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COURT OF APPEALS
DIVISION II

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No. 37653-9-II

STATE OF WASHINGTON

BY *Em*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RICHARD WAYNE BUTLER,

Appellant.

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

The Honorable George L. Wood

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. MR. BUTLER'S CONVICTION FOR FAILING TO REGISTER AS A SEX OFFENDER MUST BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY ADMITTED IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF FOUR PRIOR CONVICTIONS FOR THE SAME OFFENSE

Robert Butler argues that his conviction for failing to register as a sex offender must be reversed because the trial court improperly admitted evidence that he had failed to register on four prior occasions, resulting in criminal convictions. Brief of Appellant at 8-27. The State acknowledges that the trial court did not undergo the proper ER 609 analysis on the record in admitting the prior convictions, which is in itself an abuse of discretion. Brief of Respondent at 5; State v. Wilson, 83 Wn.App. 546, 550, 922 P.2d 188 (1996), rev. denied, 130 Wn.2d 1024 (1997). The State, however, argues the error is harmless. Brief of Respondent at 5-7. This Court should not adopt the State's position.

The admission of a defendant's prior criminal convictions is inherently prejudicial. State v. Hardy, 133 Wn.2d 701, 710, 946 P.2d 1175 (1997); State v. Jones, 101 Wn.2d 113, 119-200, 677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124, 127 (1988). The prejudice is especially great when, as

here, the prior convictions are for the same offense as the one the defendant is on trial for. Jones, 101 Wn.2d at 120. A defendant's prior criminal convictions may be admitted only if they are actually relevant to the defendant's ability to tell the truth. State v. Calegar, 133 Wn.2d 718, 723, 947 P.2d 235 (1997); Jones, 101 Wn.2d at 120.

A trial court's error in admitting prior convictions under ER 609(a) is reviewed under the harmless error test. Calegar, 133 Wn.2d at 727. This Court must reverse if it is likely that the outcome of the trial would have been different if the error had not occurred. Id. Thus, the test requires the appellate court to review all of the facts of the case, including any proffered defense.

The State's harmless error analysis focuses only on the proof that Mr. Butler had not registered as required by law. Brief of Respondent at 6. This Court, however, must also consider Mr. Butler's necessity defense, which the State was unable to counter. The efficacy of the necessity defense rested on the jury's determination of Mr. Butler's credibility. It is the job of the jury, not the appellate courts, to determine witness credibility. State v. Jungers, 125 Wn.App. 895, 901, 106 P.3d 827 (2005).

Because Mr. Butler's credibility was the central issue at trial, this Court must conclude it is reasonably probable that his four prior convictions for the identical offense for which he was on trial persuaded the jury not to believe him. It is thus "reasonably probable" that the prior convictions "tipped the balance" against Mr. Butler and "therefore determined the outcome of the trial." Calear, 133 Wn.2d at 729. Mr. Butler's conviction must therefore be reversed.

2. THE COURT LACKED STATUTORY AUTHORITY
TO ORDER MR. BUTLER TO PAY RESTITUTION
TO THE CLALLAM COUNTY JAIL

The superior court ordered Mr. Butler to pay \$832.65 in restitution to the Clallam County Jail. CP 10. Mr. Butler argues on appeal that the jail was not a victim of his offense and not entitled to restitution. Brief of Appellant at 32-36. The prosecutor responds that the jail is entitled to recover medical costs under former RCW 70.48.130.¹ Brief of Respondent at 10-11. This Court should strike the restitution order because it is not authorized by the felony restitution statute.

¹ RCW 70.48.130 was amended in 2007. Laws of 2007 ch 259 § 66. The amendments do not apply here, as an SRA sentence is governed by the law in effect at the time of the crime, which in this case was October 2006. CP 6; RCW 9.94A.345.

Felony sentencing in Washington is governed by the Sentencing Reform Act (SRA). RCW 9.94A.505(a); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782, 784 (2007). The superior court's power to require an offender to pay restitution is statutory. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Restitution must be causally connected to the crime and must be based upon "easily ascertainable" damages for injury, or loss of or damage to property, and the defendant may be ordered to pay up to twice the victim's loss. State v. Kinneman, 155 Wn.2d 272, 288-89, 119 P.3d 350 (2005); RCW 9.94A.753(3).

The State does not claim that the jail medical costs are "restitution" for purposes of the SRA, but instead argues the jail was entitled to recover medical costs pursuant to the City and County Jails Act, RCW 70.48. Brief of Respondent at 10-11. When imposed legal financial obligations, the court is required to determine the total cost, but also segregate the various amounts owed in various categories so that restitution is separate from a fine or court costs. RCW 9.94A.760(1). Here, the trial court listed the medical costs as "Restitution," and the order does not mention RCW 70.48. CP 11. RCW 9.94A.760 specifically authorizes the court to order an offender to pay the "cost of incarceration" at the

rate of \$50 per day. RCW 9.9A.760(2). The statute, however, does not mention the costs of medical treatment. RCW 9.94A.760. This Court must assume the Legislature meant what it said and cannot add language to a statute. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003); State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Under the doctrine of expressio unius est exclusio alterius, "omissions are deemed to be exclusions." In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

Moreover, there is not evidence the Clallam County Jail complied with the City and County Jails Act in requesting payment from Mr. Butler. The act was designed in part to ensure that jails are safe and humane and to determine which level of government is financially responsible for jail inmates. Harrison Memorial Hospital v. Kitsap County, 103 Wn.2d 887, 889, 700 P.2d 732 (1985). It permits a county jail to obtain funding for an inmate's emergency or necessary health care from the Department of Social and Health Services (DSHS) if the inmate is indigent and eligible for state-funded medical care. Former RCW 70.48.130. After payment by DSHS, the financial responsibility for any remaining costs is divided between the appropriate government unit and the medical care provider. Id. The jail may obtain reimbursement from

the inmate for costs not covered by public assistance. Id. Here, however, the Clallam County Jail made no showing it had attempted to obtain reimbursement for Mr. Butler's medical costs from DSHS or to determine if Mr. Butler had health insurance that would cover all or part of the costs.

The Clallam County Prosecutor's position that Mr. Butler must pay the jail medical costs as restitution is untenable and has serious due process implications. Mr. Butler was in custody prior to sentencing because he was indigent and unable to post \$2500 bail. SuppCP ____ (Order of Conditions and/or for Release Pending Trial, sub. no. 9, dated April 5, 2007). If he had not been in jail, his medical costs at a doctor's office or hospital would at most result in a civil judgment and not subject him to incarceration for failure to pay.

Procedural safeguards must be established and followed when the court seeks to force an indigent offender to pay costs without violating the equal protection clause of the United States Constitution. Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). A statute must be tailored to impose a financial obligation "only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who

actually become able to meet it without hardship.” Fuller, 417 U.S. at 54. The trial court, however, made no finding that the chronically homeless defendant had the financial ability to pay the medical costs or that he would have that ability in the future.

The authority of the court and the Department of Corrections to enforce restitution orders is long-lasting, and restitution may not be discharged in bankruptcy. RCW 9.94A.760; RCW 9.94A.7602; RCW 9.94A.7606; RCW 9.94A.7609; RCW 9.94A.7701; In re Thompson, 418 F.3d 362 (3rd Cir. 2005). An offender may be incarcerated for failure to pay restitution. RCW 9.94A.631; RCW 9.94A.634. The court must therefore limit costs it categorizes as restitution to those which are statutorily authorized, such as reimbursing the crime victim for medical costs or the loss of property. Mr. Butler’s medical costs in jail are not restitution, and this Court must strike the restitution order.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Richard Butler requests this Court reverse his conviction for failing to register as a sex offender and remand for a new trial. In the alternative, the portion of his sentence requiring Mr. Butler to pay restitution for his jail medical costs must be stricken.

DATED this 24th day of November 2008.

Respectfully submitted,

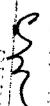


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 RICHARD BUTLER,)
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 BY  DEPUTY

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF NOVEMBER, 2008, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF NOVEMBER 2008.

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