Supreme Court No.: 94573-0
Court of Appeals No.: 74537-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LATOUSHA YOUNG,

Petitioner.

PETITION FOR REVIEW

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

Marla L. Zink
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Latousha Young, petitioner here and appellant below, requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals in *State v. Young*, No. 74537-9-I, filed April 24, 2017. A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A person who is licensed, invited, or otherwise privileged to enter a building cannot, as a matter of law, be convicted of burglary for entering that building. The State charged Latousha Young with first-degree burglary for entering her mother's home, but her mother gave her blanket permission to visit. At trial, the prosecutor argued Latousha's entry through a window constituted burglary. Where Latousha Young was licensed, invited, or otherwise privileged to enter her mother's house, should the Court grant review to determine whether entering through a window transforms the entry into the crime of burglary? RAP 13.4(b)(3), (4).

2. The Court of Appeals case, *State v. Sanchez*, 166 Wn. App. 304, 271 P.3d 264 (2012), holds "that the consent of a protected person cannot override a court order excluding a person from the residence." The trial court's instruction six provided, "A person who is prohibited by court order from entering a premise cannot be licensed, invited, or otherwise

privileged to so enter or remain on the premise by an occupant of the premise." CP 67. Should the Court grant review to determine whether instruction six is a misstatement of the law because it overstates the case law, transforming residence to premise and removing the protected person as the actor, focusing instead on the occupant of a premise? RAP 13.4(b)(2), (3), (4).

3. Whether the Court should grant review where the trial court imposed legal financial obligations (LFOs) with accruing interest contemporaneous to finding Latousha Young indigent and without considering her ability to pay, in conflict with *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015) and RCW 10.01.160? RAP 13.4(b)(1), (3), (4).

C. STATEMENT OF THE CASE

Latousha Young has unrestricted permission to enter and visit her mother, Janice Young's, home at 21329 2nd Drive SE in Bothell, Washington. RP (12/14/15) 54, 67. Janice[1] resides there with her partner and her partner's minor daughter, J.T. RP (12/14/15) 42. Janice shares her master bedroom with her partner, and J.T. lives in the second

[1] Because Latousha Young and her mother Janice Young share the same last name, first names are used for clarity. The protected party, Alexis S., is also referred to only by first name to maintain her privacy.

bedroom. RP (12/14/15) 42-43, 56. Latousha comes over "quite often" to the house for visits. RP (12/14/15) 54, 67.

Latousha Young's partner, Alexis S., stayed in Janice's home on a temporary basis including on the night of October 4, 2015.[2] Alexis and her young son shared the bedroom with J.T. when they stayed at the house. RP (12/14/15) 43, 58, 72. A no-contact order prohibited Latousha from entering, remaining, or coming within 1,000 feet of Alexis's residence, school, workplace, or person. Exhibit 23. On October 6, 2015, Alexis signed a lease on a new apartment. RP (12/14/15) 77.

Latousha Young was very intoxicated on the night of October 4, 2015. RP (12/14/15) 67-68, 108-09. She entered her mother's home by breaking the window near the front door, went upstairs to J.T.'s bedroom, where Alexis was sleeping, and hit Alexis in the head with both fists. RP (12/14/15) 59-61, 68. Janice Young called the police, who found Latousha lying in the backyard. RP (12/14/15) 60-62, 112-13.

The State charged Latousha Young with first-degree burglary for unlawfully entering or remaining "in the building of Janice Young, located

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[2] At trial, witnesses testified about the night of October 4 preceding the events that would have occurred in the early morning of October 5 as well as the early morning of October 4. RP (12/14/15) 44-45, 58, 85-86. Because the exact timing is not critical, this petition simply uses the night of October 4.

at 21329 2nd Drive SE, Bothell, WA" and felony violation of a no-contact order. CP 128-29 (amended information), 143-44 (information). A jury convicted her as charged and the court imposed costs with accruing interest along with a prison sentence. CP 17-30, 54-57. The Court of Appeals affirmed. Slip Op. at Appendix.

D. ARGUMENT

1. **Where Latousha Young was licensed, invited, or otherwise privileged to enter her mother's house, the Court should grant review and hold entering through a window cannot transform the entry into the crime of burglary.**

a. Latousha was permitted to be in her mother's home; at most she was not licensed, invited or otherwise privileged to enter the bedroom in which Alexis was sleeping.

The evidence at trial was clear that Latousha had permission to be inside her mother's home. RP (12/14/15) 67. Latousha is "welcome at [her mother's] house"; "she doesn't have to call to ask for permission to come over to visit." *Id.*; *accord* RP (12/14/15) 77. In fact, Latousha visited her mother's house many times over the five-and-a-half years her mother lived there. RP (12/14/15) 54, 67. Although Latousha did not have her mother's permission to break through the entryway window, the act of breaking that window was perhaps malicious mischief but was not burglary. RP (12/14/15) 66-67, 155; *see* RCW 9A.52.020; RCW 9A.48.070, .-080, -.090; *see State v. Jackson*, 112 Wn.2d 867, 876, 774

P.2d 1211 (1989) (discussing distinction between burglary and malicious mischief where conduct involved kicking a window of a building); *State v. VanValkenburgh*, 70 Wn. App. 812, 856 P.2d 407 (1993) (sufficient evidence of malicious mischief for breaking building windows); *State v. Fisher*, 40 Wn. App. 888, 892, 700 P.2d 1173 (1985) (sufficient evidence of malicious mischief for shattering window of residence).

While a no-contact order prohibited certain contact between Latousha and Alexis, it did not prohibit Latousha's entry into Janice Young's home. The no-contact order prohibited Latousha from entering, remaining, or coming within 1,000 feet of Alexis's residence, school, workplace, or person. Exhibit 23. The State did not charge or prosecute based on Alexis's residence but upon Janice Young's home at 21329 2nd Drive SE in Bothell. Alexis's residence was not Janice Young's house. Alexis was a temporary guest sharing a bedroom with Janice's permanent resident, twelve-year-old J.T.

Janice Young's step-daughter, J.T. occupied the smaller room in Janice's home. RP (12/14/15) 42, 56. On October 4, Alexis and her son were temporarily staying in the bedroom of J.T. RP (12/14/15) 43, 56, 58.

Alexis did not occupy the entire home. When Alexis stayed, she stayed in J.T.'s bedroom. RP (12/14/15) 58. J.T. shared her bedroom with Alexis and Alexis's son. RP (12/14/15) 43, 72; *see id.* at 50, 51 (J.T.

describes room as "my bedroom"). Janice, as the property owner, and her partner shared the master bedroom. RP (12/14/15) 43, 56. Janice Young controlled the other areas of the house as well. RP (12/14/15) 56 (Janice designated the bottom level a media room; describing layout of her home).

Janice Young did not consider Alexis to be a resident in her home. RP (12/14/15) 56. Janice Young testified she shared her home with her partner and her daughter, J.T. RP (12/14/15) 56. Alexis stayed with them "off and on a couple of times." RP (12/14/15) 58. As of October 4, Alexis had shared J.T.'s room for "about a month," and she signed a lease on her own apartment two days later. RP (12/14/15) 72, 77.

b. Her mother's permission to enter was not in conflict with the protection order between Latousha Young and Alexis.

Janice Young's license to her daughter Latousha was not in conflict with the no-contact order between Latousha and Alexis. A license to enter can be impliedly limited in scope to distinguish among portions of a premise. *State v. Collins*, 110 Wn.2d 253, 254, 258, 261-62, 751 P.2d 837 (1988) ("We hold that, in some cases, depending on the actual facts of the case, a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case."). While Alexis was occupying part of J.T.'s bedroom, Janice's license to allow her daughter to enter Janice's home still applied to the remainder of the house.

Janice controlled the home and Alexis had no authority or control over any part other than possibly the shared bedroom.

The no-contact order did not bar Latousha from entering 21329 2nd Drive SE, and Janice Young explicitly permitted it. The only portion of the home that Latousha was not necessarily privileged to enter was the bedroom in which Alexis was staying, due to the no-contact order.

This is consistent with both *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007), and *State v. Sanchez*, 166 Wn. App. 304, 271 P.3d 264 (2012). In *Wilson*, a no-contact order prohibited the defendant from various forms of being in personal contact with his partner but did not bar him from his residence, which he co-possessed and co-habited with the protected party. 136 Wn. App. at 604-05, 607. This Court held that "in determining whether an offender's presence is unlawful [for purposes of burglary], courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises." *Id.* at 606. While the no-contact order prohibited contact between Wilson and his cohabitant, it did not prohibit Wilson's entry into his home. *Id.* at 604, 611. Because Wilson was the co-possessor of the home and present with his partner's consent, he was licensed to enter and the burglary conviction could not stand "as a matter of law." *Id.* at 607-09, 611-12. Wilson's privilege to

enter the property, of course, did not excuse his unlawful contact with the protected party, which violated the no-contact order.

In *Sanchez*, this Court declined to expand *Wilson* to allow a protected party to license the defendant to enter her home when that entry is explicitly in violation of a court order. 166 Wn. App. at 305. In that case, a no-contact order excluded the defendant from his ex-wife's residence, within 300 feet of her, and from her place of work. *Id.* at 306, 310. He entered her home anyway and insisted on sexual relations. *Id.* at 306. The court held that a protected-party cannot override a no-contact order by inviting the defendant onto her property where the no-contact order expressly prohibits such contact. *Id.* at 305, 307. As policy, the court recognized its holding "removes any incentive an abuser may have to pressure the protected person to consent to his presence in violation of the order." *Id.* at 311.

Sanchez is distinct from *Wilson* both because the no-contact order in *Wilson* did not exclude Wilson from the protected party's residence as it did in *Sanchez* and because Wilson had a possessory interest in the property, which Sanchez did not. *Id.* at 310.

Here, Alexis was the protected party but not the property owner. At most, Alexis was a temporary resident or guest in a bedroom in Janice's house. By inviting Alexis to share J.T.'s bedroom on a temporary

basis, Janice did not forfeit the right to license Latousha to enter other portions of her home. Recognizing that Janice could license Latousha to enter her home does not run afoul of the policy concerns addressed in *Sanchez*, 166 Wn. App. at 311 (policy concern that abuser would pressure protected person to consent to contact). Meanwhile, recognizing the property owner's right to license others to lawfully enter her property comports with the policy addressed in *Wilson*, 136 Wn. App. at 608-09.

Because the State's burglary charge and proof at trial focused exclusively on an illegal entry through the exterior window of Janice's home, and yet merely entering her mother's home was not unlawful, the jury necessarily found Latousha guilty on an improper basis. The Court should grant review because although the burglary conviction cannot stand as a matter of law, the Court of Appeals affirmed. *Compare Wilson*, 136 Wn. App. at 612 *with* Slip Op. at 3-5.

2. The Court should grant review to determine whether instruction six is a misstatement of the law because it overstates Court of Appeals case law, by changing residence to premise and focusing on the occupant of a premise rather than the protected person.

On the State's request, the Court instructed the jury, "A person who is prohibited by court order from entering a premise cannot be licensed, invited, or otherwise privileged to so enter or remain on the

premise by an occupant of the premise." CP 67; CP 158; RP (12/14/15) 142-45.

This instruction misstated the law. *See State v. Brush*, 183 Wn.2d 550, 557-58, 353 P.3d 213 (2015) (instruction misstates the law where it inaccurately interprets case law). As discussed, *Sanchez* held "that the consent of a protected person cannot override a court order excluding a person from the residence." 166 Wn. App. at 310. The court's instruction turns *Sanchez* on its head and expands it. Instead of instructing the jury that a protected person cannot override a court order excluding a person from the residence, the court instructed the jury that no occupant can privilege, invite or license another party from entering a premise from which she is prohibited by court order. *Compare Sanchez*, 166 Wn. App. at 310 *with* CP 67; *see Brush*, 183 Wn.2d at 558 ("legal definitions should not be fashioned out of courts' findings regarding legal sufficiency"). The *Sanchez* court did not opine on the authority of property owners, other than the protected party, to license persons to enter their property. *Wilson* is closer on this issue and reaches a different conclusion. The *Wilson* court recognized the rights of a property owner to enter her own property and to license entry to others. *Sanchez* is also not conclusive for purposes of the court's instructions here because the *Sanchez* court did not discuss

the difference between a residence, a building, a dwelling, or a premise, particularly as applies to the situation of a houseguest.

Because the trial court not only misstated the law but resolved factual issues in its instruction, the instruction is an unconstitutional comment on the evidence. *Brush*, 183 Wn.2d at 556-57, 558-59. Article IV, section 16 does not allow judges to "charge juries with respect to matters of fact, nor comment thereon." Const. art. IV, § 16. An instruction that "essentially resolve[s] a contested factual issue . . . constitute[s] an improper comment on the evidence and effectively relieve[s] the prosecution of its burden." *Brush*, 183 Wn.2d at 557, 559.

It should have been an open question for the jury whether Alexis's residence was limited to the bedroom she shared or constituted the entire home even if she did not control it. But instruction six took this issue away from the jury. The instruction also presumes Latousha Young was prohibited by court order from entering the "premise" of Janice's home. But as discussed, that was at least an open question. She was only barred from Alexis's residence, which is not necessarily the same as the entire premise under these unique circumstances. Because the instruction resolved disputed issues, it lessened the State's burden and constituted a judicial comment on the evidence. *Brush*, 183 Wn.2d at 559.

The comment on the evidence is presumed prejudicial. *Id.* The State cannot overcome the presumption here because a reasonable juror could find Alexis's residence did not encompass the entire home and the testimony was clear that Latousha was otherwise authorized to enter her mother's home. Further, the State depended upon the court's erroneous instruction in closing argument. RP (12/14/15) 161-62. The jury then deliberated for just an hour. *See* CP 178. The State cannot show that "no prejudice could have resulted" from the improper instruction. *See Brush*, 183 Wn.2d at 559-60.

The Court should grant review to determine whether the trial court's instruction misstated Court of Appeals case law and constituted an unconstitutional comment on the evidence.

3. This Court should grant review to determine whether the sentencing court must find an ability to pay prior to imposing a DNA fee and a victim assessment fee with interest accruing immediately upon an indigent person.

Latousha was unemployed and has significant debt. CP 53. She struggles with sobriety. *See* CP 21, 53. And she is serving almost four years in prison to be followed by 18 months community custody. CP 17-

30. Latousha was indigent at trial and the sentencing court found her indigent for purposes of appeal. CP 145-49.

At sentencing, the court did not consider her ability to pay prior to imposing a $500 victim assessment and a $100 DNA collection fee. CP 24. The imposed fees bear interest at the 12 percent statutory interest rate. CP 25. Yet, the court waived all other costs, presuming these imposed costs were "the mandatory ones." RP (12/23/15) 8, 13; CP 24.

On appeal Latousha Young argued (1) the imposition of these legal financial obligations without inquiring into her ability to pay was unlawful under the statutes and this Court's holding in *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015) and, alternatively, (2) the statutes are unconstitutional if they allow the imposition of $600 in costs plus interest without requiring the sentencing court to determine whether a person has the ability to pay those LFOs. Op. Br. at 15-25; Reply Br. at 5-7. The Court of Appeals affirmed. Slip Op. at 8-10. This Court should grant review because the lower court's opinion conflicts with *Blazina* and raises substantial issues of public import where the imposition of LFOs upon indigent defendants works a disservice on rehabilitation and affects an entire class of offenders. RAP 13.4(b)(1), (4).

The 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). This Court recently held "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." *Blazina*, 182 Wn.2d at 830.

Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835. Continuing LFO obligations cause 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. *Id.* at 837. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The 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"); *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.

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, 712-13, 355 P.3d 1093 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[3]

The Court should make clear that *Blazina* supersedes *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992) to the extent they are inconsistent.[4] The Court in *Blazina* repeatedly described its holding as

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[3] 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).

[4] Almost 25 years ago, this Court apparently assumed that the statute mandated imposition of the penalty on indigent and non-indigent

applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs.").

General Rule 34, also supports consideration of ability to pay.[5] This Court has 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 v. Webb*, 177 Wn.2d 520, 522-23, 527-30, 303 P.3d 1042 (2013). Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply in criminal cases.

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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." *Curry*, 118 Wn.2d 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.

[5] 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).

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).

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.

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 may have a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on 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.

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.[6]

These constitutional implications also warrant this Court's review.

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[6] *See, e.g.*, 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), *available at* http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf; *Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).

RAP 13.4(b)(3).

E. CONCLUSION

The Court should grant review because the jury necessarily found Latousha guilty on an improper basis where merely entering her mother's home was not unlawful, because the court's instruction misstates the law by overstating case law and improperly comments on the evidence, and because the imposition of LFOs plus interest against indigent defendants contravenes the courts' statutory authority, this Court's opinion in *Blazina*, and the state and federal constitutions.

DATED this 22nd day of May, 2017.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LATOUSHA RANEE YOUNG, Appellant.	No. 74537-9-I DIVISION ONE UNPUBLISHED OPINION FILED: April 24, 2017

LEACH, J. — A jury convicted Latousha Young of first degree burglary and violation of a no-contact order after she broke into her mother's home and assaulted her partner. Young appeals her burglary conviction. She challenges the sufficiency of the evidence to prove that she unlawfully entered or remained in the home. She also claims the trial court commented on the evidence with its instruction on unlawful entry. The State presented enough evidence to persuade a reasonable juror that Young did not have permission to enter or remain in the home and that she entered in violation of a no-contact order. And the trial court's instruction to the jury did not misstate the law or resolve any factual questions. So we affirm Young's burglary conviction.

FACTS

In August 2015, Bothell Municipal Court entered a postconviction domestic violence no-contact order, prohibiting Young from having contact with her partner,

Alexis Stewart. Specifically, the order barred Young from coming within 1,000 feet of Stewart's residence, school, workplace, or person.

On October 4, 2015, Stewart had been living in the home of Young's mother, Janice Young, for about a month.[1] Stewart and her young child slept in the bedroom of Janice's partner's 12-year-old daughter.

About 1:00 a.m. on October 4, Janice awoke to a loud bang. She went to investigate. She saw Young break a window next to the front door and enter the home. Young went upstairs to the bedroom where Stewart was staying. Janice testified that she told Young not to do "this" and warned her that she would call the police. Janice claims she grabbed Young to prevent her from getting into the room but then let her go so she could call 911.

Young jumped on Stewart and began hitting her. Janice called 911, and Young fled outside and hid in the bushes in the backyard where the police found and arrested her.

The State charged Young with first degree burglary and violation of a no-contact order.[2] After the State presented its evidence, the defense moved the court to dismiss the burglary charge, asserting that no rational trier of fact could find that Young unlawfully entered or remained on the premises. The court denied the motion. It found Janice's testimony about Young not having permission to

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[1] To avoid confusion, we refer to Janice Young by her first name.

[2] The State also charged Young with third degree assault, alleging that she assaulted a law enforcement officer, but this charge was not tried in this proceeding.

break through the window sufficient to raise a question of fact as to whether Young had permission to enter the home.

The jury convicted Young of both charges. She appeals her burglary conviction.

DISCUSSION

Dismissal of Burglary Conviction

First, Young claims that the State's evidence is insufficient as a matter of law to prove an essential element of first degree burglary.

In reviewing a challenge to the sufficiency of the evidence, we determine whether a rational trier of fact could find the elements of the crime beyond a reasonable doubt.[3] We view all facts and draw reasonable inferences in the light most favorable to the State.[4]

To prove first degree burglary, the State must show that Young entered or remained unlawfully in a building with the intent to commit a crime, and while in the building or in immediate flight therefrom, she or another participant in the crime was armed with a deadly weapon or assaulted any person.[5] Young contends that the State has not shown she entered or remained unlawfully on the property. We disagree.

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[3] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

[4] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[5] RCW 9A.52.020(1).

"A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."[6] In addition, a court order can serve as the basis for the unlawful entry element.[7] Here, the State introduced evidence that Young did not have permission to enter the premises and that she entered in violation of a no-contact order. A rational trier of fact could find her entry was unlawful for either reason.

Young claims her entry was not unlawful because Janice gave her permission to enter. Janice testified that Young was welcome to visit her home and frequently did. But she also said that Young did not have permission to break through the window. In addition, Janice restrained Young from entering the bedroom and called the police. From these facts, a jury could rationally conclude that she did not have permission either to enter the home or to remain at that time.

Even if Young had Janice's permission, her entry was unlawful because it violated a no-contact order. Young asserts that despite the court order, Janice's permission gave her license to enter the premises. An individual's permission cannot override a court order.[8]

Young likens this case to State v. Wilson.[9] In that case, the jury convicted Wilson of burglary when he assaulted his girlfriend in their jointly shared residence in violation of a court order.[10] The trial court properly dismissed the burglary

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[6] Former RCW 9A.52.010(5) (2011).

[7] State v. Sanchez, 166 Wn. App. 304, 310, 271 P.3d 264 (2012); State v. Kilponen, 47 Wn. App. 912, 919, 737 P.2d 1024 (1987).

[8] Sanchez, 166 Wn. App. at 311.

[9] 136 Wn. App. 596, 150 P.3d 144 (2007).

[10] Wilson, 136 Wn. App. at 602.

conviction because, although Wilson's conduct inside the home was unlawful, his act of entering and remaining inside the residence was not unlawful because the order did not exclude him from the residence.[11] We distinguish this case from Wilson because the protective order expressly bars Young from coming within 1,000 feet of Stewart's residence or person. Thus, unlike Wilson, the no-contact order contained express provisions that made Young's entry unlawful.

Young contends that she did not enter the home in violation of the no-contact order because Stewart was a guest, not a resident, at Janice's home. We disagree that as a matter of law, Janice's home was not Stewart's residence. Before October 4, Stewart had been living at Janice's home for a month. The record contains no evidence that Stewart lived anywhere else during this month. Two days after the assault, Stewart signed a lease on a new apartment. A jury could conclude Janice's home was Stewart's residence when the assault occurred.

A jury could also conclude that when she entered the home she violated the no-contact order by coming within 1,000 feet of Stewart's person. Drawing all reasonable inferences in favor of the State, the description of the home indicates that when Young entered the house, she was within 1,000 feet of Stewart.

In sum, the State provided evidence that Young did not have permission to enter the premises and that Young violated a no-contact order when she broke into the home. Either is sufficient for the jury to find unlawful entry. Sufficient evidence supports the unlawful entry element of the burglary charge.

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[11] Wilson, 136 Wn. App. at 604-05.

Jury instruction

Next, Young claims the court improperly instructed the jury. We review alleged errors in jury instruction de novo.[12]

Young challenges the following instruction:

> A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.
>
> A person who is prohibited by court order from entering a premise[s] cannot be licensed, invited, or otherwise privileged to so enter or remain on the premise[s] by an occupant of the premise[s].

Young contends that this instruction misstates the law and is an improper judicial comment on the evidence. We disagree.

The Washington Constitution forbids judges from commenting on the evidence presented at trial.[13] A jury instruction that essentially resolves a contested factual issue is an improper comment on the evidence.[14] A jury instruction that does no more than accurately state the law about an issue, however, is not a comment on the evidence by the trial judge.[15]

Young first contends that the court's instruction inaccurately states the law because it is broader than the court's holding in State v. Sanchez.[16] Sanchez states "that the consent of a protected person cannot override a court order excluding a person from the residence."[17] But Young incorrectly asserts that

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[12] State v. Woods, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001).
[13] WASH. CONST. art. IV, § 16; Woods, 143 Wn.2d at 590-91.
[14] State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).
[15] Woods, 143 Wn.2d at 591.
[16] 166 Wn. App. 304, 271 P.3d 264 (2012).
[17] Sanchez, 166 Wn. App. at 310.

Sanchez limited its holding to the consent of protected persons. Sanchez repeatedly suggests that the true issue is whether a conflict exists between a court order and a property possessor and held that "only a judge can alter a court order."[18] The trial court properly interpreted Sanchez's holding about a possessor of the premises to mean that an occupant cannot override a court order.

Young also contends that the instruction improperly resolves an important factual issue. "[L]egal definitions should not be fashioned out of courts' findings regarding legal sufficiency."[19] Young asserts that the instruction prevented the jury from considering whether and to what extent the house was Stewart's residence and, thus, whether the court order barred Young from entering the home. But the instruction did not define premises or state that the court order barred Young's entry. The instructions left these questions to the jury to decide.

Because the instruction accurately stated the law and did not resolve any factual issues, the trial court did not improperly instruct the jury.

Statement of Additional Grounds

Young also filed a statement of additional grounds for review. Young's first additional ground simply restates certain facts of the case and appears to address the question of Stewart's residence. We have already resolved this issue and need not discuss it further.

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[18] Sanchez, 166 Wn. App. at 305, 311-12.
[19] Brush, 183 Wn.2d at 558.

Young's second additional ground claims that the trial court's decision to address a separate judicial issue related to a civil complaint that Young had filed prejudiced her criminal case. Young does not identify this civil complaint or explain how she was prejudiced. Her citation to the record does not reference any other proceeding. Young's third additional ground appears to dispute the testimony of an arresting officer and criticize actions of the police but does not identify any reviewable error. Because these grounds do not inform the court of the "nature and occurrence of alleged errors" and relate to matters outside the record, we do not consider them.[20]

Legal Financial Obligations

Next, Young challenges for the first time on appeal the court's decision to impose $600 in legal financial obligations (LFOs). "Unpreserved LFO errors do not command review as a matter of right."[21] However, RAP 2.5(a) grants the court discretion to consider a claim of error raised for the first time in the appellate court. We exercise our discretion to consider the issue presented and affirm the trial court's award of costs.

The trial court imposed a $100 deoxyribonucleic acid (DNA) testing fee and a $500 victim penalty assessment. Both the DNA fee and victim penalty

[20] RAP 10.10(c).
[21] State v. Blazina, 182 Wn.2d 827, 833, 334 P.3d 680 (2015).

assessment are mandatory.[22] We have repeatedly held that a trial court must impose mandatory LFOs without considering the defendant's ability to pay.[23]

Young asserts that the plain language of RCW 10.01.160(3) requires the court to consider ability to pay for both discretionary and mandatory fees. The statute provides,

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.[24]

But we have previously held that "unlike discretionary legal financial obligations, the legislature unequivocally requires imposition of the mandatory DNA fee and the mandatory victim penalty assessment at sentencing without regard to finding the ability to pay."[25]

Young also claims that imposing mandatory LFOs on indigent defendants violates substantive due process and that to allow mandatory fees to be waived for civil litigants, but not for criminal defendants, violates equal protection.[26]

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[22] RCW 7.68.035(1)(a) (victim assessment); RCW 43.43.7541 (DNA testing fee); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013); State v. Lundy, 176 Wn. App. 96, 103, 308 P.3d 755 (2013).

[23] State v. Shelton, 194 Wn. App. 660, 674-75, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002 (2017); Lundy, 176 Wn. App. at 102.

[24] RCW 10.01.160(3).

[25] Shelton, 194 Wn. App. at 674-75.

[26] See GR 34(a); Jafar v. Webb, 177 Wn.2d 520, 523, 303 P.3d 1042 (2013).

Division Two considered and rejected these same arguments in State v. Mathers.[27] We follow Mathers and affirm the LFOs imposed.

Appellate Costs

Finally, Young asks the court to deny the State appellate costs based on her indigency. We generally award appellate costs to the substantially prevailing party on review. However, when a trial court makes a finding of indigency, that finding continues throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."[28] Here, the trial court found Young was indigent. If the State has evidence indicating significant improvement in Young's financial circumstances since the trial court's finding, it may file a motion for costs with the commissioner.

CONCLUSION

We affirm.

Leach, J.

WE CONCUR:

[27] 193 Wn. App. 913, 924-29, 376 P.3d 1163, review denied, 186 Wn.2d 1015 (2016).

[28] RAP 14.2.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74537-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Mara Rozzano, DPA
[mrozzano@co.snohomish.wa.us]
Snohomish County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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