of Lavery*, 154 Wn.2d 249, 254, 111 P.3d 837 (2005).

To determine whether a foreign conviction is legally comparable to a Washington most serious offense, courts employ a two-part test: first, the court must examine whether the elements of the foreign offense are substantially similar to a Washington most serious offense. *Id*. at 255. Offenses are not legally comparable if the foreign offense covers a broader range of illegal activity than the Washington offense. *State v. Latham*, 183 Wn. App. 390, 397, 335 P.3d 960 (2014). If the foreign offense is legally comparable, then the inquiry ends and the foreign offense is counted as if it were a Washington offense. *State v. Jordan*, 180 Wn.2d 456, 461, 325P.3d 181 (2014).

If, however, the elements of the foreign conviction are not substantially similar, or if the Washington offense is defined more narrowly than the foreign offense, it is necessary to look to the factual record of the foreign conviction to establish factual comparability. *Latham*, 183 Wn. App. at 397, *citing*, *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999), *abrogated by statute on other grounds at* RCW 9.94A.530(2).

It is the State who bears the burden of proving by a preponderance of the evidence that the record supports the existence and classification of out-of-state convictions. *Ford*, 137 Wn.2d at 480. Information provided in support of the State's burden must have some minimum indicia of reliability beyond mere allegation and must have some basis in the record. *Id*. at 481-82. The defendant has no burden of disproving the State's assertions which are unsupported by evidence. *Id*.

a. Idaho's aggravated assault is not a class A felony because Idaho has no subdivided classifications of felonies.

The POAA includes "Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony" within the list of crimes considered to be most violent offenses. RCW 9.94A.030(33)(a). Under Idaho law, only two types of crimes exist: felonies and misdemeanors. Idaho Code 18-110 (Appendix A). Felonies are not divided into further subcategories of levels, classes or

other type; instead, each felony statute provides for individual maximum sentences. *See eg*. Idaho Code 18-906 (Appendix A).

An aggravated assault is punishable under Idaho law by no more than five years of incarceration and/or a fine of no more than $5000.00. Idaho Code 18-906 (Appendix A). This punishment is analogous to a class C felony in Washington. RCW 9A.20.021(c). Because there are no "class A felonies" under Idaho law, and because the maximum penalties are far less severe than a Washington class A felony, the Idaho crime of aggravated assault cannot be found to be "defined under any law as a class A felony." Therefore, the Idaho conviction for aggravated assault is not a prior most serious offense as a class A felony.

b. Idaho's aggravated assault is not legally comparable to assault in the first or second degree under Washington Law because the Idaho offense is substantially broader than the Washington offenses, and Idaho's definition of assault is significantly different.

The POAA lists assault in the second degree as a most serious offense. RCW 9.94A.030(33)(b). Idaho's charge of aggravated assault is not legally and/or factually comparable to the Washington crime of assault in the second degree.

Idaho law defines aggravated assault as an assault:

> (a) With a deadly weapon or instrument without intent to kill; or

> (b) By any means or force likely to produce great bodily harm.[; or]
> (c) With any vitriol, corrosive acid, or a caustic chemical of any kind….

Idaho Code 18-905 (Appendix A).

To be legally comparable to a Washington most serious offense, the elements of the Idaho offense must be substantially similar to the Washington offense, and cannot be broader. *Latham*, 183 Wn. App. at 397.

Washington's Second Degree Assault is defined as follows:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
> (c) Assaults another with a deadly weapon; or
> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
> (e) With intent to commit a felony, assaults another; or
> (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
> (g) Assaults another by strangulation or suffocation….

RCW 9A.36.021.

From even a cursory examination of Washington's statute, the difference is obvious. Washington's second degree assault statute is far more narrowly-tailored than Idaho's aggravated assault statute; in order to violate the Washington statute, very specific acts are required. The Idaho statute, by contrast, covers a far broader range of activities, including those "likely" to produce great bodily harm—no actual bodily harm is required by the statute. Additionally, while Washington's statute requires assault "with a deadly weapon," Idaho's statute more broadly includes a deadly weapon "or instrument." The statutory language is unclear as to the definition of a deadly weapon or instrument: ""Deadly weapon or instrument" as used in this chapter is defined to include any firearm, though unloaded or so defective that it can not [sic] be fired." Idaho Code 18-905(d) (Appendix A).

One cannot assume that the "deadly weapon" alluded to in the Idaho charging document is sufficiently similar to the "deadly weapon" under Washington law. Such assumptions are not founded in law. Herein, the Court should not assume "a large butcher knife" must be longer than 3 inches, making it *per se* a deadly weapon under Washington law. See RP 486; CP 56, 62. Such assumptions are dangerous where a statute sets forth

a specific and objective length and a factual allegation is based on subjective ideas of relative size.

Further muddying the waters, Idaho has separate offenses of "assault" and "battery" which do not exist in Washington. Washington adheres to the common law definition of assault:

> An assault is an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

WPIC 35.50 (West, 2014). By contrast, Idaho defines assault as:

> (a) An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or
> (b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with

> an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Idaho Code 18-901 (Appendix A).

Idaho defines "battery" as:

> (a) Willful and unlawful use of force or violence upon the person of another; or
> (b) Actual, intentional and unlawful touching or striking of another person against the will of the other; or
> (c) Unlawfully and intentionally causing bodily harm to an individual.

Idaho Code 18-903 (Appendix A).

Idaho considers an assault to be either an attempt or a threat and a battery the completed act, whereas Washington includes actual battery in its definition of assault. Furthermore, Idaho does not require that the fear of injury be "reasonable," merely "well-founded," and requires only fear that "violence is imminent," not that "bodily injury" is imminent.

Thus, any assault committed under Idaho law does not include an actual battery. Although this may sometimes be sufficient to constitute assault in the second degree in Washington, an actual battery and resulting injury is required where the seriousness of the injury is a necessary element of the offense. RCW 9A.36.021(1)(a).

Finally, the second, alternative act constituting the crime of aggravated assault includes *any* means or force likely to produce great bodily harm. This is far more expansive than the Washington crime of assault in the second degree, which sets forth very specific means of force that can constitute the crime, and requires a completed act resulting in some form of injury in most alternative methods of commission of the offense. In short, a person could be convicted of aggravated assault in Idaho based on actions which would not amount to assault in the second degree in Washington. In fact it is plausible that some activities covered by the Idaho statute would amount to a fourth degree assault in Washington.

c. Idaho's aggravated assault is not legally comparable to assault in the first or second degree because the Idaho offense contains a substantially different mens rea.

Idaho's aggravated assault contains two different possible means of committing the crime: either an assault with a deadly weapon or instrument, or by any means or force likely to produce great bodily harm. Idaho Code Ann. § 18-905 (Appendix A). The "deadly weapon or instrument" act contains an absurdly broad *mens rea*. So long as the individual is acting "without intent to kill," he or she has committed the crime. This would presumably include recklessness, negligence or even

strict liability. By contrast, Washington requires that an assault be an "intentional" act. *See* RCW 9A.36.021.

Thus, Washington's most serious offense requires a far more specific intent than Idaho's aggravated assault. When the *mens rea* of a foreign offense is less than Washington's required *mens rea*, the offenses are not legally comparable. *See, e.g.*, *Latham*, 183 Wn. App. at 402. Idaho requires no specific intent—only a lack of one particular type of intent.

Because the *mens rea* for Idaho's aggravated assault is vastly broader, it is not legally comparable to Washington's most serious offenses.

> *d. Mr. Miller's Idaho conviction may not be considered as a most serious offense because no finding of facts or admission of facts was entered in that case.*

If a foreign offense is not legally comparable to a Washington offense, the Court must examine whether the offenses are factually comparable. *Latham*, 183 Wn. App. at 397. Offenses are factually comparable "if the defendant's conduct constituting the foreign offense *as evidenced by the undisputed facts in the record* would constitute the Washington offense." *Id*., (emphasis added). In the examination of factual comparability, a court may only consider those facts which were

proved to a finder of fact beyond a reasonable doubt in the foreign conviction, or those to which the defendant admitted or stipulated. *Id*. The State must prove factual comparability by a preponderance of the evidence. *Id*. The key consideration for a sentencing court is whether a defendant could have been convicted under the Washington statute had the same acts occurred in Washington. *State v. Thomas*, 135 Wn. App. 474, 485, 144 P.3d 1178 (2006). While the sentencing court can look to the charging document for evidence of comparability, the focus of the analysis is always the elements of the crime as set forth in statute. *Id*. Where facts alleged in the charging document are not directly related to the elements of the offense under statute, the sentencing court may not assume that all facts necessary for comparability have been proven or admitted. *Id*. at 486.

In *State v. Bunting*, 115 Wn. App. 135, 61 P.3d 375 (2003), the State provided evidence to the sentencing court showing that Bunting had pled guilty to an Illinois bank robbery charge. *Bunting*, 115 Wn. App. at 142. The Court was provided with a complaint, a grand jury indictment and a summary of facts from the Illinois Department of Corrections. *Id*. at 141-42. Because Bunting had pled guilty, the Court of Appeals held that the complaint and the summary of facts were not admissible for

consideration, only the grand jury indictment. *Id*. at 142. The Court reasoned that the complaint and the summary of facts were never proved at a trial, and a plea of guilty did not necessarily mean that Bunting had admitted to all of the facts charged. *Id*. at 143-43.

In *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007), the Washington Supreme Court similarly held that bare allegations by the State, even coupled with a judgment and sentence, were insufficient to show facts proven or admitted by the defendant. *Thiefault*, 160 Wn.2d at 415-16 n.2. In that case, defense counsel was found to be ineffective for failing to object to the State's position that a foreign offense was factually comparable based only on the allegations and sentence in the foreign case. *Id*. at 417. The Court opined that defense counsel should have challenged the factual basis of the conviction, and that failure to do so materially prejudiced Thiefault. *Id.*

Here, the documents provided by the State at sentencing did not prove by a preponderance of the evidence that the Idaho conviction for aggravated assault was factually comparable to Washington's assault in the first or second degree. The State provided only a charging document and the Idaho equivalent of a judgment and sentence; no findings of fact, statement on plea of guilty or other factual bases for the conviction were

provided to the sentencing court for the necessary findings of factual comparability. RP 485-90.

The Idaho statute would allow Mr. Miller to plead guilty to aggravated assault based on a set of facts completely unrelated to the charging document. It is entirely possible that the Idaho Court could have found Mr. Miller guilty under a set of facts supporting the non-weapon alternative of aggravated assault, which is far broader than Washington's second degree assault statute. Since the State provided no established, admitted set of facts, it was impossible for the sentencing court to fully know the factual basis of Mr. Miller's plea. This Court should find the State has not met its burden of proving the comparability of the Idaho offense by preponderance of the evidence.

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

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

Mr. Miller 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. Miller'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. 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. Miller 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. Miller 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 absent proof that the defendnat had the ability

to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitutuion, 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. Miller's present or future ability to pay legal financial obligations. 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 paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Miller's financial resources and the potential burden of imposing LFOs on him. RP 495-97. Moreover, the boilerplate language is inaccurate because the Court commented that Mr. Miller's "ability to pay is not much ability at all." RP 497. Nevertheless, the Court ordered Mr. Miller to begin making payments as funds become available while incarcerated. CP 169.

The boilerplate finding that Mr. Miller 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. Miller 's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

In the event Miller is not the prevailing party in this appeal, this Court should exercise its discretion and include in its opinion the denial of appellate costs for the reason stated in *State v. Sinclair*, __Wn. App. __, 2016 WL 393719, Slip Op. No. 72102–0–I (Jan. 27, 2016).

E. CONCLUSION

For the reasons stated, the conviction should be reversed or, in the alternative the matter should be remanded for resentencing within the standard range and to make an individualized inquiry into Mr. Miller's current and future ability to pay before imposing LFOs.

Respectfully submitted, February 22, 2016

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s/David N. Gasch
Attorney for Appellant

APPENDIX A

I.C. § 18-905. Aggravated assault defined

An aggravated assault is an assault:

(a) With a deadly weapon or instrument without intent to kill; or

(b) By any means or force likely to produce great bodily harm.[; or]

(c) With any vitriol, corrosive acid, or a caustic chemical of any kind.

(d) "Deadly weapon or instrument" as used in this chapter is defined to include any firearm, though unloaded or so defective that it can not be fired.

CreditsS.L.
1979, ch. 227, § 2.

Idaho Code Ann. § 18-905 (West)

I.C. § 18-901. Assault defined

An assault is:

(a) An unlawful attempt, coupled with apparent ability, tocommit a violent injury on the person of another; or

(b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

CreditsS.L.
1979, ch. 227, § 2.

Idaho Code Ann. § 18-901 (West)

I.C. § 18-906. Aggravated assault—Punishment

An aggravated assault is punishable by imprisonment in the state prison not to exceed five (5) years or by fine not exceeding five thousand dollars ($5,000) or by both.

CreditsS.L.
1979, ch. 227, § 2.

Idaho Code Ann. § 18-906 (West)

I.C. § 18-903§. Battery defined

A battery is any:

(a) Willful and unlawful use of force or violence upon the person of another; or

(b) Actual, intentional and unlawful touching or striking of another person against the will of the other; or

(c) Unlawfully and intentionally causing bodily harm to an individual.

CreditsS.L.
1979, ch. 227, § 2.

Idaho Code Ann. § 18-903 (West)

I.C. § 18-110. Grades of crime

Crimes are divided into:

1. Felonies; and

2. Misdemeanors.

Credits
S.L. 1972, ch. 336, § 1.I.C. § 18-110, ID ST § 18-110
Current through end of the 2015 First Regular and First Extraordinary Sessions of the 63rd Legislature

Idaho Code Ann. § 18-110 (West)

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 22, 2016, 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 the brief of appellant:

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