

No. 40369-2-II  
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

Vs.

TORRIE LYONS  
Appellant.

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY  
DENVER

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Appeal from the Superior Court of Washington for Lewis County

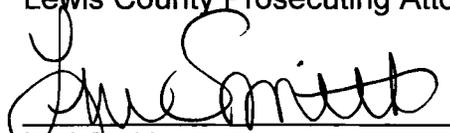
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**Respondent's Brief**

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## STATEMENT OF THE CASE

Without waiving the right to contest any facts, Appellant's statement of the case as continued in her opening brief is adequate for purposes of responding to this appeal only.

## ARGUMENT

### **A. LYONS' EXCUSE FOR MISSING HER COURT APPEARANCES DID NOT CONSTITUTE "UNCONTROLLABLE CIRCUMSTANCES" AND HER BAIL JUMPING CONVICTIONS SHOULD BE AFFIRMED.**

Lyons' argues that the trial court erred when it found that her reasons for missing her court appearances did not constitute "uncontrollable circumstances" as contemplated by the bail jumping statute. Therefore, Lyons claims, there was insufficient evidence to support the bail jumping convictions. The State disagrees.

When reviewing a challenge to the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Brown, 162 Wn.2d at 428. An insufficiency claim admits the truth of the State's evidence and all reasonable

inferences. Brown, 162 Wn. 2d at 428. Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wash.2d 821, 874, 83 P.3d 970 (2004) (citing State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)). The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Thomas, 150 Wash.2d at 875.

RCW 9A.76.170(1) provides, in relevant part that "[a]ny person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear. . . as required is guilty of bail jumping." RCW 9A.76.170(1). The statute provides an affirmative defense where the accused proves that "uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist." RCW 9A.76.170(2).

Thus, "[t]he elements of bail jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a particular

crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required." State v. Downing, 122 Wn.App. 185, 192, 93 P.3d 900 (2004).

Additionally, "the knowledge requirement is met when the State proves that the defendant has been given notice of the required court dates." State v. Fredrick, 123 Wn.App. 347, 353, 97 P.3d 47 (2004)(citing State v. Carver, 122 Wn.App. 300, 306, 93 P.3d 947 (2004)). "Uncontrollable circumstances" means:

an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010. Lyons' excuse does not meet this definition.

Here, Lyons claims that she met her burden of establishing this statutory defense and that the "uncontrollable circumstances" that prevented her from attending the court hearings were that she had to go to Arizona to get an attorney to help her with her father's estate. But these circumstances do not meet the definition of "uncontrollable circumstances" as contemplated by the statutes.

Here, Ms. Lyons claims she missed her court date because her father died, and she had to take care of his estate. RP 39,40.

However, there was nothing about this situation that was an immediate emergency or necessity requiring the immediate presence of Ms. Lyons. Rather, Ms. Lyons went to Arizona to deal with non-emergent issues regarding her father's will, or estate and to "head this woman off from robbing our estate and I had to get into the legal system to do that." RP 40, 43. Taking care of details involving a decedant's estate are certainly not the type of "uncontrollable circumstances" contemplated by the statute as set out above (and as found by the trial court). RCW 9A.76.010. Nothing about this situation made it a "necessity" for Ms. Lyons to miss her court dates.

There was simply nothing about Ms. Lyons' father's death that made it an emergency for Ms. Lyons to travel to Arizona. Ms. Lyons' father died on September 29, 2009. RP: 39. Ms. Lyons was told over the telephone this same date that her father died. RP 39. Thus, this was not a situation where Ms. Lyons received an urgent "deathbed" phone call telling her that her father was about to die and that she should go see him immediately while she could still to so. RP 39,40. Rather, Ms. Lyons became upset over some woman who allegedly claimed she had married Ms. Lyons father and because this woman was allegedly claiming there was "an

elusive handwritten will that they wouldn't provide." RP 40.

Nothing about this situation required Ms. Lyons immediate presence in Arizona. Obviously, Ms. Lyons could have hired an attorney in Arizona over the phone--she did not have to drive to Arizona to do that. RP 45. And Ms. Lyons drove to Arizona--not a short drive. RP 40, 41. These circumstances did not amount to an "emergency" or a "necessity" or an "uncontrollable circumstance" so as to meet the statutory defense for bail jumping. The "need to settle her father's affairs" is not the type of circumstance contemplated by the statute. As correctly found by the trial court:

a death in the family under the circumstances as they are described here does not rise to the uncontrollable circumstance that is anticipated in this defense. Even if it were, I agree with the State that the defense has not proved that she appeared or surrendered as soon as the circumstances ceased to exist. So, for both of these reasons I find that the defense of uncontrollable circumstances has not been met.

RP 64. Because the evidence supports the trial court's ruling finding that Lyons' alleged "defense" did not meet the definition of "uncontrollable circumstances", and because credibility determinations are solely province of the fact finder, this Court should affirm Lyons' bail jumping convictions.

**B. FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE COMPLETED BY THE TRIAL PROSECUTOR BEFORE RECEIPT OF LYONS' OPENING BRIEF AND FORMAL ENTRY OF THE FINDINGS IS SET FOR NOVEMBER 4, 2010.**

Lyons also assigns error to the trial court's failure to enter written findings after the bench trial. However, *before* the State received Lyons' opening appellate brief, written findings were prepared by the trial prosecutor and a court date has been set for November 4, 2010, for formal entry of the findings. Therefore, this issue is moot. But even if this court considers this issue, there is no reversible error for the entry of tardy findings because there is no chance the findings have been tailored to the issues raised in this appeal.

Although it is true that the practice of submitting late findings is disfavored, entry of findings while an appeal is pending "does not generally require reversal unless the delay was prejudicial or the findings have been altered to address issues raised by the appeal." State v. Knippling, 141 Wn.App. 50, 57, 168 P.3d 426 (2007), *citing* State v. Cannon, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996). In other words, the late-filed findings must not be "tailored to avoid reversal when . . . they are presented after the initial appellate briefing." State v. Garcia, 146 Wn.App. 321, 326, 193 P.3d 181 (2008). The failure to file a reply brief after late findings and

conclusions are entered precludes a defendant from establishing prejudice. State v. Moore, 70 Wn.App. 667, 670-672, 855 P.2d 306 (1993).

In the present case, the trial prosecutor is a different prosecutor than the deputy prosecutor handling this appeal. Furthermore, the findings and conclusions were drafted before Lyons' opening appellate brief was received by the State, and the appellate prosecutor represents to this Court that the trial prosecutor has not seen Lyons' opening brief. The findings are set for formal entry on November 4, 2010. Once the findings are formally entered, the State will file a supplemental designation of clerk's papers to include the findings. Because there is no danger the tardy findings were tailored to meet the issues raised by Lyons in this appeal (the trial deputy did not see Lyons' opening brief), and because Lyons still has the opportunity to respond to the late findings in her reply brief, entering the late findings is not reversible error.

**C. THE LEGAL FINANCIAL OBLIGATIONS WERE PROPERLY IMPOSED.**

Lyons also has various complaints about the legal financial obligations imposed at the time of sentencing. The costs for appointed counsel, jail costs, and sheriff's costs for service of warrants or subpoenas are all costs that are allowed under current law.

The Superior Court has discretion to impose legal financial obligations as part of a convicted criminal defendant's judgment and sentence pursuant to RCW 9.94A.760. Imposition of such fines "is within the trial court's discretion. [And] [a]mple protection is provided from an abuse of that discretion[:]. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified." State v. Curry, 118 Wn.2d 911, 916 (1992). The authority to impose LFO's against convicted criminal defendants is statutory. RCW 10.01.160 authorizes a trial court to impose costs on a convicted indigent defendant if he is able to pay or will be able to pay. RCW 10.01.160(3); State v. Eisenman, 62 Wn.App. 640, 644, 810 P.2d 55, 817 P.2d 867 (1991).

This statute further notes that "[i]n 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)(part). This statute survived a constitutional challenge in State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976). In Barklind, the Court discussed the parameters of constitutionally permissible costs and fees system, and decided that the following requirements must be satisfied:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayments may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

Barklind, 87 Wn.2d at 818, citing Eisenman, supra. Furthermore, although criminal defendants can challenge the imposition of LFO's, it is also true that "[h]e *imposition of the penalty assessment, standing alone*, is not enough to raise constitutional concerns." Curry at 918(emphasis added). Rather, "constitutional principles will be implicated . . . only if the government seeks to enforce

collection of the [costs] 'at a time when [the defendant is] unable, *through no fault of his own*, to comply.'" State v. Crook, 146 Wn.App. 24, 27, 189 P.3d 811(2008)(emphasis added), *quoting* Curry, 62 Wn.App. at 681(*quoting* United States v. Pagan, 785 F.2d 378, 381 (2nd Cir. 1986)). Put differently, "[t]he unconstitutionality of a law is not ripe for review unless the person seeking review is harmed by the part of the law alleged to be unconstitutional." State v. Ziegenfuss, 118 Wn.App. 110, 113, 74 P.3d 1205 (2003); State v. Smits, 152 Wn.App. 514, 216 P.3d 1097(2009)("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation"). In other words, a defendant is "not an 'aggrieved party' . . . 'until the State seeks to enforce payment and contemporaneously determines his ability to pay.'" Smits, *supra*, *quoting* State v. Mahone, 98 Wn.App. 342, 347-348, 989 P.2d 583(1999)((citing State v. Blank, 131 Wn.2d 230,242,930 P.2d 1213 (1997)). Indeed, "[i]t is at the point of enforced collection . . . , where an indigent may be faced with the alternatives of *payment or imprisonment*, that he 'may assert a constitutional objection on the ground of his indigency.'" Crook at 27 (other citations omitted); Mahone, 98 Wn.App. at 348.

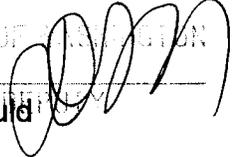
In the present case, first of all, Ms. Lyons did not object in any way to the costs imposed upon her at the time she was sentenced. 2/17/2010 RP 11. The State has not yet tried to enforce the collection of these costs. Furthermore, all of the costs imposed are allowed by statute and the judgment and sentence contains the statutory citation for authority to assess each of the costs imposed. CP 19-27.

As to the sheriff's fee costs, the costs imposed were for \$163 subpoena service fees. 2/17/2010 RP 10. In addition, a \$200 filing fee was assessed. Id. Ms. Lyons was sentenced to three months in jail (90 days), and was assessed a \$1,000 jail fee. The attorney fees imposed would reflect the costs of taking a case through trial, so \$1,200 does not seem like an exorbitant amount. Ms. Lyons was ordered to pay \$25 per month towards these costs--to begin 60 days after her release. 2/17/2010 RP 10. Ms. Lyons can bring a motion to modify these costs at any time, but she has not yet done so. In sum, the costs imposed in this case are statutorily authorized, are indeed commonly assessed in these cases, they are not unreasonable, and neither is requiring Ms. Lyons to repay these costs at a mere \$25 per month. Accordingly, the imposition of costs should be affirmed.

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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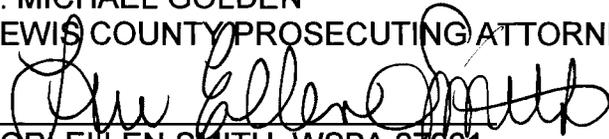
CONCLUSION

For the reasons previously discussed, this Court should  
affirm the convictions and sentence in all respects.

RESPECTFULLY SUBMITTED this 25th day of October,  
2010.

L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTORNEY

by:

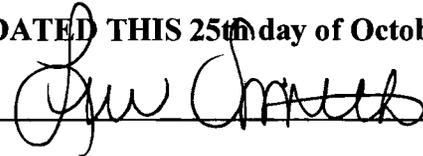
  
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the document to which  
this certificate is attached was served upon the appellant by U.S. mail,  
postage prepaid, addressed to appellant's attorney as follows:

Gregory Link  
Washington App. Project  
1511 3rd Ave., Suite 701  
Seattle, WA 98101-3635.

DATED THIS 25th day of October, 2010.

  
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