NO. 33909-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS LIMPERT,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Nicholas Limpert and Desarae Dawson were tried together and Ms. Dawson's statements to law enforcement, implicating Mr. Limpert, were admitted at trial although Ms. Dawson did not testify. Both were acquitted of robbery and conspiracy to commit robbery but Mr. Limpert was convicted of attempted assault in the second degree based on intent to commit the felony of robbery. The trial was constitutionally flawed because Mr. Limpert's right to confrontation was violated by the admission of his codefendant's out-of-court statements implicating him. Mr. Limpert was also prejudiced by the prosecutor's likening of his case to O.J. Simpson's armed robbery conviction.

B. ASSIGNMENTS OF ERROR

1. Mr. Limpert's constitutional right to confront witnesses was violated when an officer testified about statements co-defendant Desarae Dawson made to the officer that directly implicated Mr. Limpert.

2. The prosecutor committed misconduct by inflaming the passions and prejudices of the jurors and relying on facts not in evidence.

3. The trial court improperly overruled Mr. Limpert's objection to the prosecutor's misconduct.

4. The trial court erred in imposing $800 in legal financial obligations (LFOs).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Confrontation Clause of the federal and state constitutions bars admission of a codefendant's out-of-court statements at a joint trial where the codefendant does not testify and the statement directly implicates the defendant. Did the admission of Desarae Dawson's statements to law enforcement, which directly implicated Nicholas Limpert, and where Ms. Dawson did not testify, violate Mr. Limpert's constitutional right to confront witnesses?

2. Prosecutors may not make arguments that inflame the jury's passions and prejudices and that rely on facts not in evidence. Did the prosecutor commit misconduct when he argued to the jury that this case was like O.J. Simpson's Nevada armed robbery conviction?

3. RCW 10.01.160 mandates the waiver of costs and fees for indigent defendants. "[A] trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827,

830, 344 P.3d 680 (2015). While the trial court recognized Mr. Limpert was indigent, the court imposed legal financial obligations (LFOs) without considering his inability to pay. Should this Court remand with instructions to strike LFOs?

D. STATEMENT OF THE CASE

Makelle Hamilton, an admitted addict, claimed she was not paid the full amount for her boyfriend's Suboxone pills,[1] which she was illegally selling. RP 245-51.[2] She arranged for the sale through her ex-boyfriend, Brenden McCullough. RP 251-52. Ms. Hamilton claimed she let Mr. McCullough into the motel room in which she was staying, gave him the pills, and he gave her insufficient funds and a cell phone as collateral. RP 252-53, 269, 281-82. Ms. Hamilton claimed Mr. McCullough told her an individual named Desarae Dawson was in the parking lot, she wanted to buy the pills, and he would bring up the rest of the money after Ms. Dawson received them. RP 253.

[1] Suboxone is an opiate blocker that can be used as a replacement for heroin or to achieve "a high if you don't do heroin." RP 247-48.

[2] The verbatim report of proceedings is contained in four volumes. The three consecutively-paginated volumes are referred to as "RP." The 22-page separately-paginated volume containing hearings from May 21 and June 18, 2015 is referred to as "5/21/15 RP."

Ms. Hamilton claims that Michelle Pearson came into her room after Mr. McCullough left, trying to get the phone back. RP 255-56, 270-73. However, Ms. Hamilton said she refused to return the phone until she had all the money. *Id*. Ms. Hamilton did not remember how many pills she was selling, but vaguely remembered the price as $300. RP 250, 268-69.

Next, Makelle Hamilton claims Nicholas Limpert and Ms. Dawson came into her motel room asking for the cell phone back. RP 256, 273-74. Ms. Hamilton could not remember who let them into the room, but she was not going to give the phone back to anyone but Mr. McCullough. RP 256, 270-74. Ms. Hamilton's brother, Patrick, who was also in the room, vouched for Ms. Limpert and Mr. Dawson and left to find Mr. McCullough and have everything resolved. RP 257-58, 273. Ms. Hamilton claims while she was alone with Mr. Limpert and Ms. Dawson, Mr. Limpert pulled out a knife then put it away and started choking her. RP 258, 262-63, 289. According to Ms. Hamilton, after her brother returned, they all became friendly and Mr. Limpert offered to help get the rest of the money or her boyfriend's pills back. RP 259-60, 262-63. She gave them the phone and wrote her name and number down so that they could reach her. RP 276-77, 293-94.

Ms. Hamilton admitted the incident was "a blur." RP 260; *see* RP 250-51 (she was using heroin and methamphetamine at the time), 267 (she was high when she arranged for sale), 285 (she was using pain medications and heroin but not methamphetamine). She testified she was staying in the motel because she was otherwise homeless, but four days later law enforcement met with her in her apartment. *Compare* RP 244-45 *with* RP 263-64, 357. And although the State agreed not to charge Ms. Hamilton with selling controlled substances if she testified and cooperated, she was a reluctant witness, who did not appear for trial on several occasions. RP 8-12, 17-18, 25-31, 33-51, 55-70, 266-67, 291.

Additional evidence called into question Makelle Hamilton's credibility. For example, she testified that she never talked to her friend Zacariah Tesch about this incident. RP 279. Yet, Mr. Tesch testified that Ms. Hamilton told him a month after the incident that Mr. Limpert never assaulted her. RP 363-67. Ms. Hamilton also claimed not to know a Randall Smeltzer or Renee Palmer, but Mr. Smeltzer testified they were friends and Ms. Hamilton told him no assault occurred. RP 280-81, 371-75.

Patrick Hamilton, Makelle's brother, testified he had no recollection of the day as he was "heavy into heroin and opiates" and took some pills provided by his sister. RP 298-302. *But see* RP 317-23 (Patrick approached police and directed them to sister's motel).

Michelle Pearson testified that she and Ms. Hamilton got into a physical altercation when Ms. Pearson went into the motel room to get her cell phone. RP 379, 382-87. Ms. Pearson also testified that Mr. Limpert and Ms. Dawson were not involved in the planning of the drug purchase. RP 388-89.

Based on Makelle Hamilton's account and Ms. Dawson's and Mr. Limpert's statements to law enforcement following arrest, the State charged Mr. Limpert with conspiracy, robbery and attempted assault. CP 1-2; RP 327-37, 344 (Limpert denied assaulting Makelle Hamilton). Ms. Dawson was also charged with conspiracy and robbery, but the State did not charge Mr. McCullough with any crimes. The jury acquitted Mr. Limpert and Ms. Dawson of first-degree robbery and conspiracy to commit first-degree robbery. CP 1-2, 112, 114; RP 460-61. However, Mr. Limpert was convicted of attempted assault in the second-degree with intent to commit the felony of robbery. CP 1-2, 113.

E. ARGUMENT

1. Mr. Limpert's constitutional right to confront witnesses was violated when his codefendant's out-of-court statements implicating Mr. Limpert were admitted at trial without testimony from the codefendant.

a. The Confrontation Clause bars the admission of statements made by a non-testifying codefendant that implicate the defendant.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses. A criminal defendant is denied the right of confrontation when a nontestifying codefendant's confession that names the defendant as a participant in the crime is admitted at a joint trial, even where the court instructs the jury to consider the confession only against his codefendant. *Bruton v. United States*, 391 U.S. 123, 135-36, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The *Bruton* Court recognized the "powerfully incriminating" effect of the extrajudicial statements of a codefendant "who stands accused side-by-side with the defendant." *Id*.

Violations of the Confrontation Clause are reviewed de novo. *State v. Fisher*, __ Wn.2d __, Slip Op. at 4 (Jul. 7, 2016). Obviating any need for objection from Mr. Limpert, the prosecutor stated he was

cognizant of confrontation and *Bruton* issues. RP 129-30. Even if a contemporaneous objection by Mr. Limpert was necessary, the Court should review the issue under RAP 2.5(a)(3) because a violation of the confrontation clause is a matter of constitutional magnitude that is obvious on this record. *See State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

b. Officer Tofsrud repeated two statements that implicated Mr. Limpert and were made by codefendant Dawson, who did not testify.

At trial, Officer Tofsrud testified about statements Ms. Dawson made to him hours after the alleged crimes. RP 334-37. The officer's testimony included statements that facially incriminated Mr. Limpert. *See Fisher*, Slip Op. at 5 (confrontation problem arises when nontestifying codefendant's statements facially incriminate defendant). The jury learned Ms. Dawson reported she heard the complaining witness say "He just pulled a knife." RP 334-35. This statement directly implicated Mr. Limpert because he was the only male reportedly in the room at the time and the only one accused of possessing a knife. RP 257-58, 288-89; CP 1-2.

Officer Tofsrud further testified that Ms. Dawson told him she understood that "they" were "going after . . . a phone that the victim would not return." RP 335. "They" referred to her alleged coconspirator, Mr. Limpert.

The statements were not redacted in any way to eliminate reference to Mr. Limpert. Rather, the statements directly implicated him. Immediately preceding the admission of this second statement, the court had cut off testimony that named Mr. Limpert. RP 335. Yet, Mr. Limpert was plainly implicated through the pronoun "they" without admonition. *Id*. *see Fisher*, Slip Op. at 5-11 (redactions are sufficient only if they eliminate references to defendant's name and existence). His codefendant, Ms. Dawson, did not testify. Therefore, the admission of these statements violated Mr. Limpert's constitutional confrontation rights. The only remaining question is whether the State can show the verdict would have been the same if the incriminating statements had not been admitted at trial.

c. Because the State cannot show the admission of these statements was harmless beyond a reasonable doubt, the conviction should be reversed and the case remanded for a new trial.

The State has the burden of demonstrating beyond a reasonable doubt that a confrontation violation did not contribute to the verdict.

Chapman v. California, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The remedy for a violation of the Confrontation Clause is reversal and remand for a new trial. *Gray v. Maryland*, 523 U.S. 185, 197, 118 S. Ct. 1151, 140 L. Ed. 294 (1998).

Here, the untainted evidence was far from overwhelming. *See Fisher*, Slip Op. at 11. The complaining witness, Makelle Hamilton's, credibility was severely tarnished. She testified only under agreement not to be prosecuted for selling her boyfriend's prescription medication. RP 266-67, 291. She is a recovering drug addict and was admittedly using at least heroin at the time the incidents purportedly occurred. RP 246, 250-51 (she was using heroin and methamphetamine at the time), 267 (she was high when she arranged for sale), 285 (she was using pain medications and heroin but not methamphetamine).

Specific portions of Makelle Hamilton's testimony were inconsistent. She testified she was staying in the motel because she

was otherwise homeless, but four days later law enforcement met with her in her apartment. *Compare* RP 244-45 *with* RP 263-64, 357. Ms. Hamilton's testimony that she never talked to her friend Zacariah Tesch about this incident was contradicted by his testimony that Ms. Hamilton told him Mr. Limpert never assaulted her. RP 279, 363-67. Ms. Hamilton also claimed not to know a Randall Smeltzer or Renee Palmer, but Mr. Smeltzer testified they were friends and Ms. Hamilton also told him the assault never happened. RP 280-81, 371-75.

Showing the doubtfulness of the State's case, the jury acquitted Mr. Limpert and Ms. Dawson of the robbery and conspiracy charges. During deliberations, the jury also questioned whether the cell phone could form the basis for a robbery. CP 108-11 (jury question and response). Yet, Ms. Dawson's statements implicating Mr. Limpert regarded the count for which he was convicted—attempted assault. Thus, the admission of Ms. Dawson's statements that they went into the hotel room to get the cell phone (intent to rob) and that Ms. Hamilton said Mr. Limpert pulled a knife (attempted assault) was not harmless as to attempted assault in the second degree. RP 334-35.

Because the untainted evidence was not overwhelming, the State cannot assure this Court that, beyond a reasonable doubt, Mr. Limpert

would have been convicted of attempted assault if Ms. Dawson's incriminating statements had been properly excluded.

2. The prosecutor committed misconduct by analogizing to a highly-publicized, out-of-state robbery where the facts of that case were not in evidence at Mr. Limpert's trial .

Every prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and "to act impartially in the interest only of justice." *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *accord State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). Prosecutors must ensure justice is done and the accused receive a fair and impartial trial. *E.g.*, *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Prosecutorial misconduct violates a respondent's right to a fair trial where the prosecutor makes an improper statement that has a prejudicial effect. *E.g.*, *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009); *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). The misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *Sease*, 149 Wn. App. at 81.

A "prosecutor's duty is to ensure a verdict free of prejudice and based on reason." *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). Yet here the prosecutor relied on inflammatory argument to secure a conviction. He likened the case against Mr. Limpert to the successful armed robbery conviction of O.J. Simpson. The prosecutor argued,

> Please take a look at Instruction No. 15 when you get it. That's the definition for robbery and it talks about how the taking of personal property off of the person of another by use of force, threat of force, intimidation, that's a robbery. A great example is O.J. Simpson. He's in prison in Nevada right now for going into a motel room –

RP 420-21. The argument was cut off by Mr. Limpert's objection. RP 421. The court allowed the State to finish its analogy, but the prosecutor continued with the facts of this case. RP 421.

O.J. Simpson's criminal cases have been among the most widely followed and storied in recent American popular culture.[3] His acquittal for the murder of his ex-wife and her friend and subsequent conviction for armed robbery and kidnapping invoke intense emotions about the

[3] *E.g.*, Francis McCabe, "O.J. Simpson appeal denied by Nevada Supreme Court," Las Vegas Review-Journal (Oct. 22, 2010), *available at* http://www.reviewjournal.com/news/oj-simpson-appeal-denied-nevada-supreme-court; John C. Meringolo, The Media, the Jury and the High-Profile Defendant: A Defense Perspective on the Media Circus, 55 N.Y.L. School L. Rev. 981 (2010/2011).

criminal justice system, celebrities and race in our country.[4] The prosecutor's attempt to liken Mr. Limpert's case to O.J. Simpson's sought to play on the jury's passions and prejudices. But the law precludes the State from making inflammatory arguments that rely on the jury's passions and prejudices.

The argument is improper also because it relies on facts not in evidence. *Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). "A prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." *Id.* The jury received no evidence about O.J.'s Simpson's trial or conviction. The jury had no basis on which to compare Mr. Limpert's case to O.J. Simpson's. Presumably, the State did not want the jury to conduct a rational evaluation, however; the State used the analogy to pique the jury's emotional rancor. For this reason, the argument was improper.

Mr. Limpert's objection should have been sustained and the jury instructed on the argument's impropriety. Because the trial court overruled the objection, however, the jury was free to use this emotional basis to convict Mr. Limpert. The admission was not

[4] *E.g.*, *id.*; Earl Ofari Hutchinson, More Than a Sentence for O.J. Simpson," The Huffington Post (Dec. 4, 2008), *available at* http://www.huffingtonpost.com/earl-ofari-hutchinson/more-than-a-sentence-for_b_148418.html.

harmless in light of the weaknesses in the State's case: a largely incredible complaining witness, defense evidence that directly challenged with the State's case, and acquittals on the robbery and conspiracy charges.

3. The Court should strike the legal financial obligations because Mr. Limpert lacks the ability to pay.

a. The trial court found Mr. Limpert unable to pay legal costs, yet imposed legal financial obligations it believed to be mandatory.

At sentencing, the court imposed a $500 victim assessment; a $100 DNA collection fee, a $200 criminal filing fee, and a $100 DNA fee. CP 135. These fees bear interest at the 12 percent statutory interest rate. CP 136. The court stated at sentencing that it does not "believe in" fines and costs, but was imposing the victim impact fee, court costs, and DNA fee. RP 489. The court noted, "I have to impose them even though they've been imposed on Mr. Limpert multiple times before." *Id*.

The judgment contains a boilerplate statement that Mr. Limpert has the ability to pay. CP 131. But that finding was not discussed and lacks support. On the same day, the trial court found Mr. Limpert indigent for purposes of appeal. CP __ (Sub # 113, 114). The

presumption of indigency continues on appeal. RAP 15.2(f). Mr. Limpert's continued indigency is further supported by the attached Report as to Continued Indigency. Appendix; *see* Court of Appeals, Div. III, In re the Matter of Court Administration Order re: Request to Deny Cost Award (Jun. 10, 2016).

b. The relevant statutes and rules prohibit imposing LFOs on impoverished defendants; reading these provisions otherwise violates due process and the right to equal protection.

Our legislature mandates that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized this means "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); *accord State v. Duncan*, 185 Wn.2d 430, 2016 WL 1696698, *2-3 (Apr. 28, 2016) (remanding to trial court for resentencing with "proper consideration" of defendant's ability to pay).

Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wn.2d at 835. LFOs accrue interest at a

rate of 12 percent and can accrue collections fees; on average a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." *Id.* at 837. All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837; *Duncan*, 2016 WL 1696698 (recognizing the "ample and increasing evidence that unpayable LFOs 'imposed against indigent defendants' imposed significant burdens on offenders and our community" (quoting *Blazina*, 182 Wn.2d at 835-37)).

Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010. Further, it proves a detriment to society by increasing hardship and recidivism. *Blazina*, 182 Wn.2d at 837.

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay.

See RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(2)(h) (convicted criminal defendants "shall be liable" for a $200 fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 355 P.3d

1093, 1097 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[5]

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). *Curry*, however, addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and non-indigent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830

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

("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). Indeed, when listing the LFOs imposed on the two defendants at issue, the court cited one of the same LFOs Mr. Limpert challenges here, the criminal filing fee. *Id.* at 831 (discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition costs). *See id.* If the Court were limiting its holding to only certain of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

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

It would be particularly problematic to require Mr. Limpert to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants. *Cf. Blazina*, 182 Wn.2d at 857 (noting significant disparities in administration of LFOs across counties). This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, 183 Wn.2d at 712 ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because "the error, if permitted to stand, would create inconsistent sentences for the same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties); RCW 9.94A.010(3) (stating that a sentence should "[b]e commensurate with the punishment imposed on others committing similar offenses").

General Rule 34, which was adopted at the end of 2010, also supports Mr. Limpert's position. That rule provides in part, "Any

individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

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

Our Supreme Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Jafar*, 177 Wn.2d at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability

to pay those fees." *Id.* at 529. Given Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837; CP 49.

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

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal

Protection problems also arise from the arbitrarily disparate handling of the "criminal filing fee" across counties. *See Jafar*, 177 Wn.2d at 528-29; *Blazina*, 182 Wn.2d at 857.

The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that "principles of due process or equal protection" guided the court's analysis and recognizing that failure to require waiver of fees for indigent litigants "could lead to inconsistent results and disparate treatment of similarly situated individuals"). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

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

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because "incarceration would result only if failure to pay was willful" and not due to indigence. *Id.* at 241. This assumption was not borne out. As significant studies post-dating *Blank* recognize, indigent defendants in Washington are regularly imprisoned because

they are too poor to pay LFOs. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay); *see Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).[6] The risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

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

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

impoverished people like him is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.[7]

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

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. The trial court here plainly felt constrained to apply these costs and fees against Mr. Limpert. RP 489. In *Blazina*, the Supreme Court exercised discretionary review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand" it. 182 Wn.2d at 835.

[7] The other divisions have recently held that despite the equal hardships imposed by "mandatory" and "discretionary" LFOs, the above statutory interpretation and constitutional grounds were insufficient to reverse the imposition of "mandatory fees." *State v. Mathers*, 193 Wn. App. 913, __ P.3d __ (2016); *State v. Lewis*, No. 72637-4-I, slip op. at 4-10 (June 27, 2016); *State v. Shelton*, 72848-2-I, slip op. at 1 (June 20, 2016). For the reasons set forth above, this Court should not follow these decisions.

The Court re-emphasized this holding in *Duncan*, 2016 WL 1696698, at *2-3.

This case raises the same concern. *See also Blazina*, 182 Wn.2d at 841 (Fairhurst, J. concurring) (arguing RAP 1.2(a), "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits," counsels for consideration of the LFO issue for the first time on appeal).

Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs. *Accord Duncan*, 2016 WL 1696698, at *2-3. Because the record demonstrates Mr. Limpert's indigence, this Court should remand with instructions to strike legal financial obligations, and strike the boilerplate finding that Mr. Limpert has the ability to pay.

Finally, in the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5. As set forth above, the imposition of costs on an indigent defendant is contrary to the statutes and constitution. The presumption of indigence continues on appeal pursuant to RAP 15.2(f). *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Mr. Limpert's Report as to Continued Indigency, attached

at the appendix, proves this verity. The law and facts call for an exercise of this Court's discretion not to impose appellate costs against Mr. Limpert. RAP 1.2(a), (c); RAP 2.5; *Blazina*, 182 Wn.2d at 835; *id.* at 841 (Fairhurst, J. concurring).

F. CONCLUSION

The jury received evidence—Ms. Dawson's out-of-court statements implicating Mr. Limpert—and argument—the prosecutor's play on the jury's passions and prejudices with facts not in the record—that was improperly admitted. Because it is likely these errors impacted the State's relatively weak case against Mr. Limpert, the conviction should be reversed.

DATED this 25th day of July, 2016.

Respectfully submitted,

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APPENDIX

REPORT AS TO CONTINUED INDIGENCY

(in support of motion or request that the court exercise discretion not to award costs on appeal)

Please fill out this report to the best of your ability. While you are not required to answer all of the questions, complete information will help the court determine whether to deny costs on appeal to the State, should it prevail.

I, NICHOLAS ADAM LUPER J certify as follows:

1. That I own:
   - (✓) a. No real property
   - ( ) b. Real property valued at $_____.
   - ( ) c. Real property valued at $_____, on which I am making monthly payments of $_____ for the next _____ months/years (circle one).

2. That I own:
   - (✓) a. No personal property other than my personal effects
   - ( ) b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at $_____.
   - ( ) c. Personal property valued at $_____, on which I am making monthly payments of $_____ for the next _____ months/years (circle one).

3. That I have the following income:
   - (✓) a. No income from any source.
   - ( ) b. Income from employment: $_____ per month.
   - ( ) b. Income of $_____ per month from the following public benefits:

☐ Basic Food (SNAP) ☐ SSI ☐ Medicaid ☐ Pregnant Women Assistance Benefits

☐ Poverty-Related Veterans' Benefits ☐ Temporary Assistance for Needy Families

☐ Refugee Settlement Benefits ☐ Aged, Blind or Disabled Assistance Program

☐ Other: _____

4. That I have:
   - ( ) a. The following debts outstanding:

	Approximate amount owed:
Credit cards, personal loans, or other installment debt:	$?
Legal financial obligations (LFOs):	$?
Medical care debt:	$?
Child support arrears:	$ NOT NO MORE
Other debt:	$?

Approximate total monthly debt payments: $_____

( ) b. No debts.

5. That I am without other means to pay costs if the State prevails on appeal and desire that the court exercise discretion to deny costs.

6. That I can pay the following amount toward costs if awarded to the State: $ 0 .

7. That I am 30 years of age at the time of this declaration.

8. That the highest level of education I have completed is: 12.

9. That I have held the following jobs over the past 3 years:

Employer/job title	Hours per week	Pay per week	Months at job
NONE			

10. That I have received the following job training over the past three years: None

11. That I have the following mental or physical disabilities that may interfere with my ability to secure future employment: Yes - I used to get GAU from State I'm institutionalized.

12. That I am financially responsible for the following dependents (children, spouse, parent, etc.): None

I, Nick Limpert, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

7-11-16 — Nick Limpert

Date and Place — Signature of (Defendant) (Respondent) (Petitioner)

MCC.TRU.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 33909-2-III
	)	
NICHOLAS LIMPERT,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN O'BRIEN [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] NICHOLAS LIMPERT 338607 MCC-TWIN RIVERS UNIT PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF JULY, 2016.

X_____

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