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NO. 70928-3-1

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

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STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ARNOLD,

Appellant.

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

The Honorable Charles Snyder, Judge

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BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS CIVIL  
STATE OF WASHINGTON  
JAN 15 2014 4:25 PM

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial where the trial court instructed the jury on an uncharged alternative means of committing the offense.

2. The trial court erred when it ordered appellant to pay discretionary legal financial obligations (LFOs).

Issues Pertaining to Assignments of Error

1. Whether the appellant was deprived of his right to a fair trial when the trial court erroneously instructed the jury on an uncharged alternative means of committing robbery in the first degree?

2. Whether the court erred in imposing discretionary LFOs as part of appellant's sentenced when it failed to comply with RCW 10.01.160(3)?

B. STATEMENT OF THE CASE

1. Procedural History

On July 8, 2013, the Whatcom County prosecutor charged appellant Alexander Arnold with one count of "Robbery in The First Degree While Armed with a Deadly Weapon."<sup>1</sup> CP 2-3. On September 11, 2013, the information was amended, merely

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<sup>1</sup> More details about the charging document are provided below.

changing the date of the offense by one day. CP 6-7. A jury found Arnold guilty of first degree robbery, but answered “no” when asked by special verdict whether Arnold was armed with a deadly weapon. CP 43-44. Arnold, who had no criminal history, was sentenced to the low end of the standard range – 31 months. CP 46-57. As a condition of his sentence, Arnold was also ordered to pay the following discretionary LFOs: \$600 for appointed counsel; and \$250 for jury demand fee. CP 49.

2. Substantive Facts

Around 11:00 p.m. on July 2, 2013, Adriana McDowell stopped at a gas station in a rural part of Whatcom County. 2RP 13, 26, 128.<sup>2</sup> After she putting gas in her truck, she walked around the passenger side and began to clean trash off the floorboard. 2RP 27. While she bent down, Arnold came up behind her. 2RP 29.

McDowell said Arnold grabbed her by the neck and threw her to the ground. 2RP 29. She claimed Arnold had a foot-long knife in his hand and asked for money. 2RP 30-31, 42. She claimed she gave him \$64 dollars. 2RP 33. Arnold reportedly then

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<sup>2</sup> The transcripts are referred to as follows: 1RP (9-9-13); 2RP (9-10-13, 9-11-13, 9-12-13); and 3RP (9-17-13, 10-15-13).

asked for her phone. 2RP 33. McDowell testified that after she gave Arnold the phone, he told her to drive away and not look back or he would kill her. 2RP 34.

Arnold admitted he robbed McDowell but recalled the incident differently. 2RP 196-97. Arnold said he came up behind McDowell and put his hand on her shoulder. 2RP 197. Startled, McDowell fell backward on the ground. 2RP 197. Arnold asked for money but received only \$4.00. 1RP 39; 2RP 196. He then took McDowell's phone to prevent her from calling the police. 1RP 148. He merely told McDowell to drive away thereafter. 2RP 196.

Arnold consistently denied having a knife, putting his arm around McDowell's neck, or threatening to kill her. 1RP 39; 2RP 148, 159, 208, 214, 217, 228.

After leaving the gas station, McDowell drove to the next gas station approximately just up the road, where she used the phone to call police. 2RP 43, 63. Whatcom County Sheriff deputies responded and took her statement. 2RP 63. Upon learning that a cell phone was stolen, deputies initiated a "ping" through the cell phone company. 2RP 73, 112, 125.

Around midnight, the phone was pinged to a property just 1.25 miles from where the robbery took place. 1RP 22; 2RP 76.

Deputy Jason Nyhus responded. 1RP 17. Arnold was staying at the home on the property, which belonged to his uncle. 2RP 130-31. Nyhus vaguely explained why he was there. 1RP 42-43. Arnold was cooperative and told Nyhus he had McDowell's phone in his backpack and consented to a search. 1RP 23, 25, 39; 2RP 131, 167, 199. Nyhus found McDowell's cell phone, clothing consistent with what McDowell described, and \$4.00 in the backpack. 1RP 23-25. 2RP 131-138, 142. They did not find a knife consistent with that described by McDowell. 1RP 39; 2RP 140. Deputies then searched Arnold's bedroom but did not find any more money or a knife. 2RP 144, 200.

McDowell was taken to the house and identified Arnold as the person who robbed her. 2RP 45. At the police station, Arnold provided a written statement admitting he took \$4.00 and the cell phone from McDowell. 1RP 50; 2RP 148.

3. Charging Language and Instructions.

The information charging Arnold was given the following title: "ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON." CP 2, 6. It charged:

I ...Deputy Prosecuting Attorney in and for Whatcom County ... by this information do accuse **ALEXANDER C. ARNOLD** with the crime(s) of

**ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON**, committed as follows:

Then and there being in Whatcom County, Washington,

**ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON**, That on or about the 2<sup>nd</sup> day of July, 2013, the said defendant, ALEXANDER C. ARNOLD, then and there being in said county and state, with intent to commit theft, did unlawfully take personal property that the Defendant did not own from the person or in the presence of Adriana McDowell, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime and in immediate flight therefore, the Defendant was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon and/or inflicted bodily injury upon Adriana McDowell in violation of RCW 9A.56.200(1)(a)(i) and (ii),<sup>3</sup> RCW 9A.56.190 and RCW 9.94A.533...

CP 2-3, 6-7 (emphasis in original). Based on this charging language and the affidavit of probable cause (which did not allege

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<sup>3</sup> This statute provides:

- (1) A person is guilty of robbery in the first degree if:
- (a) In the commission of a robbery or of immediate flight therefrom, he or she:
- (i) Is armed with a deadly weapon; or
  - (ii) Displays what appears to be a firearm or other deadly weapon; or
  - (iii) Inflicts bodily injury.

any injury), the defense prepared its case with the understanding that the State would only be seeking a conviction based on the two statutory means specifically cited (i.e. was armed with a deadly weapon or displayed what appeared to be a deadly weapon). 2RP 173-76.

Despite the fact the information only specifically charged Arnold with violating two alternative means for robbery, the State sought to have the jury instructed as to all three. 2RP 172. When defense counsel objected, the State countered by saying there was language in the charging document that stated "inflicted bodily injury," to support instructing on the third means. 2RP 171- 72. The prosecutor alleged the defendant had sufficient notice when it sent over photographs of the victim showing injury.<sup>4</sup> 2RP 172.

Defense counsel countered that a plain reading of the information showed only two alternatives were charged. 2RP 173. He also explained that the pictures were of poor quality and did not provide notice of injuries and, even if they did, they arrived too late for the defense to adequately investigate and prepare. 2RP 173-74.

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<sup>4</sup> The photographs were sent to defense counsel just 3 days before the speedy trial date was to have originally run. 2RP 175.

Based on the words “inflicted bodily harm,” the trial court found the charging language sufficient to instruct on all three means and so instructed the jury. CP 31-32; 2RP 174-75. The jury returned a guilty verdict for first degree robbery. However, when asked by special verdict if Arnold had a deadly weapon, the jury said no. After the trial, at least one juror explained she believed McDowell had suffered bodily injury. 3RP 3. During sentencing, the prosecutor conceded that he believed some of the jurors found there was a knife and some found that there were injuries. 3RP 3. The trial court also reached this conclusion. 3RP 8.

C. ARGUMENT

I. ARNOLD WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OVER DEFENSE OBJECTION.

Washington case law establishes that the elements in RCW 9A.56.200(1)(a)(i) through (iii) are alternative means of committing first degree robbery. E.g., State v. Nicholas, 55 Wn. App. 261, 272–73, 776 P.2d 1385 (1989). The State charged Arnold with committing robbery by two means, under subsections (i) and (ii). Yet, the jury was instructed on all three means. The record shows a substantial likelihood that at least some of the jurors relied on this

third means when reaching their verdict. As a result, Arnold was denied constitutional due process.

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution require that an accused be informed of the charges he must face at trial. “One cannot be tried for an uncharged offense.” State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003) (citing State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988)).

Where the information alleges specific statutory alternative means of committing a crime, it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence. State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); State v. Brewczynski, 173 Wn. App. 541, 549, 294 P.3d 825, review denied, 177 Wn.2d 1026, 309 P.3d 505 (2013).

The first step is to construe the charging language to determine whether the charging document put Arnold on notice of that all three means were charged. See, State v. Brockie, 178 Wn.2d 532, 538, 309 P.3d 498 (2013) (undertaking this first step). Because the defendant timely objected below, the charging language must be strictly construed. State v. Taylor, 140 Wn.2d 229, 996 P.2d 571 (2000). To strictly construe “means that given a

choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.” Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973).

For a charge to be sufficiently precise and informative, a defendant must be apprised of the legal elements of the charged crime and the conduct of which is alleged to have constituted the crime. City of Seattle v. Termain, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). The information here contained a factual assertion that Arnold inflicted bodily injury. However, as for the legal basis of the charge, Arnold was informed only that he was charged with violating subsections (i) and (ii), not subsection (iii). CP 47. By specifying the legal basis of the charge as to those two means alone, the charging document limited Arnold’s notice to those means. In other words, under the charging language taken as a whole, Arnold was not sufficiently notified the State would seek conviction under RCW 9A.56.200(1)(a)(iii).

Instructing the jury on an uncharged alternative means is presumed prejudicial unless the State can show that the error was harmless. Brockie, 178 Wn.2d at 536. It cannot do so here.

First, defense counsel explained that when preparing his defense he relied on the fact that the information charged only two means and he would have prepared differently had he also had been charged under subsection (iii). 2RP 170-74.

Second, the other jury instructions reinforced the error, rather than remedy it. Not only did the to-convict include the uncharged means, it was included in the definitional instruction as well. CP 31-32.

Finally, and most importantly, the record clearly shows the prosecution would not have secured a conviction for first degree robbery without the inclusion of the uncharged alternative means. As the trial court noted at sentencing, the State's evidence regarding the deadly weapon was "unclear and not in any way conclusive." 3RP 7-8. Indeed, the jury returned a special verdict finding that the defendant was not armed with a deadly weapon. CP 44. Moreover, at least one juror specifically said she found that Arnold inflicted bodily injury. 3RP 3. Even the prosecutor concluded the jurors were split with some finding Arnold inflicted bodily injury. 3RP 3.

Given this record, the State cannot rebut the presumption that the instructional error was prejudicial. As such, this Court must reverse Arnold's conviction. Bray, 52 Wn. App. at 37.

II. THE TRIAL COURT'S FAILURE TO CONSIDER ARNOLD'S ABILITY TO PAY BEFORE IMPOSING LFOs IS SENTENCING ERROR THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

RCW 9.94A.760 permits the court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability, or likely future ability, to pay. The record here does not show the trial court in fact considered Arnold's ability or future ability before it imposed LFOs. Because such consideration is statutorily required, the trial court's imposition of LFOs was erroneous and the validity of the order may be challenged for the first time on appeal.

(i) The Legal Validity of the LFO Order May Be Challenged For The First Time On Appeal As An Erroneous Sentencing Condition.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on

appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) (citing numerous cases where defendants were permitted to raise sentencing challenges for the first time on appeal); see also, State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community custody could be challenged for the first time on appeal). Specifically, this Court has held a defendant may challenge, for first time on appeal, the imposition of a criminal penalty on the ground the sentencing court failed to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).<sup>5</sup>

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<sup>5</sup> See also, State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); In re Personal Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining “sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional”); State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding “challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal”); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has “established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

In Moen, the Washington Supreme Court held that a timeliness challenge to a restitution order could be raised for the first time on appeal. It looked at the authorizing statute, which set forth a mandatory 60-day limit, and the record, which showed the trial court did not comply with that statutory directive. Specifically rejecting a waiver argument, it explained:

We will not construe an uncontested order entered after the mandatory 60-day period of former RCW 9.9A.142(1) had passed as a waiver of that timeliness requirement; it was invalid when entered.

Id. at 541 (emphasis added). The Supreme Court concluded the restitution was not ordered in compliance with the authorizing statute and, therefore, the validity of the order could be challenged for the first time on appeal. Id. at 543-48.

Consequently, the salient question here is whether the record shows the trial court complied with the statutory requirements set forth in RCW 10.01.160(3) before it ordered LFOs as a condition of Arnold's sentence. If not, Arnold is entitled to challenge the trial court's LFO order for the first time on appeal.

Appellant is aware a panel of this Court, in State v. Calvin, \_\_\_ Wn. App. \_\_\_, 316 P.3d 496 (2013), concluded that a defendant may not challenge LFOs for the first time on appeal. However,

appellant respectfully disagrees that that holding is determinative here.

Calvin's appeal involved a challenge to the factual basis supporting the trial court's LFO order. Id. at 507. He argued there was insufficient evidence to support the trial court's decision that Calvin had the ability to pay LFOs. Id. By contrast, Arnold asserts the trial court failed to undertake the statutorily required factual analysis under RCW 10.01.160.

The factual nature of Calvin's argument drove this Court's waiver analysis. Specifically, Calvin states, "the imposition of costs under [RCW 10.01.160] is a factual matter 'within the trial court's discretion,'" and "[f]ailure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal." Id. (citations omitted). Having framed the issue as a sufficiency challenge, rather than a legal one, Calvin went on to cite the holdings in In re Personal Restraint of Goodwin<sup>6</sup> and In re Personal Restrain of Shale,<sup>7</sup> for the proposition that "[F]ailure to identify a factual dispute or to object to a discretionary

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<sup>6</sup> 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002).

<sup>7</sup> 160 Wn.2d 489, 494-95, 158 p.3d 588 (2007).

determination at sentencing waives associated errors on appeal.”

Id.

Unlike Calvin’s challenge, Arnold’s challenge does not involve discretionary acts of the trial court. As discussed in detail below, compliance with the statutory directives of RCW 10.01.160 is not discretionary. The trial court does not have the discretion to impose costs without first considering the defendant’s individual financial circumstances. Furthermore, the issue raised by Arnold is legal, not factual. See, State v. Burns, 159 Wn. App. 74, 77, 244 P.3d 988 (2010) (explaining whether the trial court exceeds its statutory authority is an issue of law). A determination of the legal validity of the LFO order does not turn on whether there was sufficient substantive evidence of his ability to pay.<sup>8</sup> Thus, Calvin’s waiver analysis does not control the issue raised herein.

As shown above, the issue raised in this case is analogous to that raised in Moen, not in Calvin. Thus, if the record shows the trial court did not comply with RCW 10.01.160(3)’s mandatory requirements, the issue is reviewable for the first time on appeal.

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<sup>8</sup> As shown below, the substantive facts only become part of the equation when this Court considers remedy.

- (ii) The Sentencing Court Did Not Comply With RCW 10.01.160(3); Thus, Arnold May Challenge the LFO Order For The First Time on Appeal.

RCW 10.01.160(3) provides:

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

RCW 10.01.160(3) (emphasis added). The word “shall” means the requirement is mandatory.<sup>9</sup> State v. Claypool, 111 Wn. App. 473, 475–76, 45 P.3d 609 (2002). Hence, the trial court was without authority to impose LFOs as a condition of Arnold’s sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court’s decision to impose LFOs under RCW 10.01.160(3) are not required, for the

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<sup>9</sup> Comparatively, RCW 9.94A.753 (a statute which addresses restitution) merely provides:

The court should take into consideration the total amount of the restitution owed, the offender’s present, past, and future ability to pay, as well as any assets that the offender may have.

(emphasis added).

LFO order to be legally valid, the record must minimally establish the sentencing judge did in fact consider the defendant's individual financial circumstances and made an individualized determination he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The record does not establish the trial court actually took into account Arnold's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing Arnold's ability to pay or ask the trial court to make a determination under RCW 10.01.160 when it asked that LFOs be imposed.<sup>10</sup> The trial court made no inquiry into Arnold's financial resources, debts, or employability. There was no discussion at the sentencing hearing regarding Arnold's financial circumstances. 3RP 3-13.

The only part of the record that even remotely suggests the

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<sup>10</sup> It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, \_\_\_ Wn. App. \_\_\_, 308 P.3d 755, 760 (2013).

trial court complied with RCW 10.01.160(3) is a boilerplate finding in the Judgment and Sentence. CP 47. However, this finding does not establish compliance with RCW 10.01.160(3)'s requirements.

In the Judgment and Sentence, the trial court entered the following:

- a. ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change.

CP 47. There was no check-box for the trial court to mark on the pre-printed sentencing form, and the trial court made no contemporaneous statements at sentencing regarding Arnold's ability to pay. CP 47; 3RP 3-13.

A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of the necessary facts); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir.2004) (explaining boilerplate findings in the absence of a more

thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

As indicated, the Judgment and Sentence form used in Arnold's case contained a pre-formatted conclusion about his supposed ability to pay, without even a box for the court to check to register even minimal individualized judicial consideration. CP 47. As cases such as Bertrand indicate, it has become commonplace for Judgment and Sentence forms to make blanket assertions the trial court followed the requirements of RCW 10.01.160(3), regardless of what actually transpired. For this reason, this type of finding, without more, cannot reliably establish the trial court complied with RCW 10.01.160(3).

In sum, the record fails to establish the trial court actually took into account Arnold's financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should permit Arnold to challenge the legal validity of the LFO order for first time on appeal, and it should vacate the order.

(iii) Arnold's Challenge to the LFO Order Is Ripe for Review.

In response, the State may argue that the issue is not ripe for review because the State has not yet attempted to collect the costs. This argument should be rejected, however, because it fails to distinguish between a LFO challenge based on financial hardship grounds (arguably not ripe) and a challenge attacking the legality of the order based on statutory non-compliance (ripe).

Although there is a line of cases that holds the relevant or meaningful time to challenge an LFO order is after the State seeks to enforce it, these cases address challenges based on financial hardship or procedural due process principles that arise in regard to collection.<sup>11</sup> By contrast, this case involves a direct challenge to the legal validity of the order on the ground the trial court failed to

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<sup>11</sup> See, e.g., Lundy, \_\_\_ Wn. App. \_\_\_, 308 P.3d 755, 761-62 (holding "any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review" until the State attempts to collect); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) (determining defendant's constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce LFO order); State v. Phillips, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (holding defendant's constitutional objection to the LFO order based on the fact of his indigence was not ripe until the State sought to enforce the order); State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (concluding the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

comply with RCW 10.01.160(3). As shown below, this issue is ripe for review.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. Bahl, 164 Wn.2d at 751. Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, as discussed above, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160 prior to issuing the order. As such, Arnold meets the first prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. As explained above, Arnold is challenging the sentencing court's failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue (the statute and the sentencing record) are fully developed.

Although the Supreme Court, in State v. Valencia, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010), previously suggested LFO

challenges require further factual development, Valencia does not apply here. Valencia involved a constitutional challenge to a sentencing condition regarding pornography. In assessing the second prong of the ripeness test, the Supreme Court compared Valencia's challenge to the court-ordered sentencing condition with a hypothetical challenge to a LFO order. It suggested the former did not require further factual development to support review, while the latter did.

It appears, however, that Valencia's hypothetical LFO challenge was predicated upon the notion that the order would be challenged on factual financial hardship grounds, rather than on statutory non-compliance grounds. For example, it stated:

[LFO orders] are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement.

Id. at 789. Certainly, this statement may be accurate if the offender is challenging the validity of the LFO order asserting current financial hardship. However, this statement is not accurate if an offender is challenging the legal validity of the LFO order based on non-compliance with RCW 10.01.160. Either the sentencing court complied with the statute prior to imposing the order, or it did not. If

it did not, the order is invalid, regardless of the particular circumstances of attempted enforcement. Accordingly, Valencia likely never contemplated the issue raised herein and, therefore, is distinguishable. As explained above, no further factual development is needed here, and the second prong of the ripeness test is met.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing that debt in the first place is not subject to change. In other words, while the defendant's obligation to pay LFOs that have been ordered may be "conditional," the original sentencing order imposing LFOs is final.<sup>12</sup> The third prong of the ripeness test therefore is met.

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<sup>12</sup> This Court previously concluded a trial court's LFO order is "conditional," as opposed to final, because the defendant may seek remission or modification at any time (State v. Smits, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009)). However, it did so in the context of reviewing a denial of the defendant's motion to terminate his debt on the basis of financial hardship pursuant to RCW 10.01.160(4).

Next, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant, and he may be subject to arrest for nonpayment. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at a 12% rate. RCW 10.82.090.

The hardships that might result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people, LFOs result in:

... reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnaring some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

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Thus, this analysis was focused on the defendant's conditional obligation to pay, rather than on the legal validity of the initial sentencing order. Id.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).<sup>13</sup>

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on the remission process to correct the error imposes its own hardships.

First, during the remission process, the defendant is saddled with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. Lundy, \_\_\_ Wn. App. \_\_\_, 308 P.3d at 760. The defendant is not required to disprove his ability. See, e.g. Ford, 137 Wn. App. At 482 (stating the defendant is "not obligated to disprove the State's position" at sentencing where it has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4).

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<sup>13</sup> This report can be found at: [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf)

Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains on the State.

Second, an offender who is left to fight his erroneously ordered LFOs though the remission process will have to do so without appointed legal representation. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given the petitioner's financial hardships, he will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se.

For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. See, Washington State Minority and Justice Commission, supra, at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties. Id. at 46-47. Permitting a challenge to an erroneous LFO order on direct appeal would enable an offender to challenge his or her debt with the help of counsel and before the financial burden grows so overwhelming the person just gives up.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that would otherwise be wasted by efforts to collect from individuals who likely never will be able to pay. See, State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources). Allowing the matter to be addressed on direct appeal will emphasize the importance of undertaking the necessary factual consideration in the first place and not rely on the remission process to remedy errors.

For the reasons stated above, this Court should hold Arnold's challenge to the legal validity of the LFO is ripe.

- (iv) Because The Record Does Not Expressly Demonstrate The Sentencing Court Would Have Imposed The LFOs If It Had Undertaken The Required Considerations, The Remedy Is Remand.

Where the sentencing court fails to comply with a sentencing statute when imposing a sentencing condition, remand is the remedy, unless the record clearly indicates the court would have

imposed the same condition anyway. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)).

The record does not expressly demonstrate the trial court would have found the evidence sufficiently established Arnold's ability to pay the LFOs. It was the State's burden to produce evidence establishing that appellant had the ability to pay. It did not do so. There is no evidence of Arnold's former employment beyond his work in the military. There is no evidence Arnold developed transferable skills that would support employment in a civilian setting. There is no evidence Arnold could return to military duty, especially since he has a violent felony on his record. There was no evidence of assets beyond a bike and some basic bike gear.

Indeed, in terms of finances, the record as it now exists suggests future financial hardship. The evidence showed Arnold was living with his and uncle – suggesting he has no home or income to support independent living. The evidence showed he had only the \$4.00 dollars in his wallet, backpack, and room. The nature of the crime charged suggests he was in desperate financial straits.

Based on this record, it cannot be said the sentencing court would have imposed the same LFOs, had it taken into account Arnold's individualized financial circumstances. As such, the remedy is remand for resentencing. Parker, 132 Wn.2d at 192-93.

D. CONCLUSION

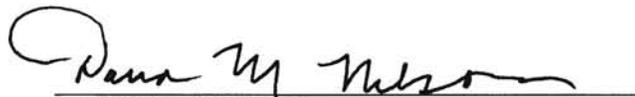
This Court should reverse appellant's conviction because there is a substantial possibility he was found guilty of an uncharged alternative means. Alternatively, this Court should strike the LFO order and ability-to-pay finding and remand for resentencing.

DATED this 15<sup>th</sup> day of April, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON

Respondent,

v.

ALEXANDER ARNOLD,

Appellant.

COA NO. 70928-3-1

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15<sup>TH</sup> DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE  
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[X] ALEXANDER ARNOLD  
DOC NO. 369445  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF APRIL 2014.

X Patrick Mayovsky

2014 APR 15 PM 4:26  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON