

FILED  
JULY 10, 2015  
Court of Appeals  
Division III  
State of Washington

**NO. 32840-6-III**

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**EMILY K. DALHAUG,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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**I. ASSIGNMENTS OF ERROR**

- A. The Court erred in declining to give a self-defense instruction.
- B. The Trial Court erred in failing to consider the Defendant's ability to pay discretionary legal financial obligations (LFOs).
- C. The DNA fee is unconstitutional as applied.

***Issues Pertaining to Assignments of Error.***

- A. Did the Trial Court error in not giving a self-defense instruction when the evidence only showed retaliation, not self-defense?
- B. Should the Appellate Court exercise its discretion under RAP 2.5 to review \$186 of LFOs?
- C. Should the Appellate Court exercise its discretion to review the DNA under RAP 2.5 fee when the Defendant fails to show standing, fails to show a constitutional issue, and fails to establish manifest error?
- D. Does the DNA fee violate the due process clause?

## II. STATEMENT OF THE CASE

Ross Rumbolz was driving into Warden when he saw the passenger in a car, later determined to be Emily Dalhaug, strike the driver. RP 75-76. Rumbolz called his step-father, Warden Police Officer Mike Martin. *Id.* Officer Martin responded to the scene and saw Dalhaug yelling at her sister. RP 91. Dalhaug described that Maine had backhanded her, and that Dalhaug “wiggled out,” assaulting Maine. RP 93. Maine had some minor injuries, Dalhaug did not have any. *Id.* Officer Martin placed Emily under arrest for Assault 4 DV. RP 94. A search of Dalhaug’s backpack incident to arrest revealed methamphetamine. RP 98, 105. Later Dalhaug signed a statement describing the incident. RP 131.

## III. ARGUMENT

### *A. Self Defense.*

A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6 P.2d 883 (1998). *See also State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). If “[t]he trial court must merely decide whether the record contains the kind of facts to which the doctrine applies” then the review is

for abuse of discretion. *Kappelman*, 167 Wn.2d at 6. In this case there is no dispute on the relevant law, the court simply weighed the evidence and found it insufficient for a self-defense instruction. Thus the standard of review is abuse of discretion. “To determine whether a defendant is entitled to an instruction on self-defense..., the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees. When assessing a self-defense claim, the trial court applies both a subjective and objective test.” *State v. Read*, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002). Dalhaug fails both.

Dalhaug proposed the following jury instruction: “The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that she is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.” CP 41 Subjectively Dalhaug never told the officer she was in fear. Instead she said:

I was arguing with my sister, Maine, about texting a friend instead of calling. My Sister stopped at an intersection... She, Maine, got upset and hit me, back handed me with her right hand, in the left shoulder. My sister started driving again and I got really upset with that. I flipped out and punched her, Maine, with a closed fist in the side of her head. I don't really know how many times or where else I

hit my sister. I tried to open the door and get out and she pulled over.

RP 131. There is clear evidence of anger in this statement. There is evidence of retaliation. But there is no evidence she believed she was in danger of injury. By the time Dalhaug struck Maine, Maine had started driving again. According to the statement this is what upset Dalhaug, not that she was in fear Maine would continue hitting her or try to injure her. Simply put, there is no evidence Dalhaug believed, reasonably or unreasonably, that Maine was going to try to hurt her or commit any offense against her, and that Dalhaug hitting Maine would stop Maine from injuring Dalhaug.

Objectively no reasonable person would find that Dalhaug had a reason to fear injury or an offense against her person. Maine struck Dalhaug once, a backhand to the shoulder. She then resumed driving. This would indicate to a reasonable person any threat to Dalhaug was over. Dalhaug then struck Maine out of anger, not with the intent to defend herself. Her objective claim fails as a matter of law. Retaliation is not self-defense. Anyone who has ever dealt with children knows the “she hit me first” defense is not enough to reasonably justify retaliation, and certainly does not amount to self-defense. The trial court did not abuse its discretion in denying a self-defense instruction.

**B. LFOs.**

For the first time on appeal Dalhaug asks the court to consider the trial judge's failure to consider her future ability to pay Legal Financial Obligations (LFO's) as a matter of discretionary review. The court should decline. The purpose of RAP 2.5 "Is to give the trial court a chance to correct the error and give the opposing party a chance to respond." *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012). The State Supreme Court held that an appellate court does not abuse its discretion when it declines to review this issue. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). In accepting *Blazina* the Supreme Court essentially held that the case involved an issue of public interest that should be decided by an appellate court. RAP 2.3(d)(3). *Blazina* has resolved that significant question of public interest, and the message has been sent to the trial courts to take the issue more seriously. Deciding this case and remanding adds nothing to *Blazina*, and does not make a statement regarding a significant question of public interest. In order to support the argument that the court should accept review Dalhaug simply repeats the public policy statements already made in *Blazina*, she does not point out anything about this case that would add to the public interest.

The appellant argues the record is insufficient to determine that Dalhaug has the present or future ability to pay. However, the burden of

proof on that finding correctly rests on the defendant. This is not an element of a crime the State needs to prove. “[I]t is generally held in criminal cases that, if the facts of an affirmative defense lie immediately within the knowledge of the defendant, the onus probandi, under the principle of ‘balancing of convenience,’ should be his.” *State v. Carter*, 161 Wn. App. 532, 541, 255 P.3d 721 (2011). This issue is not even an affirmative defense, it is finical obligations after a conviction. The defendant obviously has superior knowledge of their physical and mental well-being and future prospects for employment, as well as the nature of the burdens they face in life. While the court should have more explicitly considered Dalhaug’s ability to pay, the lack of record is held against the party having the burden of production and burden of proof. In this case that party is Ms. Dalhaug. There is nothing in the record that indicates she has a physical or mental infirmity that would make her unable to pay LFOs.

Dalhaug’s discretionary LFOs total \$189.60. CP 80-81. In order to accomplish what the defendant suggests, Dalhaug would have to be brought back before the trial court, appointed a new public defender, take court and prosecutor time, and possibly file a new appeal, which would require another appellate counsel at public defense to review the case and either file an *Anders*’ brief (*See Anders v. California*, 386 U.S. 738, 87 S.

Ct. 1396, 18 L. Ed. 2d 493 (1967)) or come up with some other issue, which would require more appellate court time and attention. These costs simply are not worth it when Dalhaug makes no showing she is entitled to actual relief, and may petition at any time for relief from the LFOs. This is exactly the type of issue RAP 2.5 was designed for. The court should not review this issue.

***C. DNA fee.***

For the first time on appeal the appellant challenges the mandatory \$100 DNA fee under RCW 43.43.7541 for first time felony offenders as violating of due process. In this case the court also imposed the mandatory \$500 criminal victims compensation fund fee (CVCA). It is unclear why the appellant accepts the greater fee as constitutional, but not the lesser. Statutes are presumed constitutional, “and the party challenging a statute's constitutionality has the burden of proving otherwise beyond a reasonable doubt.” *In re Pers. Restraint of McNeil*, 181 Wn.2d 582, 334 P.3d 548 (2014). In any event, this issue has been raised and rejected by controlling case law, specifically *State v. Blank*, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997) and *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

**1. The Appellant lacks standing to challenge the DNA fee.**

Dalhaug presents an as applied constitutional challenge to the DNA fee. She admits the statute is rationally based and constitutional if someone has the ability to pay, but argues that it unconstitutional as applied to her because the court did not find she had the likely future ability to pay. While the court did find her statutorily indigent, and thus appointed a public defender, it did not undertake the more searching analysis required to find her constitutionally indigent. “*Bearden* essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine.” *State v. Johnson*, 179 Wn.2d 534, 553-554, 315 P.3d 1090 (2014) (citing *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)). It is up to the party seeking review of an issue to provide an adequate record for review. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004).

In *Johnson* the court examined a constitutional challenge to the driving while license suspended statute based on a claim of indigence. The State Supreme Court rejected the challenge because *Johnson*, while statutorily indigent, was not constitutionally indigent, and therefore not in the class protected by the due process clause. *Bearden* and *Johnson* require a more searching inquiry for constitutional indigency. *Johnson*,

179 Wn.2d at 554. Similarly here, the court determined Dalhaug was statutorily indigent, but never inquired as to whether she could get a job, or was capable of working, or did a totality of circumstances analysis to determine if she was constitutionally indigent and would remain so. *See Bearden*, 41 U.S. at 663. There is simply an insufficient record to determine that Dalhaug has standing to raise this issue. It is her burden to provide that record, thus this claim fails.

**2. This is not a manifest or constitutional issue and should not be reviewed under RAP 2.5.**

RAP 2.5 allows the appellate court to refuse to review any error raised for the first time on appeal. There was no objection to the DNA fee in the trial court. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), relied upon by appellant, is based on statutory, not constitutional, concerns. Indeed the Supreme Court noted in *Blazina* the Court of Appeals did not abuse its discretion by declining to review the issue under RAP 2.5; *Blazina* also implicated discretionary LFOs, not mandatory ones such as the DNA fee.

The State Supreme Court has already concluded there is no constitutional infirmity in not considering the defendant's ability to pay when imposing costs, as long as there is a requirement that the court determines there is an ability to pay before imposing punishment. *State v.*

*Blank*, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997). A court must consider a defendant's ability to pay before sanctions are imposed or payment enforced. *Id.* at 247. A defendant who is unable to pay costs may, at any time, petition the court for remission of the costs or to modify the method of payment. RCW 10.01.164. In addition once a defendant has paid his or her costs, the court may waive the interest if it is causing a significant hardship. RCW 10.82.090.

*Blank*, and the case it relies upon, *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), identify the rationale for imposing costs at sentencing, but allowing a claim of indigence at time of collection. At the time of sentencing the court's decision as to whether the defendant has the likely future ability to pay is, at best, an educated guess. It is perfectly rational to wait until the time of collection to make this determination, as better information will be available. There is simply no constitutional infirmity, and the court should decline to hear this issue.

In addition when the appellant fails to provide the facts necessary in the record to adjudicate the claim on the record, the error is not manifest within the meaning of RAP 2.5. *State v. Lazcano*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d. \_\_\_ (2015) (Slip op. at 15). As discussed above, there is no evidence in this record that Dalhaug was constitutionally indigent, thus the error is not manifest within the meaning of RAP 2.5.

**3. The reasons the defendant does not make a constitutional claim under RAP 2.5 are also the reasons her claim fails under due process analysis.**

The only distinguishing characteristic of the DNA fee cited by Dalhaug that differentiates it from other mandatory fees such as the CVCA or the appellate fees at issue in *Blank* is the DNA fee is the last one that gets marked as paid. This is a distinction without a difference. Dalhaug presents no rational reason that the DNA fee should be treated differently. Dalhaug's claim has been argued before in *Blank*, and failed. As *Blazina* held, the statutory language of RCW 10.01.160 requires the court to consider the defendant's likely future ability to pay when assessing discretionary LFOs. No case has ever held that this is constitutionally mandated. Instead the constitution mandates the court consider the defendant's ability to pay when the State attempts to enforce collections on mandatory LFOs. This has not yet occurred in this case. *Blazina* was not a constitutional case and did not overrule prior precedent. This claim must be rejected.

**IV. CONCLUSION**

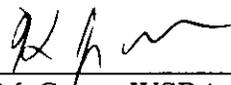
Retaliation is not the same as self-defense. There is only evidence of retaliation in this case. Dalhaug's financial claims fall short under RAP 2.5 and the due process clause. She can have her claims of indigency

evaluated at the constitutionally required time, when the State attempts to collect. The appeal should be denied.

Dated this 10<sup>th</sup> day of July 2015.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

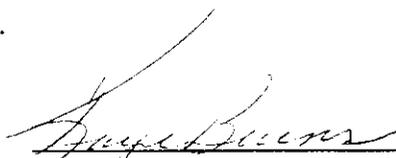
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32840-6-III
	)	
vs.	)	
	)	
EMILY K. DALHAUG,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

David N. Gasch  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

Dated: Juuly 16, 2015.

  
\_\_\_\_\_  
Kaye Burns