

NO. 43036-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GERADO MARIN-ANDRES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend, Judge

No. 09-1-02906-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence to prove the elements of burglary in the first degree; specifically, that defendant or an accomplice was armed during the burglary at the Menza's home or in immediate flight therefrom?
2. Whether defendant waived his challenge to the determination of same criminal conduct when he stipulated to the calculation of his offender score?
3. Whether the trial court properly imposed legal financial obligations upon defendant when statutes and case law support the imposition of such costs?

B. STATEMENT OF THE CASE.

1. Procedure

On June 12, 2009, the Pierce County Prosecuting Attorney (State) filed an Information charging defendant with burglary in the first degree, conspiracy to commit burglary in the first degree, trafficking in stolen property in the first degree, residential burglary, and conspiracy to commit residential burglary. CP 1–3. On September 16, 2009, the State amended the charges to add counts of theft of a firearm and theft in the first degree. CP 7–11. On November 23, 2009, the State again amended the

information in exchange for defendant’s cooperation with the investigation. CP 12–14, CP 15–19. On March 11, 2011, the court granted defendant’s request to withdraw his plea based upon a finding that defendant “did not fully understand [...] all the ins and outs of [the agreement].” 3/11/11 RP 50–53.¹ On April 12, 2011, the State amended the information in anticipation of trial. CP 59–64. On August 23, 2011, the State again amended the charges and added one count of residential burglary. CP 65–70. Defendant’s charges are reflected in the following table:

Count	Crime Charged	Victim ²	Trial Count	Jury Verdict
1 (I)	First Degree Burglary	Menza	1	Guilty (CP 185)
2 (II)	Residential Burglary	Menza	2	Guilty (CP 187)
3 (III)	First Degree Burglary	Kraut	3	Not Guilty (CP 188)
4 (IV)	Trafficking in Stolen Property	Kraut	4	Guilty (CP 189)
11 (XI)	First Degree Theft	Menza	5	Guilty (CP 190)
12 (XII)	Residential Burglary	Spencer	6	Guilty (CP 191)

¹ The State will refer to the verbatim report of proceedings as follows: The nine sequentially paginated volumes referred to as 1–9 will be referred to by the volume number followed by RP. The remaining volumes non-sequentially paginated will be referred to with the date prior to RP.

² Three separate homes were burglarized in the present case. The Menza home, on 90th Street So., Lakewood, WA; the Kline home on 78th Avenue Ct. E., Graham, WA; and the Spencer home on Kline Street SW, Lakewood, WA.

13 (XIII)	Second Degree Theft	Spencer	7	Guilty (CP 192)
14 (XIV)	Theft of a Firearm (Shotgun)	Menza	8	Guilty (CP 193)
15 (XV)	Theft of a Firearm (.40 caliber handgun)	Kraut	9	Guilty (CP 194)
16 (XVI)	Theft of a Firearm (.357 handgun)	Kraut	10	Guilty (CP 195)
17 (XVII)	Theft of a Firearm (.9mm handgun)	Kraut	11	Guilty (CP 196)
18 (XVIII)	First Degree Theft	Kraut	12	Guilty (CP 197)
19 ³ (XIX)	Residential Burglary	Kraut	13	Guilty (CP 198)

CP 65-70. The State alleged that defendant or an accomplice was armed with a firearm (shotgun) for count one; and six firearms for count three, thus elevating the crime charged to first degree burglary. CP 65-70.

Defendant insisted on representing himself at trial, and the court granted his request. 6/21/11 RP 9. After the State rested, defendant moved to dismiss the firearm enhancements and the burglary in the first degree charges, claiming that “there’s no evidence that the guns were readily available and accessible for use as required by case law.” 8 RP 792. The court denied defendant’s motion because it found sufficient evidence that

³ Although this count does not appear on the table in appellant’s brief (p.7), this count was added in the Information amended on August 23, 2011. CP 65-70.

a firearm was accessible to defendant or an accomplice. 8 RP 817; *see also infra* p. 16.

As reflected in the table above, the jury found defendant guilty on all counts except for count three (first degree burglary of the Kraut home). CP 185, CP 187–198; 9 RP 889–893. The jury also returned a special verdict that defendant or an accomplice was armed with a firearm during the burglary of the Menza home (count one). CP 186; 9RP 889–890.

Because defendant was convicted of both the lesser charge of residential burglary (count two) and the greater charge of burglary in the first degree (count one), the lesser offense merged into the greater at sentencing. 1/13/2012 RP 20-21. The court also merged the theft of a firearm convictions in regards to the .40 caliber firearm (count 15), the .357 caliber firearm (count 16), and the .9mm caliber firearm (count 17). 1/13/2012 RP 23, 26. The court also merged the first degree theft of the Menza home (count 11) with the theft of a firearm of the Menza home (count 14). 1/13/2012 RP 26. Defendant's offender score was a nine with regard to the Menza first degree burglary conviction (count one), the Spencer residential burglary conviction (count 12), and the Kraut residential burglary conviction (count 19). CP 216–229. Defendant's offender score was a seven for all remaining convictions. CP 216–229. On January 13, 2012, defendant was sentenced to the low end of the range; 87 months with an additional 60 months of firearm enhancements. CP 216–229.

Defendant filed this timely notice of appeal on February 3, 2012.
CP 230.

2. Facts

a. Burglary of Spencer Home

Ms. Sara Spencer's home, located on Kline Street in Lakewood, WA, was burglarized on June 8, 2009. 3 RP 190, 192. Ms. Spencer and her eight-year-old son were not home when the burglary occurred. 3 RP 190–191. The burglars kicked in the front door to Ms. Spencer's home and then ransacked her bedroom and her son's bedroom. 3 RP 196. The burglars stole several personal items.⁴ Ms. Spencer did not know any of the men who broke into her home, nor did she give any of them permission to enter. 3 RP 217. None of Ms. Spencer's stolen property has been returned to her. 3 RP 217–218.

b. Burglary of Menza Home

Mr. Iolani Menza's home located on 90th Street South in Lakewood, WA, was also burglarized on June 8, 2009. 8 RP 766. Mr. Menza lived with his wife and two children. 3 RP 765. During the time of the burglary, Mr. Menza was with his son and father at a local Denny's restaurant. 8 RP 766. Mr. Menza returned from the restaurant to find that

⁴ The burglars stole her son's V-Smile educational electronic gaming system and approximately 10 accompanying games, a digital camera, a laptop computer, approximately 20 DVD's, and a Nintendo Wii game system with two controllers and two games. 3 RP 196–208.

his home had been “thrashed.” 8 RP 770. Mr. Menza described the damage to his home as follows:

Everything was tossed up and down, cords were ripped out with all my electronics. My couches were walked on, boot prints on them. My bed was flipped over completely. My clothes [were] all over the place. My cabinets were rummaged through and knocked over. Electronics were missing. Just – it was wrecked.

8 RP 771. The burglars stole several personal items.⁵

The burglars also stole a 20-gauge shotgun that Mr. Menza kept beneath his bed in a soft case. 8 RP 779. The gun case did not have a lock. 8 RP 783. Mr. Menza testified that he kept the shotgun loaded and that in June of 2009 it was most likely loaded with two shells that were effectively blanks.⁶ Mr. Menza explained that the shotgun was not equipped with any kind of trigger locks. 8 RP 781. When asked if, “[...] in the condition that it was in when you left on June 8, 2009, could you have simply loaded a round into it and shot it?,” Mr. Menza replied, “Yes.” 8 RP 781. Mr. Menza kept a box of 20-gauge shotgun ammunition (slugs) “within eight inches” of the shotgun. 8 RP 783–784. The burglars stole the

⁵ The burglars stole a rare, 60-year-old ukulele of great cultural significance that Mr. Menza had planned on passing down to his son. 8 RP 772. The burglars also stole his children’s Nintendo Wii gaming system with approximately six or seven accompanying games, a Game Cube gaming system with 25 games, a ‘Chanel’ branded purse, a computer tower, and a laptop computer. 8 RP 772–778.

⁶ Mr. Menza explained that a blank is an empty shell that would fire the cap from the powder and would not “really” emit a projectile. 8 RP 779–780.

shotgun ammo. 8 RP 783. Mr. Menza did not know any of the men who broke into his home, nor did he give any of them permission to enter. 8 RP 788.

c. Burglary of Kraut Home

Mr. Joseph Kraut's home located on 78th Avenue Court East in Graham, WA, was burglarized on June 9, 2009. 6 RP 469. Mr. Kraut, a Washington State Patrol Trooper, lived in his home with his wife and daughter. 6 RP 469. Mr. Kraut was on vacation with his wife during the time of the burglary, and his daughter was at work. 6 RP 470. Mr. and Mrs. Kraut were informed of the burglary and returned early from their vacation to a home filled with the stench of pepper spray, a result of the burglars having pepper sprayed Mr. Kraut's four dogs. 6 RP 472. Mr. Kraut explained that his back garage door was kicked in and that his bedroom window had been broken. 6 RP 472. His wife's dresser had been ransacked and her jewelry cabinet was ripped apart. 6 RP 472. The burglars stole several of Mr. Kraut's personal items.⁷

The burglars also stole a gun safe that Mr. Kraut kept in his bedroom. 6 RP 472. The safe was secured by both a combination and a key lock. 6 RP 473. Mr. Kraut explained that the safe contained, "[a]ll my wife's good jewelry, my duty weapons, all my personal handguns." 6 RP

⁷The burglars stole a recently purchased gold club and an autographed Green Bay Packer raincoat. 6 RP 489, 493.

473.⁸ The duty weapons consisted of a 9mm Beretta, a .40 caliber H&K, a .357 Smith & Wesson, and a taser. 6 RP 474. The personal handguns consisted of a .25 caliber handgun, a .357 caliber Ruger, a 9mm caliber Smith and Wesson, and a .22 caliber Ruger. 6 RP 475–477. Mrs. Kraut’s jewelry consisted of a diamond heart pendant purchased by Mr. Kraut for Mrs. Kraut in celebration of their 28th anniversary, several necklaces, bracelets, five sets of earrings, and approximately 40 watches.⁹ 6 RP 494–498.

The only firearms that were recovered and returned to Mr. Kraut were the .22 caliber and .25 caliber handguns. 6 RP 483–484. The Washington State Patrol issued Mr. Kraut another handgun to replace the stolen .40 caliber H&K duty weapon. 6 RP 484.

d. Police Investigation

Ms. Susan Pernell, a school bus driver of 15 years, was driving her morning bus route when she observed a suspicious vehicle across the street from a daycare. 3 RP 224–225. Ms. Pernell observed the occupants of the vehicle load the car with possessions from a nearby house. 3 RP 228–229. Ms. Pernell reported the vehicle’s license plate number to police. 3 RP 228.

⁸ The safe also contained Mr. Kraut’s social security card, a stamp collection and extra vehicle keys. 6 RP 473, 494.

⁹ The watches were not located in the safe, but in a jewelry cabinet. 6 RP 496.

Officer Jeff Hall learned that the vehicle belonged to defendant's mother, Ms. Glafira Marin, and discovered that defendant had been issued a ticket while driving the vehicle. 5 RP 304. On the morning of June 10, 2009, investigators located the vehicle outside of Ms. Marin's house. Officer Hall contacted defendant at the house and asked if he knew why police wanted to speak with him. 5 RP 311. Defendant responded that "it was with regard to those guns – those cop guns [...] stolen from that house in Graham yesterday." 5 RP 312. Officer Hall was unaware of the crime defendant was speaking about and read defendant his *Miranda*¹⁰ rights. 5 RP 312–313. Defendant confessed to committing two burglaries in Lakewood, WA, on June 8, 2009, and also to committing a burglary in Graham, WA, on June 9 2009. 5 RP 314. He told Officer Hall that he was paid \$50 to drive the vehicle used in committing each burglary. 5 RP 314.

Police Officers obtained a search warrant for Mrs. Marin Andres' house (where defendant was living) and recovered a laptop computer, a computer tower, and shotgun shells from defendant's bedroom. 6 RP 518, 547–548.

Defendant told officers that an accomplice, "Looney," had sold several of the firearms but still had at least one stolen firearm at his trailer home in Auburn. 5 RP 315. Officer Greg McPherson began conducting surveillance on the trailer home at 11:00 a.m. on June 10, 2009. 6 RP 531.

¹⁰ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At 5:00 p.m. on the same day, police obtained a search warrant for the trailer home and discovered a rifle case containing a 20 gauge shotgun and also a plastic bag containing three pistols and a taser. 6 RP 534.

Defendant gave police permission to tape record a statement while in a Lakewood Police Department interview room on June 10, 2009. 7 RP 654–655. Officer Joseph Kolp interviewed defendant, who explained his role in the burglaries as “[...] just driving. Just keeping an eye on them [referring to co-defendants].” 7 RP 668. Defendant knew that his co-defendants were planning on breaking into houses, and when asked if he agreed to participate, defendant responded, “[y]eah, I agreed, yeah.” 7 RP 671. One member of the group would knock on the door of a potential victim’s home, and if nobody answered, other members of the group would kick the door down.¹¹ 7 RP 680–681. Defendant admitted to knocking on the front door of Trooper Kraut’s home immediately prior to burglarizing it. 7 RP 695. Defendant also explained that his accomplices had dropped a gun in Trooper Kraut’s back yard. 7 RP 708, 721. Defendant admitted to selling some of the stolen merchandise to the B&I Coin Shop in Lakewood, WA. 7 RP 710.

¹¹ Defendant explained that if somebody did answer the door, his accomplices would tell the person that they were looking for a lost puppy. 7 RP 674. Defendant and his accomplices also employed the use of a girl to knock on potential crime victim’s doors because she did not look like a suspicious person. 7 RP 694.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY OF BURGLARY IN THE FIRST DEGREE; SPECIFICALLY, THAT DEFENDANT OR AN ACCOMPLICE WAS ARMED DURING OR IN THE IMMEDIATE FLIGHT FROM THE BURGLARY AT THE MENZA HOME.

Due process requires the State to prove each and every element of the crime charged beyond a reasonable doubt. *State v. O'Hara*, 167 Wn.2d 91, 106, 217 P.3d 756 (2009). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Johnson*, 173 Wn.2d 895, 900, P.3d 591 (2012). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. Both circumstantial and direct evidence are

equally reliable. *State v. Yates*, 161 Wn.2d 714, 753, 168 P.3d 359 (2007). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In the present case, defendant was charged with burglary in the first degree for his involvement at the Menza home (count one). CP 65–70. A person commits burglary in the first degree if:

(1) [...] with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020. Under the statute, if one of the participants is armed, all the participants are armed, and all are guilty of burglary in the first degree. See *State v. Randle*, 47 Wn. App. 232, 236–237, 734 P.2d 51 (1987). A burglar can transform an ordinary burglary into a first degree burglary by arming himself with a gun he finds in the building. See *State v. Faille*, 53 Wn. App. 111, 766 P.2d 478 (1988). In *Faille*, the Court found that the defendant was “armed” as per the statute where the weapon was “readily accessible and available for use.”¹² *Id.* at 115.

¹² *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007), cited *infra*, did not abrogate *Faille*. See *infra* pp. 15–16.

A person is “armed” if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In addition to the test announced in *Valdobinos*, the Supreme Court has indicated that when determining the sufficiency of the evidence there is also a nexus requirement: “Under a two-part analysis, there must be a nexus between the weapon and the defendant and between the weapon and the crime.” *State v. Schelin*, 147 Wn.2d 562, 567–568, 55 P.3d 632 (2002).

This Court has repeatedly discussed the nexus requirement in the context of constructive possession cases, *see Valdobinos, supra* (police found cocaine and an unloaded rifle under a bed in the defendant’s home while searching for evidence of delivery and possession of cocaine); *Schelin, supra* (police found defendant in the basement of his home where the police later discovered a marijuana grow operation and a loaded revolver on the wall).

When the Court first discussed the nexus requirement in *Schelin*, the Court did so in the context of a constructive possession case. The majority of the court in *Schelin* noted that the “*Valdobinos* court clearly established that mere constructive possession is insufficient to prove a defendant is “‘armed’ with a deadly weapon during the commission of a crime” as required by the enhancement statute. *Schelin*, 147 Wn.2d at 567. It then went on to discuss “the nexus required in a constructive possession” case. *Schelin*, 147 Wn.2d at 567-568. Finally it noted that the

“requirement of a nexus to connect a defendant to a deadly weapon, and the weapon to the crime, guards against a deadly weapon enhancement being found whenever constructive possession is established.” *Schelin*, 147 Wn.2d at 575. The majority opinion discussed the nexus requirement in constructive possession cases. The majority in *Schelin* did not include actual possession cases within its discussion. The dissenting opinion in *Schelin* also focused on constructive possession cases. Considering the repeated references to “constructive possession” in the majority opinion in *Schelin*, and the lack of any subsequent case law holding there is a nexus requirement in actual possession case, the application of *Schelin* to actual possession cases is limited.

The Supreme Court recognized the limited application of the *Schelin* decision to constructive possession cases in the case of *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005):

In adopting the “easily accessible and readily available” test, we recognized that being armed is not confined to those defendants with a deadly weapon actually in hand or on their person. This is consistent with the legislature’s obvious intent to punish those who are armed during the commission of a crime more severely than those who are unarmed because the risk of serious harm to others is greater. This greater risk exists whether the defendant actually has a weapon in hand or the weapon is easily accessible and readily available.

Gurske, 155 Wn.2d at 138-139. The above language suggests that the *Gurske* court agreed that a defendant in actual possession of a weapon is “armed” for purposes of the enhancement statute. The Court went on to

discuss when evidence is sufficient to prove that a defendant in constructive possession of a weapon is armed for purposes of the enhancement statute.

Committing a crime while in actual possession of a weapon increases the risk of serious harm to others and poses an increasing and major threat to public safety. *See Gurske*, 155 Wn.2d at 138. When a defendant chooses to commit a crime while he has a weapon in his actual possession, he has engaged in the precise conduct the legislature intended to punish more harshly.

In *State v. Easterlin*, 159 Wn.2d 203, 206, 149 P.3d 366 (2006), the Supreme Court held that actual possession of a firearm is almost always sufficient to show a nexus and that Easterlin's statements that he possessed drugs and was armed was sufficient for a trier of fact to find that he was armed to protect his drugs. *Id.* at 209. In actual possession cases, it is rarely necessary to go beyond the commonly used "readily accessible and easily available" instruction. Where the defendant actually, instead of constructively, possesses a firearm, the State need not show more than that the weapon was easily accessible and readily available unless some unique circumstance so requires. *See Easterlin*, 159 Wn.2d at 209 n. 3 (giving examples of such circumstances, including possession of a ceremonial weapon for religious purposes or a kitchen knife in a picnic basket).

Recently, with *State v. Brown*, 162 Wn.2d 422, 173 P. 3d 245 (2007), there has been additional analysis of whether a person is "armed"

when handling guns in a burglary. Brown and his cousin broke into a house and took property. They discovered a rifle in a bedroom closet and placed it on the bed. They left the house without the gun.

The Supreme Court held that “the circumstance under which the weapon was found does not support a conclusion that Brown was “armed” as intended by the legislature.” 162 Wn. 2d at 432. The rifle was found on the bed only a few feet from where it had been kept. The Court went on to conclude that the facts suggested that the weapon was “merely loot,” and not there to be used. *Id.* at 434.

The determination of whether the burglar is “armed” when he picks up a gun in a burglary is fact-driven and based upon circumstances. **Brown** did not overrule **Faille** or even limit it. The court distinguished **Faille** by pointing out that Faille, as the defendant in this case, took the gun with him. 162 Wn. 2d at 434, n. 4.

Brown is distinguishable from the present case. In denying defendant’s motion to dismiss the firearm enhancement resulting from the Menza burglary, the trial court distinguished between the facts in the present case and the facts in **Brown** as follows:

[A]t least two things are significantly distinguishable between this case and the **Brown** case, and one is that in this case there is evidence that these guns were actually touched; they were loaded or had ammunition of a caliber that could be used in that weapon, for example. Although this last witness [Mr. Menza] testified that his shotgun was loaded, he also testified to another box of ammunition being within eight inches of the gun and [...] he said that the case

wasn't locked and there was no kind of safety or anything on the shotgun, so it could have been used immediately. There was nothing that would make it inaccessible and unlike in the *Brown* case, they didn't leave it behind; they took it with them, apparently.

8 RP 816. The trial court's reasoning was correct. In *Brown*, there was no evidence that Brown or his accomplice actually handled the firearm other than to move it from the closet to the bed. *Brown*, 162 Wn.2d at 432. Here, in contrast, the defendant or an accomplice actually carried the shotgun (and accompanying ammunition) from Mr. Menza's house and into defendant's vehicle. 7 RP 683–684. The shotgun was ultimately hidden beneath a trailer home located in Auburn. 6 RP 535–537.

The jury's special verdict that defendant or an accomplice was armed with a firearm at the time of the Menza burglary is supported by sufficient evidence on the record. CP 186. Mr. Menza's testimony reflected that the shotgun was intentionally accessible for immediate use. Mr. Menza owned the shotgun for "home protection." 8 RP 784. Mr. Menza testified that he kept the 20-gauge shotgun in a soft case that he referred to as a "shotgun holder." 8 RP 779. He kept the shotgun loaded and did not equip it with any kind of trigger lock. 8 RP 779–780. The prosecuting attorney performed a colloquy with Mr. Menza regarding the shotgun, in which she asked if "[...] in the condition that it was in when you left on June 8th of 2009, could you have simply loaded a round into it and shot it?" 8 RP 781. Mr. Menza replied, "[y]es." 8 RP 781. Mr. Menza

also testified that he kept a box of 20-gauge shotgun ammunition located within eight inches of the shotgun. 8 RP 784. The ammunition was later discovered in defendant's vehicle. 6 RP 611.

From this, the jury could certainly conclude that, if the shotgun was kept in a state so as to be "readily available and easily accessible" for defensive purposes for Mr. Menza, it was certainly so in the hands of the defendant or an accomplice as they fled the burglary scene with the stolen property. These facts go beyond "the mere presence of a deadly weapon at the crime scene" as discussed in *Brown*. It is possible, as in *Faille* and in this case, for a firearm to be both a weapon and "loot" at the same time.¹³

2. DEFENDANT WAIVED HIS CHALLENGE TO THE DETERMINATION OF SAME CRIMINAL CONDUCT BY STIPULATING TO THE CALCULATION OF HIS OFFENDER SCORE.

- a. Defendant agreed to his offender score at the sentencing hearing, thereby waiving his right to appeal based upon his offender score calculation.

A defendant may waive a challenge to a miscalculated offender score "where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court

¹³ Because the foregoing analysis contains the State's arguments in support of the jury's finding that defendant was "armed" for the purposes of a deadly weapon or firearm sentence enhancement, the State will not separately address appellant's issue pertaining to assignment of error #2.

discretion.” *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). While a defendant may not waive his objection to an illegal sentence, he may explicitly or implicitly waive an objection to calculation of his offender score. *Id.* at 874. *See also, In re Personal Restraint of Connick*, 144 Wn.2d 442, 464, 28 P.3d 729 (2001) *overruled in part by Goodwin, supra* (once a defendant agrees to an offender score that counts his prior offenses separately, he cannot subsequently challenge the sentencing court’s failure to consider some of those prior offenses as the same criminal conduct); *State v. Huff*, 119 Wn. App. 367, 371, 80 P.3d 633 (2003) (interpreting *Goodwin* as holding that “a stipulation to incorrect facts or a discretionary offender-score calculation is not subject to direct appeal).

“Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion.” *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000).

Here, the alleged error is the trial court’s failure to rule that the theft in the first degree conviction (Kraut home, count 18) consisted of the same criminal conduct as the theft of a firearm convictions (Kraut home, counts 15, 16, and 17). Brief of Appellant, 16. Defendant presented this argument below. The trial court ruled that the counts were not the same criminal conduct. 11/23/2011 RP 7; 1/13/2012 RP 25–26. Defendant subsequently stipulated to his prior record and offender score. CP 213–215. Defendant’s stipulation contains the following clause:

If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

CP 215. Defendant was sentenced within his standard range sentence of 87–116 months confinement. CP 216–229.

Defendant signed the stipulation to his prior record and offender score. CP 215. In stipulating to his offender score that listed the first degree theft and theft of a firearm convictions separately, defendant waived his challenge to the determination of same criminal conduct. *See Connick, supra.*

- b. The first degree theft and theft of a firearm convictions regarding the Kraut burglary do not involve the same criminal conduct.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the “same criminal conduct” only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase “same criminal conduct” to be construed narrowly. *See State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Lessley*, 118 Wn.–2d at 778. An appellate court will generally defer to a trial court’s decision on

whether two different crimes involve the same criminal conduct, and will not reverse absent a clear abuse of discretion or a misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 3 P.2d 733 (2000). See also *State v. Mutch*, 171 Wn.3d 646, 653, 254 P.3d 8-3 (2011).

Here, the crimes do not involve the same victim and should not be considered as same criminal conduct. The concept that crimes involving multiple victims equal same criminal conduct has been rejected:

Convictions of crimes involving multiple victims must be treated separately. To hold otherwise would ignore two of the purposes expressed in the SRA: ensuring that punishment is proportionate to the seriousness of the offense, and protecting the public. RCW 9.94A.010(1), (4). As one commentator has noted, “to victimize more than one person clearly constitutes more serious conduct” and, therefore, such crimes should be treated separately. D. Boerner, *Sentencing in Washington* § 5.8(a) at 5-18 (1985). Additionally, treating such crimes separately, thereby lengthening the term of incarceration, will better protect the public by increasing the deterrence of the commission of these crimes. For these reasons, we conclude that crimes involving multiple victims must be treated separately.

State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); see also *Lessley*, 118 Wn.2d 773.

In the present case, the theft conviction (count 18) has multiple victims. The trial court correctly identified two separate victims in the Kraut burglary: Trooper Kraut, and Mrs. Kraut. This determination was based upon Trooper Kraut’s testimony in which he described an ownership distinction between the guns and the jewelry stolen from his

home. Trooper Kraut referred to the stolen jewelry as his “wife’s good jewelry” and several of the stolen weapons as “my personal handguns.”¹⁴ 6 RP 473. Trooper Kraut later specified that he bought Mrs. Kraut a diamond heart pendant in celebration of their 28th anniversary. 6 RP 494. He referred to the stolen Green Bay Packers raincoat as “my coat” and the stolen jewelry as being located in “my wife’s dresser and her little jewelry stand [...]” 6 RP 492–493. Trooper Kraut also testified that he bought a cross necklace *for* Mrs. Kraut for a special occasion. 6 RP 495. Trooper Kraut responded affirmatively regarding whether a stolen pendant was “owned by [his] wife.” 6 RP 498.

The defense states that “[t]he jewelry and guns were all stolen from the same place – the safe stored in their home.” Brief of Appellant, 17. However, the record indicates that a portion of the stolen jewelry (consisting primarily of 40 watches and five sets of earrings) was actually located in a separate jewelry cabinet that Mrs. Kraut kept next to her dresser. 6 RP 496–497. A proper understanding of the jewelry location supports the trial court’s conclusion that the stolen property belonged to two separate victims.

¹⁴ Trooper Kraut also referred to the stolen duty weapons (issued by the Washington State Patrol) as “[...] my newly issued .40 caliber H&K.” 6 RP 474.

Trooper Kraut consistently referred to the jewelry as belonging to Mrs. Kraut and the handguns and jacket as belonging to himself. The trial court did not abuse its discretion in concluding that the first degree theft conviction and theft of a firearm conviction has multiple victims. A charge with multiple victims cannot merge with a crime with a single victim. *Dunaway*, 109 Wn.2d at 215. Moreover, the trial court did not abuse its discretion in relying on defendant's stipulated offender score in sentencing defendant within the standard range. The convictions must be treated separately.

3. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS UPON DEFENDANT WHERE STATUTES AND CASE LAW SUPPORT THE IMPOSITION OF SUCH COSTS.

a. The matter is not properly before this court.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). However, RAP 2.5(a) provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In determining whether a defendant may raise an issue for the first time on appeal under RAP 2.5(a), the court must first make a cursory determination as to whether the alleged error even suggests a

constitutional issue. *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992). If it does, the court must then determine if the error is manifest; that is, if the asserted error had practical and identifiable consequences in the trial of the case. *Id.* at 345. See also *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (holding that an appellant must show that he or she incurred actual prejudice in order to demonstrate that a constitutional error is manifest). Once the appellant has demonstrated that the error is both constitutional and manifest, the burden shifts to the State to prove that the error was harmless. *State v. Bertrand*, 165 Wn. App. 393, 401, 267 P.3d 511 (2011). Furthermore, when the record does not contain the facts necessary to adjudicate a claimed error, “no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

In the present case, defendant never challenged the imposition of LFOs at the trial court level, whereas on appeal defendant argues that he is unable to pay LFOs. Brief of Appellant, 19–20. Because there is no record below of defendant’s inability to pay LFOs, the defendant has not suffered prejudice and the claimed error cannot be manifest. *McFarland*, 127 Wn.2d at 333. Therefore, defendant’s new claim must be otherwise justified under RAP 2.5(a) or under case law.

The defendant does not claim any of the three conditions listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal; in fact, defendant cannot meet any of the requirements of RAP

2.5(a). Rather, defendant relies on *Bertrand*, 165 Wn. App. at 394, for the proposition that “this error may be challenged for the first time on appeal.” Brief of Appellant, 18. However, the court in *Bertrand* relied upon *State v. Baldwin*, 63 Wn. App. 303 at 310–311, 818 P.2d 1116 (1991), 837 P.2d 646 (1992), to describe the circumstances that must be met for the court to consider a challenge to the imposition of LFOs:

Baldwin holds that ‘the meaningful time to examine the defendant’s ability to pay is *when the government seeks to collect the obligation.*’ The *Baldwin* court further noted: ‘The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*’

Bertrand, 165 Wn. App. at 405. Thus, to the extent that defendant *can* challenge the imposition of LFOs for the first time on appeal, it is limited to being raised at the time of collection. Because the time to determine a defendant’s ability to pay is when the government seeks collection, the trial court could not have erred in failing to consider defendant’s ability to pay at sentencing. *State v. Smits*, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009). *See also State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997) (“[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant’s finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or

longer.”) There is no evidence that the government is seeking collection or that defendant is bringing the claim on the basis of manifest hardship.

Because defendant failed to raise his inability to pay fees, presented no evidence establishing a present and future inability to pay, and now improperly petitions the Court to review the issue for the first time on appeal, the issue is not properly before this court.

- b. The trial court is not obligated to consider defendant’s ability to pay the crime victim assessment fee, DNA database fee, and criminal filing fee, because the imposition of such fees is required by statute.

Different components of a defendant’s financial obligation require separate analysis because each raises its own distinct problems. *State v. Baldwin*, 63 Wn. App. 303, 309, 818 P.2d 1116, 1120 (1991); *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991). A separate analysis of each fee at issue in the present case reveals that three of the four fees imposed (crime victim assessment fee, DNA database fee, and criminal filing fee) are mandatory in nature and that, in imposing such fees, the sentencing court is not required to consider defendant’s ability to pay.

The crime victim assessment fee is mandatory per RCW 7.68.035, which provides, in relevant part:

When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there *shall be imposed by the court upon such convicted person a penalty assessment.* The

assessment shall be in addition to any other penalty or fine imposed by law and *shall be five hundred dollars* for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

Id. (emphasis added). Case law affirms the mandatory nature of the crime victim assessment fee. *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991) (finding that “. . . imposition of the VPA [victim penalty assessment] is mandatory and requires no consideration of a defendant’s ability to pay.”). The trial court did not error in imposing this mandatory fee.

Defendant’s \$100 DNA database fee is also mandatory per RCW 43.43.754(1) & RCW 43.43.754(1), which state the following, respectively:

A biological sample *must* be collected for purposes of DNA identification analysis from: (a) *every adult* or juvenile individual *convicted of a felony* [. . .].

Every sentence imposed for a crime specified in RCW 43.43.754 *must include a fee of one hundred dollars*. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law.

Id. (emphasis added). Case law affirms the mandatory nature of the DNA database fee, regardless of defendant’s ability to pay. *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165, 1170 (2009) (finding that “In

2008, the legislature passed an amendment to make the fee mandatory regardless of hardship.”). Defendant was convicted of several felonies and is required to pay the \$100 DNA database fee. The trial court did not error in imposing this fee.

Defendant’s \$200 criminal filing fee is also mandatory per RCW 36.18.020(h), which states the following:

*Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, a defendant in a criminal case **shall be liable for a fee of two hundred dollars.***

Id. (emphasis added). The statute is clear. The trial court did not error in imposing the fee.

Because the imposition of the crime victim assessment fee, DNA database fee, and criminal filing fee is a statutory requirement, the court was not obligated to determine defendant’s ability to pay.

- c. The trial court’s imposition of court-appointed attorney fees and defense costs is not clearly erroneous given that the record is sufficient to review whether the trial court considered defendant’s ability to pay.

The Appellate Court reviews a sentencing court’s determination of a defendant’s resources and ability to pay under the clearly erroneous standard. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 1120

(1991) (reasoning that the erroneous standard applies because defendant's ability to pay and financial status are essentially factual findings). Courts may require defendants to pay court costs and other assessments associated with bringing the case to trial pursuant to RCW 10.01.160. This statute contains the following constitutional safeguards:

(1) A sentencing court may impose repayment of court costs *only if it determines that the defendant is or will be able to pay*, and

(2) A defendant who has been ordered to pay costs and who *is not in contumacious default* in the payment thereof may *at any time* petition the sentencing court for remission of the payment of costs.

RCW 10.01.160 (emphasis added). In light of such safeguards, the judiciary is not required to provide the added protection of formal findings to support the assessment of court costs. *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991). *See also State v. Eisenman*, 62 Wn. App. 640, 810 P.2d 55 (1991); *State v. Suttle*, 61 Wn. App. 703, 812 P.2d 119 (1991) (in both cases, financial obligations were upheld in the absence of formal findings of defendant's ability to pay).

A defendant's poverty does not immunize him from punishment or the requirement to pay legal financial obligations. *State v. Blank*, 131 Wn.

2d 230, 241, 930 P.2d 1213 (1997), quoting *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). Courts should not speculate on an offender's future earning ability. *Blank*, *supra* at 242. After release, the defendant remains under the court's jurisdiction for collection of his legal financial obligations until the amounts are fully paid. While a court may not incarcerate an offender who truly cannot pay LFOs (*Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed2d 221 (1976)), every offender must make a good faith effort to satisfy those obligations. Offenders must seek employment, borrow money, or raise money in any other lawful manner to pay the LFOs. *State v. Woodward*, 116 Wn.App. 697, 703-704, 67 P.3d 530 (2003). "A defendant who claims indigency must do more than simply plead poverty in general terms [...]." *Woodward*, at 704, quoting *State v. Bower*, 64 Wn. App. 227, 233, 823 P.2d 1171 (1992).

In the present case, the Honorable Stephanie A. Arend found that defendant has the likely future ability to pay his LFOs. Finding 2.5 of defendant's judgment and sentence states that:

The court has considered the total amount owing, the defend's [sic] past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the likely

future ability to pay the legal financial obligations imposed herein.

CP 216–229 at 218. The record supports this finding. In defendant’s June 10, 2009, interview with Officer Joseph Kolp, defendant stated that he was currently employed at “The Janitorial Management System” (JMS). 7 RP 657. He had been working five hours per day at JMS for five months prior to the burglaries. 7 RP 657. Unlike the defendant in *Bertrand*, the defendant here has not presented any evidence of a physical disability that might limit his present or future ability to pay LFOs. *Bertrand*, 165 Wn. App. at 404 n.5.

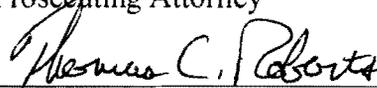
Although not required to enter formal findings regarding defendant’s ability to pay LFOs until collection, the record indicates that the trial court took into account the financial resources of defendant in imposing court-appointed attorney fees and defense costs. The record also does not reflect that defendant has ever taken advantage of the safeguards of RCW 10.01.160. There is no evidence that defendant has even petitioned the court for remission of payment of costs. The trial court did not error in imposing LFOs upon defendant.

D. CONCLUSION.

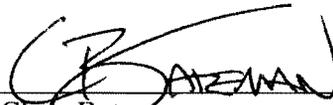
For the above stated reasons, the State respectfully requests this Court to affirm defendant's conviction and sentence.

DATED: September 14, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



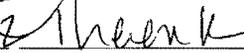
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442



Chris Bateman
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.17.12 
Date Signature

PIERCE COUNTY PROSECUTOR

September 18, 2012 - 2:01 PM

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