

NO. 46470-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

KIMBERLY LELAND,

Appellant.

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

The Honorable Michael H. Evans, Judge
The Honorable Marilyn Haan, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Charges, verdicts, and sentences</u>	3
2. <u>Trial testimony</u>	4
C. <u>ARGUMENT</u>	6
1. THE TWO CONVICTIONS FOR SECOND DEGREE TAKING A MOTOR VEHICLE WITHOUT OWNER’S POSSESSION VIOLATE DOUBLE JEOPARDY BECAUSE THE ACTS CONSTITUTED A SINGLE UNIT OF PROSECUTION.....	6
a. <u>An analysis of the statute supports only a single unit of prosecution.</u>	7
b. <u>The history of the statute does not support separate charges</u>	11
c. <u>The facts in this case do not support separate charges</u>	14
d. <u>The result under State v. Arndt is no different</u>	15
2. THE TRIAL COURT’S FAILURE TO CONSIDER LELAND’S ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL. ALTERNATIVELY, COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF LFOs.	18

TABLE OF CONTENTS (CONT'D)

	Page
a. <u>The legal validity of the LFO order may be challenged for the first time on appeal as an illegal sentencing condition.</u>	19
b. <u>Because the sentencing court did not comply with RCW 10.01.160(3), Leland may challenge the LFO order for the first time on appeal.</u>	23
c. <u>Leland's challenge is ripe for review.</u>	26
d. <u>Because the record does not demonstrate the sentencing court would have imposed the LFOs had it undertaken the required procedures, the remedy is remained.</u>	33
e. <u>Alternatively, Leland was denied effective assistance of counsel when her trial counsel failed to object to the imposition of LFOs.</u>	33
D. <u>CONCLUSION</u>	36

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>City of Federal Way v. Koenig</u> 167 Wn.2d 341, 217 P.3d 1172 (2009).....	14
<u>In re Dependency of K.N.J.</u> 171 Wn.2d 568, 257 P.3d 522 (2011).....	25
<u>In re Personal Restraint of Fleming</u> 129 Wn.2d 529, 919 P.2d 66 (1996).....	20
<u>In re Personal Restraint of Goodwin</u> 146 Wn.2d 861, 50 P.3d 618 (2002).....	21
<u>In re Personal Restraint of Pirtle</u> 136 Wn.2d 467, 965 P.2d 593 (1998).....	34
<u>In re Personal Restraint of Shale</u> 160 Wn.2d 489, 158 P.3d 588 (2007).....	22
<u>State v. Adel</u> 136 Wn.2d 629, 965 P.2d 1072 (1998).....	6, 7
<u>State v. Arndt</u> 87 Wn.2d 374, 553 P.2d 1328 (1976).....	8, 15, 16, 17
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	19, 27
<u>State v. Baldwin</u> 63 Wn. App. 303, 818 P.2d 1116 (1991).....	27
<u>State v. Bertrand</u> 165 Wn. App. 393, 267 P.3d 511 (2011) <u>review denied</u> , 175 Wn.2d 1014 (2012).....	22, 24
<u>State v. Blazina</u> 174 Wn. App. 906, 301 P.3d 492 <u>review granted</u> , 178 Wn.2d 1010 (2013).....	18, 22, 23, 34

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Burns</u> 159 Wn. App. 74, 244 P.3d 988 (2010).....	22
<u>State v. Calvin</u> 176 Wn. App. 1, 302 P.3d 509 (2013) <u>motion for reconsideration granted and republished at</u> 316 P.3d 496 (October 24, 2013)	21, 22
<u>State v. Carter</u> 56 Wn. App. 217, 783 P.2d 589 (1989).....	35
<u>State v. Chambers</u> 176 Wn.2d 573, 293 P.3d 1185 (2013).....	33
<u>State v. Claypool</u> 111 Wn. App. 473, 45 P.3d 609 (2002).....	23
<u>State v. Curry</u> 118 Wn.2d 911, 829 P.2d 166 (1992).....	24
<u>State v. Duncan</u> 180 Wn. App. 245, 327 P.3d 699 (2014).....	23, 34
<u>State v. Ford</u> 137 Wn.2d 427, 973 P.2d 452 (1999).....	19, 31
<u>State v. Hall</u> 168 Wn.2d 726, 230 P.3d 1048 (2010).....	7, 9, 11, 14, 15
<u>State v. Hancock</u> 44 Wn. App. 297, 721 P.2d 1006 (1986) <u>review denied</u> , 158 Wn.2d 1021 (2006)	15
<u>State v. Hathaway</u> 161 Wn. App. 634, 251 P.3d 253 (2011).....	32
<u>State v. Hiatt</u> 154 Wn.2d 560, 115 P.3d 274 (2005).....	8, 13, 16

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Hunter</u> 102 Wn. App. 630, 9 P.3d 872 (2000).....	20
<u>State v. Jensen</u> 164 Wn.2d 943, 195 P.3d 512 (2008).....	7, 14
<u>State v. Kosanke</u> 23 Wn.2d 211, 160 P.2d 541 (1945).....	16
<u>State v. Kyllo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	35
<u>State v. Lundy</u> 176 Wn. App. 96, 308 P.3d 755 (2013).....	19, 26, 31, 35
<u>State v. Mahone</u> 98 Wn. App. 342, 989 P.2d 583 (1999).....	31
<u>State v. McCaskey</u> 55 Wn.2d 329, 347 P.2d 895 (1959).....	9, 12
<u>State v. Medley</u> 11 Wn. App. 491, 524 P.2d 466 <u>review denied</u> , 84 Wn.2d 1006 (1974)	9, 13, 16
<u>State v. Melick</u> 131 Wn. App. 835, 129 P.3d 816 <u>review denied</u> , 158 Wn.2d 1021 (2006)	3, 14
<u>State v. Moen</u> 129 Wn.2d 535, 919 P.2d 69 (1996)	19, 20, 22
<u>State v. Paige-Colter</u> 175 Wn. App. 1010 <u>review granted</u> , 178 Wn.2d 1018 (2013)	23
<u>State v. Paine</u> 69 Wn. App. 873, 850 P.2d 1369 (1993).....	20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Parker</u> 132 Wn.2d 182, 937 P.2d 575 (1997).....	20, 33
<u>State v. Pettitt</u> 93 Wn.2d 288, 609 P.2d 1364 (1980).....	8, 9, 13
<u>State v. Phillips</u> 65 Wn. App. 239, 828 P.2d 42 (1992).....	26
<u>State v. Roche</u> 75 Wn. App. 500, 878 P.2d 497 (1994).....	20
<u>State v. Smits</u> 152 Wn. App. 514, 216 P.3d 1097 (2009).....	29
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	33
<u>State v. Tilton</u> 149 Wn.2d 775, 72 P.3d 735 (2003)	35
<u>State v. Tully</u> 198 Wash. 605, 89 P.2d 517 (1939)	12
<u>State v. Tvedt</u> 153 Wn.2d 705, 107 P.3d 728 (2005).....	6
<u>State v. Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	27, 28
<u>State v. Varnell</u> 162 Wn.2d 165, 170 P.3d 24 (2007).....	7
<u>State v. Villanueva-Gonzalez</u> 180 Wn.2d 975, 329 P.3d 78 (2014).....	7, 9
<u>State v. Westling</u> 145 Wn.2d 607, 40 P.3d 669 (2002).....	15

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Ziegenfuss</u> 118 Wn. App. 110, 74 P.3d 1205 (2003).....	26

FEDERAL CASES

<u>Brown v. Ohio</u> 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).....	9, 13
--	-------

<u>Hardman v. Barnhart</u> 362 F.3d 676 (10th Cir.2004).....	25
---	----

<u>Schad v. Arizona</u> 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).....	8
---	---

<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997).....	34
---	----

<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	34
---	----

<u>United States v. Loy</u> 237 F.3d 251 (3d Cir. 2001).....	27
---	----

RULES, STATUTES AND OTHER AUTHORITIES

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 74.02 (3d Ed. 2008)	8
--	---

<u>The Assessment and Consequences of Legal Financial Obligations in Washington State</u> Washington State Minority and Justice Commission (2008)	30
--	----

Laws of 1975, 1st ex.s., ch. 260, §9A.76.070.....	12
---	----

Laws of 2002, ch. 324, § 1.....	12
---------------------------------	----

Laws of 2003, ch. 53.....	11
---------------------------	----

TABLE OF AUTHORITIES (CONT'D)

	Page
Laws of 2003, ch. 53 § 73	11
Former RCW 9.54.020.....	12
RCW 9.54.020	12
RCW 9.94A.142	20
RCW 9.94A.589	3
RCW 9.94A.753	18, 23
RCW 9.94A.760	18
RCW 9A.56.070	11
RCW 9A.56.075	3, 7, 8, 11, 16
RCW 10.01.160	2, 18, 20, 21, 22, 23, 24, 25, 27, 28, 29, 31, 34, 35, 36
RCW 10.01.180.....	30
RCW 10.82.090.....	30
RCW 36.18.016.....	19, 35
RCW 74.08.331	15
U.S. Const. amend. V	6
U.S. Const. Amend. VI.....	33
Const. art. I, § 9.....	6
Const. art. I, § 22.....	33

A. ASSIGNMENTS OF ERROR

1. The court violated the appellant's right to be free from double jeopardy where she was convicted of two counts of taking a motor vehicle based on a single unit of prosecution.

2. The trial court erred when it found the appellant had the current or future ability to pay legal financial obligations (LFOs). CP 41-42 (financial obligation finding 2.5).¹

3. The trial court's conclusion that the appellant has the ability to pay LFOs is unsupported by the record.

4. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs

Issues Pertaining to Assignments of Error

1. According to the State's evidence at trial, the appellant participated in the taking of a vehicle, was seen driving the same car two days later, and a day after that, was pulled over driving the same vehicle. The State charged two counts of second degree taking a motor vehicle without the owner's permission. Where the acts constituted a single unit of prosecution, did a second conviction violate the appellant's right to be free from double jeopardy?

¹ The Judgment and Sentence is attached as an Appendix.

2. RCW 10.01.160 requires the trial court to consider the defendant's present, past, and future ability to pay the amount ordered before imposing discretionary LFOs. The trial court ordered appellant to pay \$2,025 in legal financial obligations, including \$1,250 in non-mandatory fines. In so ordering, the trial court included generic, pre-formatted language in the Judgment and Sentence that concluded appellant had the ability or likely future ability to pay this amount and cited the restitution statute, which was inapplicable under the circumstances given that restitution was not ordered. There is nothing in the record, however, indicating that the trial court ever took into account the appellant's financial resources or likely future resources.

a. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary LFOs as part of appellant's sentence, thus making the LFO order erroneous and challengeable for the first time on appeal?

b. Is the appellant's challenge to the validity of the LFO order ripe for review?

c. Is the remedy to remand for resentencing?

d. Was appellant's trial attorney ineffective for failing to object to the imposition of discretionary legal financial obligations?

B. STATEMENT OF THE CASE²

1. Charges, verdicts, and sentences

The State charged Kimberly Leland with two counts of second degree taking a motor without owner's permission occurring on December 5 (count 1) and December 8, 2013 (count 2). CP 3-4, 8-12; RCW 9A.56.075(1). The State charged both "taking" and "riding" as to both counts, and the jury was so instructed. CP 10-11. 29-30. In addition, the State charged possession of a stolen vehicle as an alternative to the December 8 count. CP 11.

A jury convicted Leland of two counts of taking a motor vehicle and therefore did not reach the possession alternative on the second count. CP 35-37.

At sentencing, Leland argued the offenses constituted the same criminal conduct based on the principles set forth in State v. Melick,³ which prohibits conviction for theft and possession of the same property. 2RP 148-49; RCW 9.94A.589(1)(1). The court ruled the offenses did not constitute the same criminal conduct based on the fact the evidence

² This brief refers to the verbatim reports as follows: 1RP 4/10/14 (first trial ending in mistrial); 2RP – 5/27 and 6/12/14 (second trial and sentencing).

³ 131 Wn. App. 835, 840-41, 129 P.3d 816, review denied, 158 Wn.2d 1021 (2006).

showed Leland was a passenger on December 5 and the driver on December 8. 2RP 150.

The court counted each offense as a point against the other and sentenced Leland to concurrent standard range sentences based on the resulting offender score. CP 44. The court also ordered Leland to pay \$2,025 in legal financial obligations, including \$1,225 in non-mandatory legal financial obligations. CP 42.

Leland timely appeals. CP 52.

2. Trial testimony

In 2013, Kelso resident Frank Wilson owned a red Chevrolet Cavalier. 2RP 29. But Wilson was elderly and his health began to fail the summer of that year. 2RP 77. Jesse Bridgman, Wilson's neighbor, was Wilson's part-time caregiver until October of 2013 and previously owned Wilson's Cavalier. 2RP 29, 77. Bridgman denied knowing Leland, but witnesses saw the two together during that October. 2RP 51, 79.

By December 5, 2013, Wilson was in a nursing home, but his Cavalier was still parked on the street near Wilson's vacant home. 2RP 37, 39-40. That evening, Connie Russell, another neighbor of Wilson's, was at home when Leland came to Russell's door and asked to speak with Russell's boyfriend. Leland claimed Russell's daughter was in trouble.

2RP 53-54. Russell found Leland's demeanor, as well as the content of the conversation, odd. 2RP 53, 56.

Russell looked across the street and saw two men in grey jackets bending over the Cavalier. 2RP 54. Russell, alarmed, decided to call her adult daughter, Shawna, who was helping Wilson's stepson sell the Cavalier.⁴ 2RP 54, 57.

While Russell was in the process of contacting Shawna, Leland ran across the street, opened the passenger door of the Cavalier, and got into the car. In the process, Leland kissed one of the men, who was now in the driver's seat, on the cheek. Leland rode away in the Cavalier as a passenger. 2RP 57.

After speaking with Shawna, Russell called the police. 2RP 57, 71. Wilson's stepson reported the car stolen the following day. CP 13. The stepson testified that, as of December 5, the car had not been sold to anyone and no one had permission to drive it away. 2RP 36, 38.

Two days later, Russell saw Leland driving the Cavalier down her street. 2RP 60. When the car stopped for a moment, Russell's boyfriend yelled to Leland that the car belonged to Wilson and that Leland should pull over. 2RP 60. Leland "floored it" and left the area. 2RP 60. The

⁴ The stepson had a power of attorney granting him control over Wilson's affairs. 2RP 36.

following day, December 8, Shawna again saw Leland driving the Cavalier and flagged down a Kelso police officer, who eventually stopped the car. 2RP 61, 88-92.

According to the officer, Leland claimed she bought the car after it was posted on the Craig's List website. Leland was, however, unable to identify the seller or provide contact information. 2RP 93. When Russell arrived to identify Leland, Leland said, "Oh, her." 2RP 95.

C. ARGUMENT

1. THE TWO CONVICTIONS FOR SECOND DEGREE TAKING A MOTOR VEHICLE WITHOUT OWNER'S POSSESSION VIOLATE DOUBLE JEOPARDY BECAUSE THE ACTS CONSTITUTED A SINGLE UNIT OF PROSECUTION.

Under the double jeopardy provisions of the United States and Washington constitutions, an accused may not be convicted more than once under the same criminal statute if only one "unit" of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). The "unit of prosecution" analysis applies when a defendant is convicted multiple times under the same statutory provision; the analysis asks "what act or course of conduct has the Legislature defined as the punishable act." State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

This Court applies a multi-step approach to determine the unit of prosecution: The first step is to analyze the statute. Next, this Court reviews the statute's history. Finally, this Court performs a factual analysis as to the unit of prosecution because even where the Legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one unit of prosecution has occurred. State v. Hall, 168 Wn.2d 726, 730, 230 P.3d 1048 (2010) (quoting State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007)).

Notably, “[u]nless the legislature clearly and unambiguously intends to turn a single transaction into multiple offenses, the rule of lenity requires a court to resolve ambiguity in favor of one offense.” State v. Jensen, 164 Wn.2d 943, 949, 195 P.3d 512 (2008) (citing Adel, 136 Wn.2d at 634). This Court's review is de novo. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014).

- a. An analysis of the statute supports only a single unit of prosecution.

The statute in question is RCW 9A.56.075(1), which provides:

A person is guilty of taking a motor vehicle without permission in the second degree if . . . she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle . . . or . . . she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

“[L]egislatures frequently enumerate alternative means of committing a crime without intending to define . . . separate crimes.” Schad v. Arizona, 501 U.S. 624, 636, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991); State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976). RCW 9A.56.075 is such a statute. State v. Pettitt, 93 Wn.2d 288, 293, 609 P.2d 1364 (1980) (riding activity and the actual taking are alternative methods of committing the same crime); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 74.02, at 132-34 (3d Ed. 2008).

The Supreme Court has gone even further, to find that the distinction between the alternatives is effectively nonexistent given the statute’s assignment of equal culpability to a rider: It renders a rider essentially an accomplice to the taking of the car. In State v. Hiett, the Court held that, “[t]aking the vehicle is an act which is necessary to commit the crime and . . . imputed to a knowing and voluntary rider who is, by statute, equally guilty with the person taking or driving the vehicle.” 154 Wn.2d 560, 565, 115 P.3d 274 (2005) (affirming joint and several liability as to restitution for driver and passenger convicted of second degree taking a motor vehicle); see also State v. Medley, 11 Wn. App. 491, 497, 524 P.2d 466 (by providing that a culpable rider is equally guilty with the driver, “riding” is deemed the equivalent of aiding, “abetting, counseling, or encouraging” the principal act) (quoting State v.

McCaskey, 55 Wn.2d 329, 332, 347 P.2d 895, 897 (1959)), review denied, 84 Wn.2d 1006 (1974).

“Riding” under the statute is considered a continuing course of conduct, analogous to possession of stolen property, and a taker by definition also “rides” in the vehicle. State v. Pettitt, 22 Wn. App. 689, 692-93, 591 P.2d 862 (1979), overruled on other grounds, 93 Wn.2d 288, 293, 609 P.2d 1364 (1980). The plain language of the statute does not, moreover, provide any indication that a “taking” should be divided temporally.⁵ If the Legislature fails to define the unit of prosecution or its intent is unclear, under the rule of lenity, the ambiguity is to be resolved against turning a single transaction into multiple offenses. Villanueva-Gonzalez, 180 Wn.2d at 984.

The case of Brown v. Ohio, 432 U.S. 161, 168-69, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) is also instructive in this respect. There, the Court found a double jeopardy violation under circumstances analogous to those in this case.

On November 29, 1973, Brown stole a car from a parking lot in East Cleveland, Ohio. Nine days later, Brown was caught driving the car in Wickliffe, Ohio. The complaint regarding the Wickliffe incident

⁵ Conceivably, such a division might be warranted by the facts of a case, such as in the case of a car’s return and subsequent second taking. See Hall, 168 Wn.2d at 730 (final step in analysis).

charged that “on or about December 8, 1973, . . . Brown did unlawfully and purposely take, drive or operate a certain motor vehicle to wit; a 1965 Chevrolet . . . without the consent of the owner one Gloria Ingram” Id. at 162 (internal quotation marks omitted). Brown pleaded guilty to this charge and was sentenced. Id.

Upon his release from jail, Brown was indicted by a grand jury for the initial taking nine days earlier. The indictment charged the theft of the car “on or about the 29th day of November 1973,” and also joyriding on that date under a different statute. Id. at 162-63 (internal quotation marks omitted). A bill of particulars specified that “on or about the 29th day of November, 1973 . . . Brown unlawfully did steal a Chevrolet motor vehicle, and take, drive or operate such vehicle without the consent of the owner, Gloria Ingram” Id. at 163. Under Ohio law at the time, joyriding consisted of “taking or operating a vehicle without the owner's consent, and auto theft consist[ed] of joyriding with the intent permanently to deprive the owner of possession.” Id. at 167.

Brown objected to both counts of the East Cleveland indictment, arguing he had already been put in jeopardy for the same offense. Id. at 163. The Ohio court held the two prosecutions involved the same statutory offense, but held the second prosecution did not violate double jeopardy because the acts occurred on two separate dates. Id. at 164.

The Supreme Court reversed. The Court not only found the two offenses were the same in law, but also explicitly rejected that the facts of the case supported two separate crimes because the charging dates were nine days apart. Id. at 169-70. As the Court stated, “[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.” Id. at 169.

The statute here, while ostensibly describing two means of commission, describes one crime. Moreover, the statute provides no indication of how or whether the crime may be divided spatially or temporally. In summary, the first step in the analysis set forth in Hall strongly supports that a single indivisible crime occurred.

b. The history of the statute does not support separate charges

The history of the statute also indicates that taking and riding are considered a single offense. Looking to the history of RCW 9A.56.075, the statute was formerly codified in its entirety as RCW 9A.56.070(2)(a), but was split off in 2004 when first and second degree taking a motor vehicle were separated into two separate sections. Laws of 2003, ch. 53 § 73 (eff. July 1, 2004) (part of Laws of 2003, chapter 53, entitled “Technical Reorganization of Criminal Statutes”).

The prior version of that statute provided:

Every person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle . . . shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of taking a motor vehicle without permission.

Laws of 1975, 1st ex.s., ch. 260, §9A.76.070. That language, in turn, is nearly identical to the language of former RCW 9.54.020.⁶ E.g., McCaskey, 55 Wn.2d at 331.

The language of the statute was amended into its current form by laws of 2002, ch. 324, § 1, which divided the offense of taking a motor

⁶ The version of RCW 9.54.020 applicable in 1959 provided:

Every person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, whether propelled by steam, electricity or internal combustion engine, the property of another, shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of a felony.

McCaskey, 55 Wn.2d at 331. The provision under Remington's Revised Statutes likewise contained nearly identical language. See State v. Tully, 198 Wash. 605, 89 P.2d 517 (1939) (citing Rem.Rev.Stat. § 2601-1).

vehicle into two degrees, with the first degree offense encompassing aggravating factors, including making alterations to the vehicle, and conduct related to stolen vehicle trafficking, and providing stiffer penalties for such conduct. Final Bill Report, ESSB 6490 (accessed at <http://lawfilesexternal.wa.gov/biennium/2001-02/Pdf/Bill%20Reports/Senate/6490-S.FBR.pdf>).

Thus, the “alternatives” of taking and riding, without aggravating circumstances, are currently, and have historically been, placed together in the statutory scheme. They remained together through the major reassessment of taking a motor vehicle in 2002, and the later simple “reorganization” of the statutes. They remained together following the Supreme Court’s interpretation of the two means as conceptually indistinct in Hiatt, the Pettit decisions, and Medley. This persistent grouping of the “alternatives” indicates second degree taking may involve both, and yet encompass a single offense.

Moreover, nothing in the statute’s history indicates an intention to divide the crime into temporal units. The statute remained unchanged following the United States Supreme Court’s decision in Brown, which interpreted statutes similar to the one in this case. Brown was decided well before major alterations to the statute in the new millennium. See City of Federal Way v. Koenig, 167 Wn.2d 341, 352, 352, 352 n. 5, 217

P.3d 1172 (2009) (once a court has construed a statute, the legislative branch is free to clarify its intent by altering the statute, but if it does not do so, legislature is presumed to be satisfied with the interpretation). Like the first inquiry, the history of the statute likewise supports a single unit of prosecution in this case.

- c. The facts in this case do not support separate charges.

The final consideration is whether the particular facts in a case reveal more than one unit of prosecution. Hall, 168 Wn.2d at 735. For example, in State v. Jensen, the Supreme Court used the particular facts of the case to find that three separate conversations, where the defendant solicited the killing of four people, was properly charged as more than a single count of solicitation to commit murder. 164 Wn.2d at 958-59. In contrast, where the case involves a single, continuous course of conduct, the particular facts do not warrant multiple charges. Hall, 168 Wn.2d at 736.

Leland's case involves one act — a taking of a car that was then, as the evidence showed, retained over the course of three days. Cf. State v. Melick, 131 Wn. App. 835, 840-41, 129 P.3d 816 (where defendant charged with motor vehicle taking and possession of stolen property for same vehicle, dismissing the latter conviction based on longstanding

principle that “one cannot be both the principal thief and the receiver of stolen goods”) (citing State v. Hancock, 44 Wn. App. 297, 301, 721 P.2d 1006 (1986)), review denied, 158 Wn.2d 1021 (2006). There was no indication of a break in possession.

Based on the test set forth in Hall, the plain language of the statute, the history of the statute, and the rule of lenity, a three-day “taking” of a single car constitutes a single unit of prosecution. The second count of taking a motor vehicle should be reversed and dismissed. State v. Westling, 145 Wn.2d 607, 612, 40 P.3d 669 (2002)

d. The result under State v. Arndt is no different.

The above factors reveal a single unit of prosecution in Leland’s case. The result under the somewhat modified approach found in State v. Arndt is no different. In Arndt, the Supreme Court examined RCW 74.08.331 (grand larceny by fraudulent receipt of public assistance), seeking to determine whether the statute “describes a single offense committable in more than one way, or describes multiple offenses.” Arndt, 87 Wn.2d at 378. In ultimately determining the statute created a single crime committed in multiple ways, the Court examined several factors:

- (1) the title of the act;
- (2) whether there is a readily perceivable connection between the various acts set forth;
- (3) whether the acts are consistent with and not repugnant

to each other; (4) and whether the acts may inhere in the same transaction.

Arndt, 87 Wn.2d at 379 (quoting State v. Kosanke, 23 Wn.2d 211, 213, 160 P.2d 541 (1945)).

First, regarding the title of the act, RCW 9A.56.075, like its predecessor, refers to a single crime, “Taking motor vehicle without permission.”

Second, there is a readily apparent connection between the acts described. The statute lists two methods of committing the taking, one of which is riding with knowledge that the vehicle is stolen. Under the statute, the act of “taking the vehicle” is imputed to a rider. Hiett, 154 Wn.2d at 565. For purposes of the analysis, therefore, the means are identical.

Third, the methods of committing the offense are consistent with, and not repugnant to, each other. “The varying ways by which a crime may be committed are not repugnant to each other unless the proof of one will disprove the other.” Arndt, 87 Wn.2d at 383. Here, Leland was essentially an accomplice to the original taking, although based on the structure of the statute, it was unnecessary for the State to charge accomplice liability. Medley, 11 Wn. App. at 497. In essence, the State

charged Leland with the very crime with which she was already guilty as an accomplice.

Finally, not only may the acts inhere in the same transaction, they did so here. They are inseparable. According to the State's evidence, Leland participated in the taking of a car on December 5, which she then was seen driving on December 7 and 8. 2RP 53-57, 59-61.

All of the Arndt considerations also weigh in favor of a single offense. In finding that the statute in Arndt defined a single offense, that Court also relied on two general interpretive rules: (1) under the rule of lenity, doubts are generally resolved in favor of lenity and (2) penal statutes are generally construed against the State in favor of the accused. Arndt, 87 Wn.2d at 385-386. These considerations also support that a single unit of prosecution occurred here. One of the convictions should be reversed and dismissed because it violated Leland's right to be free from double jeopardy.

2. THE TRIAL COURT’S FAILURE TO CONSIDER LELAND’S ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL. ALTERNATIVELY, COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF LFOs.⁷

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 her individual financial circumstances and concluded she has the ability, or likely future ability, to pay. Other than a boilerplate “finding” on the judgment and sentence citing the restitution statute,⁸ CP 41, the record here does not show the trial court in fact considered Leland’s ability or future ability before it imposed discretionary LFOs. 2RP 145-57 (sentencing hearing).⁹ Because such consideration is

⁷ A related issue is now pending in the Supreme Court under case no. 89028-5, State v. Nicholas Peter Blazina. Oral argument was heard in February of 2014.

⁸ The preprinted “finding” cites only RCW 9.94A.753, which deals exclusively with restitution. The State did not seek, and the court did not impose, restitution in this case. 2RP 157.

⁹ Here, the discretionary LFO costs imposed included \$825 in court appointed attorney fees. CP 41; State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (recognizing court appointed attorney fees are “discretionary legal financial obligations”), review granted, 178 Wn.2d 1010 (2013). They also included a non-mandatory \$250 jury demand fee and a \$150

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. Moreover, counsel was ineffective for failing to object.

- a. The legal validity of the LFO order may be challenged for the first time on appeal as an illegal 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).¹⁰

“incarceration fee.” RCW 10.01.160(2) (listing permissible costs including costs of incarceration); RCW 36.18.016(3)(b) (jury demand fee); see also State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (“mandatory” fees are \$500 victim penalty assessment, \$100 DNA fee, and \$200 criminal filing fee).

In Moen, the 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, the Court explained:

We will not construe an uncontested order entered after the mandatory 60-day period of former RCW 9.94A.142 (1) had passed as a waiver of that timeliness requirement; it was invalid when entered.

Id. at 541 (emphasis added). The 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.

The record shows the trial court failed to comply with the statutory requirements set forth in RCW 10.01.160(3). Leland may therefore challenge the trial court's LFO order for the first time on appeal.

¹⁰ 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 State v. Calvin,¹¹ Division One of this Court originally held Calvin could challenge his LFO order for the first time on appeal. But the Court later reversed course. The reasoning supporting Division One's course change in Calvin does not apply here.

Calvin's appeal involved a challenge to the factual basis supporting the trial court's LFO order, that is, whether there was insufficient evidence to support the trial court's decision that he had the ability to pay LFOs. Calvin, 302 P.3d at 521. Here, in contrast, Leland asserts the trial court failed to undertake the statutorily required factual analysis required under RCW 10.01.160.

The factual nature of Calvin's argument drives Division One's waiver analysis. Specifically, Division One 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." Calvin, 316 P.3d at 507. Having framed the issue as a sufficiency challenge, rather than a legal one, Calvin goes on to cite the Supreme Court's holdings in In re Personal Restraint of Goodwin¹² and In re Personal

¹¹ State v. Calvin 176 Wn. App. 1, 302 P.3d 509 (2013), motion for reconsideration granted and republished at 316 P.3d 496 (October 24, 2013).

¹² 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002).

Restrain of Shale,¹³ for the proposition that “failure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal.” Id.

Unlike Calvin, Leland’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. Furthermore, the issue raised by Leland 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). Thus, Calvin’s waiver analysis is not on point. Cf. State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013) (declining to consider an LFO challenge raised for the first time on appeal); State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012) (concluding for the first time on appeal that finding Bertrand had present or future ability to pay LFOs was unsupported by the record and therefore clearly erroneous). The issue raised in this case is analogous to that raised in Moen, not Calvin.

More recently, in State v. Duncan, Division Three of this Court noted inconsistencies among the Court of Appeals divisions as to whether LFOs may be challenged for the first time on appeal. 180 Wn. App. 245, 252, 327

¹³ 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007).

P.3d 699 (2014). Concluding that there was a “clear potential for abuse,” the Court declined to allow Duncan to raise an LFO argument for the first time on appeal. *Id.* at 255. Duncan recognized however, the forthcoming Supreme Court opinions in Blazina and State v. Paige-Colter¹⁴ would ultimately clarify the issue. 180 Wn. App. at 253.

Here the record shows the trial court did not comply with the requirements of RCW 10.01.160(3). Indeed, its only finding cites to the restitution statute, which did not apply in this case. Thus, the issue should be considered reviewable for the first time on appeal.

- b. Because the sentencing court did not comply with RCW 10.01.160(3), Leland 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.

The word “shall” means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). In contrast, RCW 9.94A.753, a statute which addresses restitution -- and which the judgment and sentence cited despite its inapplicability -- provides:

¹⁴ Unpublished opinion noted at 175 Wn. App. 1010, review granted, 178 Wn.2d 1018 (2013).

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).

Hence, the trial court was without authority to impose LFOs as a condition of Leland's sentence if it did not first take into account her 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, 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); Bertrand, 165 Wn. App. at 393. 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 Leland's financial resources and the nature of the payment burden or that it made an individualized determination regarding her ability to pay. 2RP 145-57 (absence of any such discussion or finding during sentencing hearing).

The only part of the record that even remotely suggests the trial court complied with RCW 10.01.160(3) is the boilerplate finding in the Judgment and Sentence. CP 41. However, this finding does not establish compliance with the requirements of RCW 10.01.160(3), and indeed cites an inapplicable statute.

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).

The Judgment and sentence form used in Leland's case contained a pre-formatted conclusion, citing an inapplicable statute, that she had the ability to pay LFOs. It does not include a checkbox to register even minimal individualized judicial consideration. CP 41. Rather, every time one of these forms is used, there is a pre-formatted conclusion the trial court followed the requirements of RCW 10.01.160(3) regardless of what actually transpires. This type of finding therefore 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 Leland's financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should permit Leland to challenge the legal validity of the LFO order for first time on appeal, and it should vacate the order.

c. Leland's challenge is ripe for review.

Alternatively, the State may argue 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, which may not be ripe, and a challenge attacking the legality of the order based on statutory non-compliance, which is.

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 an assertion of financial hardship or on procedural due process principles that arise in regard to collection.¹⁵ In

¹⁵ See, e.g., State v. Lundy, 176 Wn. App. 96, 107-09, 308 P.3d 755 (2013) (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

contrast, this case involves a direct challenge to the legal validity of the order on the ground the trial court failed to 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 affect whether the trial court complied with RCW 10.01.160 prior to issuing the order. As such, Leland 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, Leland 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.

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).

Although in Valencia, 169 Wn.2d at 789, the Supreme Court previously suggested LFO challenges require further factual development, it's logic 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 Court compared Valencia's challenge to the court-ordered proscription on pornography with a hypothetical challenge to a LFO order. The Court suggested the former did not require further factual development to support review, while the latter did.

It appears, however, the Supreme Court'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, the Court 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. This statement may be true if the offender is challenging the validity of the LFO order asserting current financial hardship. However, it 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 not valid, regardless of the circumstances of attempted enforcement. Valencia likely

never contemplated the issue raised herein and is therefore distinguishable. As explained above, no further factual development is needed, and the second prong of the ripeness test is satisfied.

Third, the challenged action is final. Once LFOs are ordered, the 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 under 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.¹⁶ As such, the third prong of the ripeness test is satisfied.

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

¹⁶ Division One 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, the Court 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). Thus, the Court's analysis focused on the defendant's conditional obligation to pay rather than on the legal validity of the initial sentencing order. Id.

imposes an immediate debt upon a defendant and nonpayment may subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, she is immediately liable for that debt which begins accruing interest at a 12 per cent 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 examining 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.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).¹⁷

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously

¹⁷ This report can be found at:
http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

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 she 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. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013). The defendant is not required to disprove this. 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). 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 challenge her 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 Leland's financial hardships, she 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 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 will otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing 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 Leland's challenge to the legal validity of the LFO is ripe.

- d. Because the record does not demonstrate the sentencing court would have imposed the LFOs had it undertaken the required procedures, 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 Leland's ability to pay the LFOs. Indeed it is silent. As such, the remedy is remand for resentencing. Parker, 132 Wn.2d at 192-93.

- e. Alternatively, Leland was denied effective assistance of counsel when her trial counsel failed to object to the imposition of LFOs.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at

225-26 (adopting two-prong test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Leland's counsel was ineffective for failing to object to the imposition of discretionary LFOs. Reversal is required because failure to object to the LFOs prejudiced Leland. See Duncan, 180 Wn. App. at 255 (recognizing ineffective assistance of counsel is "an available course for redress" when defense counsel fails to address a defendant's inability to pay LFOs).

As discussed above, RCW 10.01.160(3) permits the sentencing court to order a defendant to pay LFOs, but only if the trial court has first considered her individual financial circumstances and concluded she has the ability, or likely future ability, to pay. Here, the discretionary LFO costs imposed included \$825 in court appointed attorney fees. CP 41; Blazina, 174 Wn. App. at 911 (recognizing court appointed attorney fees are "discretionary legal financial obligations"). They also included a non-

mandatory \$250 jury demand fee and a \$150 “incarceration fee.” RCW 10.01.160(2) (listing permissible costs including costs of incarceration); RCW 36.18.016(3)(b) (jury demand fee); see also Lundy, 176 Wn. App. at 102 (“mandatory” fees are \$500 victim penalty assessment, \$100 DNA fee, and \$200 criminal filing fee).

Counsel’s failure to object to these discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not requesting the trial court to comply with the requirements of RCW 10.01.160(3). Counsel simply neglected to object to the trial court’s failure to comply with the statutory requirements. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

Counsel’s failure to object to imposition of discretionary LFO’s was also prejudicial. As discussed in under section “c” above, which addresses ripeness, the hardships that can result from the erroneous imposition of LFOs are numerous. In a remission hearing to set aside the LFOs, Leland is not only saddled with a burden of proof she would not otherwise have to bear, but she will also have to do without appointed legal representation.

There is a reasonable probability the outcome would be different but for defense counsel's conduct. Leland's constitutional right to effective assistance counsel was violated.

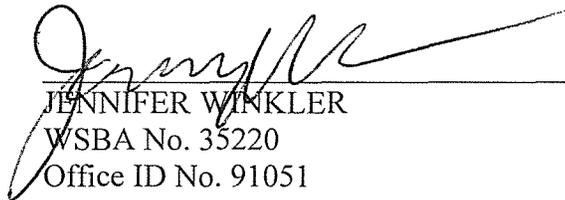
D. CONCLUSION

This Court should reverse and dismiss the second count of taking a motor vehicle because it violates double jeopardy. This Court should also remand so that the trial court may comply with RCW 10.01.160(3) in deciding whether to impose discretionary LFOs.

DATED this 10TH day of December, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

APPENDIX

FILED
SUPERIOR COURT

2014 JUN 12 P 2:46

COWLITZ COUNTY
BEVERLY R. LITTLE, CLERK

BY Ab

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

KIMBERLY SARA LELAND,

Defendant.

SID: WA26483538

If no SID, use DOB: 04-29-92

No. 13-1-01584-3

Felony Judgment and Sentence (FJS)

Prison RCW 9.94A.507 Prison Confinement

Jail One Year or Less RCW 9.94A.507 Prison Confinement

First-Time Offender

Special Sexual Offender Sentencing Alternative

Special Drug Offender Sentencing Alternative

Clerk's Action Required, para 4.5 (DOS), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

14 9 01314 7 *Sam*

I. Hearing

1.1 The court conducted a sentencing hearing this date 6/12/14; the defendant, , the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court Finds:

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon

guilty plea jury-verdict ON MAY 27, 2014 bench trial: *MKN*

Count	Crime	RCW	Date of Crime
I	TAKING A MOTOR VEHICLE WITHOUT PERMISSION IN THE SECOND DEGREE	9A.56.075(1)	12-05-13
II	TAKING A MOTOR VEHICLE WITHOUT PERMISSION IN THE SECOND DEGREE	9A.56.075(1)	12-08-13

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1.

The burglary in Count _____ involved a theft or intended theft.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.507.

The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____, RCW 9.94A.533(9).

The offense was predatory as to Count _____, RCW 9.94A.836.

Felony Judgment and Sentence (FJS)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (4/2008))

45

Scanned

39

- The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.
- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- The defendant acted with sexual motivation in committing the offense in Count _____. RCW 9.94A.835.
- This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a firearm in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.
- The defendant used a deadly weapon other than a firearm in committing the offense in Count _____ RCW 9.94A.825, 9.94A.533.
- Count _____, Violation of the Uniform Controlled Substances Act (VUCSA), RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant committed vehicular homicide vehicular assault proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- The defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.
- For the crime(s) charged in Count(s) _____, domestic violence was pled and proved. RCW 10.99.020 & RCW 26.50.010(1).
- The offense in Count _____ was committed in a county jail or state correctional facility. RCW 9.94A.533(5).
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 Criminal History (RCW 9.94A.525):

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult, Juv.	Type of Crime
1 NONE					
2					
3					
4					
5					

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The following prior offenses require that the defendant be sentenced as a Persistent Offender (RCW 9.94A.570):

The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 Sentencing Data:

Count No.	Offender Score	Serious-ness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	3	I	2 – 6 MOS		2 – 6 MOS	5 YEARS
II	3	I	2 – 6 MOS		2 – 6 MOS	5 YEARS

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9).

Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows: _____

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

within below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 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 the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

III. Judgment

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [] The defendant is found NOT GUILTY of Counts _____.

[] The court DISMISSES Count _____

IV. Sentence and Order

It is Ordered:

4.1a The defendant shall pay to the clerk of this court:

JASS CODE

RTN/RJN	\$ <u>TBD</u>	Restitution to: _____ (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	\$ <u>500.00</u>	Victim assessment	RCW 7.68.035
	\$ _____	Domestic Violence assessment up to \$100	RCW 10.99.080
CRC	\$ <u>600-</u>	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ <u>200.00</u>	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/WRF
		Jury demand fee \$ <u>250.00</u>	JFR
		Extradition costs \$ _____	EXT
		Incarceration fee \$ <u>150.00</u>	JLR
		Other \$ _____	
PUB	\$ <u>825.00</u>	Fees for court appointed attorney	RCW 9.94A.760
WFR	\$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	\$ _____	Fine RCW 9A.20.021; [] VUCSA chapter 69.50 RCW, [] VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	\$ _____	Drug enforcement fund of Cowlitz County Prosecutor	RCW 9.94A.760
MTH	\$ _____	Meth/Amphetamine Clean-up fine \$3000. RCW 69.50.440, 69.50.401(a)(1)(ii).	
CLF	\$ _____	Crime lab fee [] suspended due to indigency	RCW 43.43.690
	\$ <u>100.00</u>	Felony DNA collection fee [] not imposed due to hardship	RCW 43.43.7541
RTN/RJN	\$ _____	Emergency response costs (for incidents resulting in emergency response and conviction of driving, flying or boating under the influence, vehicular assault under the influence, or vehicular homicide under the influence, \$1000 max.)	RCW 38.52.430
	\$ _____	Urinalysis cost	
	\$ _____	Other costs for: _____	
	\$ <u>2025-</u>	Total	RCW 9.94A.760

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for _____.

Restitution ordered above shall be paid jointly and severally with:

<u>Name of other defendant</u>	<u>Cause Number</u>	<u>(Amount-\$)</u>
RJN		
_____	_____	_____
_____	_____	_____

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 25.00 per month commencing _____ . RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court finds that the defendant has the means to pay, in addition to the other costs imposed herein, for the cost of incarceration and the defendant is ordered to pay such costs at the rate of \$50 per day, unless another rate is specified here: _____. (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.1b **Electronic Monitoring Reimbursement.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 **DNA Testing.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 **No Contact:** The defendant shall not have contact with: _____, including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

The defendant shall not use, own or possess any firearm or ammunition while under the supervision of the Department of Corrections. RCW 9.94A.120.

The firearm, to wit: _____ is forfeited to _____, a law enforcement agency.

4.4 **Other:** _____

116

4.5 Jail One Year or Less. The court sentences the defendant as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the county jail:

4 days/months on Count I _____ days/months on Count _____
4 days/months on Count II _____ days/months on Count _____

Actual number of months of total confinement ordered is: 4

All counts shall be served concurrently, except for the following which shall be served consecutively:

The sentence herein shall run consecutively with any DOC sanction imposed in cause number :
_____ County Cause # _____, but concurrently to any other
felony cause not referred to in this Judgment. RCW 9.94A.589.

The sentence herein shall run consecutively with the sentence in cause number(s) _____
but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

Partial Confinement. The defendant may serve the sentence, if eligible and approved, in partial
confinement in the following programs, subject to the following conditions: _____

- work crew RCW 9.94A.725 home detention RCW 9.94A.731, .190
- work release RCW 9.94A.731

Conversion of Jail Confinement (Nonviolent and Nonsex Offenses). RCW 9.94A.680(3). The
county jail is authorized to convert jail confinement to an available county supervised community option
and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.

Alternative Conversion. RCW 9.94A.680. _____ days of total confinement ordered
above are hereby converted to _____ hours of community restitution (service) (8 hours = 1
day, nonviolent offenders only, 30 days maximum) under the supervision of the Department of Corrections
(DOC) to be completed on a schedule established by the defendant's community corrections officer but not
less than _____ hours per month.

Alternatives to total confinement were not used because of: _____
 criminal history failure to appear (finding required for nonviolent offenders only) RCW
9.94A.680.

(b) **Confinement.** RCW 9.94A.507 (sex offense only): The defendant is sentenced to the following term of
confinement in the custody of the DOC:

Count _____ minimum term _____ maximum term _____
Count _____ minimum term _____ maximum term _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under
this cause number. RCW 9.94A.505. The jail shall compute time served unless the credit for time served
prior to sentencing is specifically set forth here by the court: _____

44

4.6 Community Supervision Custody. RCW 9.94A.505, .545. The defendant shall serve _____ months in community supervision or community custody.

The court may order community custody under the jurisdiction of DOC for up to 12 months if the defendant is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime. For offenses committed on or after June 7, 2006, the court shall impose a term of community custody under RCW 9.94A.715 if the offender is guilty of failure to register (second or subsequent offense) under RCW 9A.44.130(11)(a).

Community Custody for count(s) _____, sentenced under RCW 9.94A.507, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

The defendant shall report to DOC, 1953 7th Avenue, Longview (360) 577-4050, not later than 72 hours after release from custody; and the defendant shall perform affirmative acts as required by DOC to confirm compliance with the orders of the court and shall abide by any additional conditions of community custody imposed by DOC under RCW 9.94A.720. For sex offenses, the defendant shall submit to electronic monitoring if imposed by DOC. The defendant shall comply with the instructions, rules and regulations of DOC for the conduct of the defendant during the period of community supervision or community custody and any other conditions of community supervision or community custody stated in this Judgment and Sentence. The defendant shall:

- remain in prescribed geographic boundaries specified by the community corrections officer notify the community corrections officer of any change in defendant's address or employment
- not reside within 880 feet of the facilities and grounds of a public or private school (community protection zone). RCW 9.94A.030(8).

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse mental health anger management and shall fully comply with all recommended treatment.

Other conditions: _____

For sentences imposed under RCW 9.94A.507, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

The community supervision or community custody imposed by this order shall be served consecutively to any term of community supervision or community custody in any sentence imposed for any other offense, unless otherwise stated. The maximum length of community supervision or community custody pending at any given time shall not exceed 24 months, unless an exceptional sentence is imposed. RCW 9.94A.589.

The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here: _____

4.7 Off - Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

Other conditions may be imposed by the court or DOC during community custody or are set forth here: As outlined by DOC in Appendix F, if any, and additional conditions listed below:

- Submit to, and at your expense, a polygraph examination and a plethysmograph as directed by Corrections Officer or treatment provider.
- Participate in any therapy deemed necessary by your Corrections Officer.
- Have no contact with male/female/any children under the age of eighteen.
- The defendant shall not frequent parks or playgrounds or any location where minor children congregate.

- The defendant shall not live or stay in the residence where (minor child/minor females/minor males) are present unless granted specific permission by your community corrections officer or the court.
- Do not own, use, or possess firearms or ammunition.

V. Notices and Signatures

- 5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626 (360) 414-5532 with any change in address and employment or as directed. Failure to make the required payments or advise of any change in circumstances is a violation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail. The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- This crime involves a Rape of a Child in which the victim became pregnant. The defendant shall remain under the court's jurisdiction until the defendant has satisfied support obligations under the superior court or administrative order, up to a maximum of twenty-five years following defendant's release from total confinement or twenty-five years subsequent to the entry of the Judgment and Sentence, whichever period is longer.
- 5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 **Restitution Hearing.**
 I waive any right to be present at any restitution hearing (sign initials): _____.
- 5.5 **Community Custody Violation.**
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).
- 5.6 **Firearms.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

Cross off or delete if not applicable:

5.7 **Sex and Kidnapping Offender Registration.** RCW 9A.44.130, 10.01.200.
1. **General Applicability and Requirements:** Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must

register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

2. Offenders Who Leave the State and Return: If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

3. Change of Residence Within State and Leaving the State: If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

4. Additional Requirements Upon Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Reporting Requirements for Persons Who Are Risk Level II or III: If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the

county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

8. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

5.8 Count _____ is a felony in the commission of which you used a motor vehicle. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.9 If you are or become subject to court-ordered mental health or chemical dependency treatment, you must notify DOC and you must release your treatment information to DOC for the duration of your incarceration and supervision. RCW 9.94A.562.

5.10 IF AN APPEAL IS PROPERLY FILED AND APPEAL BOND POSTED, THE DEFENDANT WILL REPORT TO THE DEPARTMENT OF CORRECTIONS, WHO WILL MONITOR THE DEFENDANT DURING THE PENDENCY OF THE APPEAL, SUBJECT TO ANY CONDITIONS IMPOSED BY DOC AND/OR INCULDED IN THIS JUDGMENT & SENTENCE AND SPECIFICALLY NOT STAYED BY THE COURT.

5.11 Other: _____

Done in Open Court and in the presence of the defendant this date: 6/12/14

M. K. Haug
Judge/Print Name:

[Signature]
(Deputy) Prosecuting Attorney
WSBA No. 36871

[Signature]
Attorney for Defendant
WSBA No. 26055

[Signature]
Defendant

Print Name: JASON LAURINE

Print Name: TED DEBRAY

Print Name: KIMBERLY SARA
LELAND

Voting Rights Statement: I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: *[Handwritten Signature]*

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

50

Identification of the Defendant

SID No. WA26483538
(If no SID take fingerprint card for State Patrol)

Date of Birth 04-29-92

FBI No. 313376ND8

Local ID No.

PCN No. _____

Other _____

Alias name, DOB: _____

Race:

Asian/Pacific Islander

Black/African-American

Caucasian

Ethnicity:

Hispanic

Sex:

Male

Native American

Other: _____

Non-Hispanic

Female

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, _____

[Handwritten Signature]

Dated: _____

6/12/14

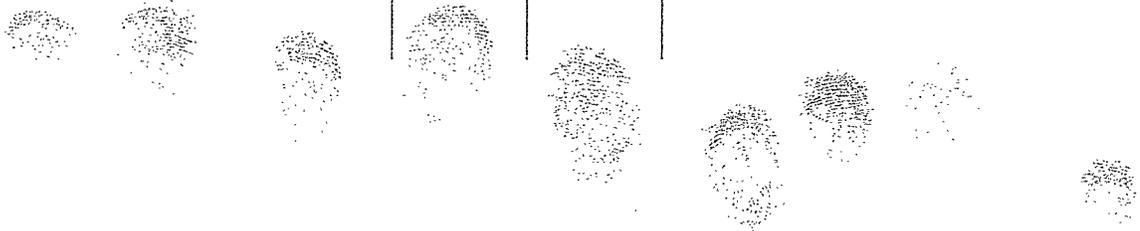
The defendant's signature: *[Handwritten Signature]*

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 46470-5-II
)	
KIMBERLY LELAND,)	
)	
Appellant.)	

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 10TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KIMBERLY LELAND
805 NE 160TH AVENUE
VANCOUVER, WA 98684

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF DECEMBER 2014.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

December 10, 2014 - 4:49 PM

Transmittal Letter

Document Uploaded: 464705-Appellant's Brief.pdf

Case Name: Kimberly Leland

Court of Appeals Case Number: 46470-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

sasserm@co.cowlitz.wa.us