

33136-9-III

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**CALEB LOUTZENHISER,**

**Appellant.**

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The court erred in its response to the jury's question at CP 168. The court's response was misleading and constituted an improper comment.
2. Defense counsel was ineffective for failing to object to, and the court erred by permitting, an officer implying that the defendant was among the "worst, most prolific Spokane criminals."
3. The court erred by convicting Mr. Loutzenhiser on count six absent sufficient evidence that he drove into an "unattended" vehicle.
4. The court erred by entering the restitution order absent sufficient supporting evidence.
5. The court erred by setting the restitution schedule without considering the proper statutory inquiry and by entering an unsupported boilerplate finding on the defendant's ability to pay legal financial obligations.
6. The court erred by imposing the community custody condition prohibiting Mr. Loutzenhiser from using or possessing marijuana or products containing THC as it was not crime-related.

7. The court erred by failing to specify in Mr. Loutzenhiser's judgment and sentence that his misdemeanor counts were to run concurrent to his felony counts.
8. The clerk of the court erred by documenting that Mr. Loutzenhiser was ordered to serve 90 months rather than the ordered 90 days on one of the misdemeanor counts.

## **II. ISSUES PRESENTED**

1. Did the trial court's legally correct response to a jury question constitute reversible error?
2. Was the officers' testimony irrelevant and did it unfairly impugn the defendant by implication such that it would warrant a new trial even though there was no objection by trial counsel?
3. Whether count six – failure to remain at the scene of an accident and leave information - must be dismissed for insufficient evidence?
4. Whether the parties agreed restitution order, signed by defendant's counsel, and jointly submitted to the trial court should be reversed because there was no separate restitution hearing after trial?

5. Whether the order setting a \$25 per month payment on legal financial obligations should be vacated where no objection was raised to the trial court?
6. Whether the community custody provision prohibiting marijuana should be stricken where the evidence established the defendant was a heavy drug user at the time of the offense?
7. Should the court remand to the trial court to correct the court administrator's scrivener's error?

### **III. STATEMENT OF THE CASE**

On February 4, 2014, police officer Dustin Howe and Sgt. Kurt Vigesaa saw a recently stolen Mazda 3 sedan driving down a street in northern Spokane. (1RP 26-27) The car was reported stolen just two days earlier. (1RP 26-27, 55, 73) These officers made this observation while they were on duty investigating an unrelated matter. (1RP 26) They trailed the stolen vehicle in their unmarked police vehicles. (1RP 27-28)

While trailing the stolen vehicle, the officer's vehicle met the defendant's stolen vehicle at an intersection. The defendant waved Officer Howe's unmarked vehicle forward; Howe pulled his vehicle in front of the Mazda 3 and stopped. (1RP 31) Officer Howe exited his vehicle and approached the defendant, repeatedly yelling "Police! Get out

of the car!” (1RP 31-32, 34, 39) Officer Howe was only two to three feet away from the defendant at this time. (1RP 34) Officer Howe was wearing a police badge and an approved highly visible tactical vest that clearly read “police.” (1RP 31, 34, 49-50, 61)

The defendant knew Officer Howe was a police officer. (Special Verdict that the defendant knew at this time the victim was a law enforcement officer; CP 119; 1RP 31, 32, 34, 39, 49-50, 57) Defendant Loutzenhiser accelerated forward toward the officer and his vehicle. He missed striking Officer Howe by only six to eight inches. *Id.* Officer Howe testified he was afraid he would be clipped, pinched, or pinned between the vehicles had he not quickly moved out of the way. (1RP 32, 34, 40, 50)

Defendant rammed the officer’s vehicle with the stolen vehicle, and pushed it out of the way. *Id.* The defendant then sped away. (1RP 32, 33) Officer Howe got back in his vehicle and began a pursuit. *Id.* The defendant left the road and hit a fence during the pursuit. (1RP 33) The defendant failed to leave the statutorily required information with the officer after ramming the officer’s car, and he never attempted to contact the owners of the fence he hit before he drove away. (CP 117, 118, 1RP 38) The defendant abandoned the stolen vehicle in the

front yard of a home and ran away. (1RP 35, 57-58, 64) The defendant was apprehended at a nearby mini mart. (1RP 36, 37, 66-68)

Mr. Loutzenhiser was charged as follows: (count 1) second-degree assault with the aggravating factor of being committed against a law enforcement officer; (count 2) possession of a stolen motor vehicle; (count 3) first-degree malicious mischief for damage to the Mazda 3; (count 4) second-degree malicious mischief for interruption and impairment to the police service vehicle; (count 5) failure to remain at the scene of an accident – attended vehicle or other property; and (count 6) failure to remain at the scene of an accident – unattended vehicle. (CP 40-42)

The jury convicted Mr. Loutzenhiser as charged, and entered a special verdict that the assault was committed against a law enforcement officer. (2RP 14-16; CP 113-19) Mr. Loutzenhiser's criminal history included 17 felonies, not counting the current offenses in this case. (CP 189-92)

Because the court found some crimes would go unpunished if the court imposed a standard range sentence, and because the jury made a special finding that the assault was committed against a law enforcement officer, the court imposed an exceptional sentence of 120 months on counts one through three, and 60 months on count four, all to run

concurrently. (CP 119, 240-41, 250-64) The court imposed 90 days for each of the misdemeanor convictions, to run concurrent to the felony convictions. (3RP 21; CP 267-682) The court then imposed 18 months of community custody, with conditions that the defendant not use or possess marijuana or products containing Tetrahydrocannabinol (THC). (CP 256-57)

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT DID NOT ERR BY GIVING THE JURY A LEGALLY CORRECT ADDITIONAL INSTRUCTION.**

###### **1. Summary of Argument**

The jury asked a specific question (CP 168) regarding a specific section of a jury instruction no. 9 (CP 94). The trial court responded in writing with a legally correct instruction on the law regarding the specific question and portion of the instruction as requested. (CP 168) The defendant now raises claims regarding that instruction that are different from the claim made at trial and therefore are not preserved. There was no error in the trial court's response to the question.

###### **2. Standard of Review**

The jury is presumed to follow instructions. *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). The appellate court reviews a challenged jury instruction de novo. *State v. Bennett*, 161 Wn.2d 303,

307, 165 P.3d 1241 (2007). RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). As pointed out in *Scott*, the general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.” *Id.* at 686, (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976))

### **3. Discussion**

Instruction no. 9 (CP 94) contains two paragraphs, each defining an alternative “charged means of committing assault in this case.” Appellant’s Br., p. 16. The first alternative means is the common law “attempted battery” form of assault, the second is the common law “assault” by intentionally creating the apprehension of an imminent battery. *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988), *disapproved on other grounds*, *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007).

The jury requested clarification of a particular segment of instruction no. 9 as follows: “Last line of second paragraph of Instruction 9 is being interpreted by some jurors to mean that it is assault

whether a defendant intends to cause bodily injury or not. Is this correct?”

(2RP 6-7)<sup>1</sup> After discussing the request with the defendant and prosecutor, the court decided to give the following instruction to the jury:

So I was going to propose the following language in response: “It is not necessary for the actor,” and then I put in parentheses “defendant,” “to actually intend to cause bodily injury.” And what I'm doing there, I think, is maybe just clarifying that last sentence of the second paragraph of Instruction 9.

2RP 7, ll. 17-21.

The trial court gave the clarifying instruction. CP 168.

The defendant agreed that the trial court's response was a correct statement of the law.<sup>2</sup> The only objection raised by the defendant was that when the jury got the response back, “they're going to take that response

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<sup>1</sup> This refers to the portion of the instruction “... which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.”

<sup>2</sup> THE COURT:

. . . .  
--the question they're asking is whether -- is assault whether defendant intends -- whether he actually has to intend to cause bodily injury or not. And if I read -- if I look back in the instructions somewhere -- I apologize I don't have it open in front of me, but I think the language says something about “cause fear or apprehension.” My reading of the instruction would be that it is not necessary for a defendant to actually intend to cause bodily injury. I think that's what the instructions says. Do you agree that in terms of the language I'm proposing, that it isn't necessary to actually intend to cause bodily injury? Do we agree about that?

MR. ZELLER: Yes.

2RP 8-9

and that part of it and forget about the first part [of instruction no. 9].”  
(2RP 9, lines 12-15)

There is no indication that the jury did not follow the instructions as given by the court. Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Indeed, “the constitutional role of the jury requires respect for the jury's deliberations.” *State v. Kirkman*, 159 Wn.2d 918 at 928 (citing Const. art. I, § 21) Therefore, there is no support to the only objection timely raised by the defendant.

Now, on appeal, the defendant belatedly raises objections to instruction no. 9 that were left unvoiced to the trial court. Because these issues were not raised with the trial court, they are not reviewable on appeal. RAP 2.5.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d at 685. As this court observed in *State v. Guzman Nuñez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012); “the general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c),<sup>1</sup> requiring that timely and well stated

objections be made to instructions given or refused ‘in order that the trial court may have the opportunity to correct any error.’” *Accord, State v. Sublett*, 176 Wn.2d 58, 75-76, 292 P.3d 715 (2012) (any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review). (2RP 8-9)

Defendant now states that the answer given to the jury regarding instruction no. 9 is misleading. This is simple rhetoric unsupported by the language of the responsive instruction. In fact, defendant’s trial counsel conceded that its answer to the question was a correct statement of the law. The defendant then argues that the inclusion of the word “defendant” in the trial court’s answer to the instruction became a comment on the evidence. Again, this claim is belatedly raised and made without any argument regarding how the issue is preserved – Appellant presents no argument that it is manifest constitutional error or another exception under RAP 2.5. Moreover, the inclusion of the word “defendant” in brackets was the only way to clearly answer the juror’s question in the manner it was asked. The juror’s question was: “Last line of 2<sup>nd</sup> Paragraph of instruction 9 is being interpreted by some jurors to mean that it is assault whether defendant intended to cause bodily injury or not - is this correct?” (CP 168. Emphasis added.)

An instruction which does no more than accurately state the law pertaining to an issue in the case does not constitute an impermissible comment on the evidence by the trial judge under Const. art. 4, § 16. *State v. Ciskie*, 110 Wn.2d 263, 282–83, 751 P.2d 1165 (1988). An impermissible comment on the evidence is an indication to the jury of the judge's personal attitudes toward the merits of the cause. *Ciskie*, 110 Wn.2d at 283, citing *State v. Foster*, 91 Wn.2d 466, 481, 589 P.2d 789 (1979) The trial judge's instruction conveyed no attitude toward the merits of the case to the jury. In fact, the court instructed the jury specifically that the law and constitution prohibited the court from doing so, and that if it appeared that the court had done so to disregard any such comment entirely:

The law does not permit me to comment on the evidence in any way and I will not intentionally do so. By a comment on the evidence, I mean some expression or indication from me as to my opinion on the value of the evidence or the weight of it. If it appears to you I do comment on the evidence, you are to disregard that apparent comment entirely.

1RP 20-21 (Preliminary instructions);

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it has appeared to you that I have indicated my personal opinion in any way, either during

trial or in giving these instructions, you must disregard this entirely.

1RP 132-133 (instructions to the jury, no. 1), CP 85.

Accordingly, there is no error.

Even presuming error, any error was harmless. There was no issue as to who was driving the stolen vehicle that was the instrument in the assault. Officer Howe encountered the defendant around 2:00 p.m. (1RP 26) The encounter took place in daylight and the visibility was good. (1RP 27) Officer Howe's face was only two to three feet away from the defendant's face at this time. (1RP 34) Additionally, the identification of the defendant as the person driving the stolen car came from his friend, Mr. West, who referred to the defendant as his "brother," although they were unrelated. (1RP 81-86) Mr. West obtained the stolen Mazda from someone named "Josh" for \$200 dollars, and did so in the defendant's presence. (1RP 83-84) Mr. West gave the the stolen car to the defendant and testified that he later found out the defendant was in jail because of the stolen vehicle. (1RP 84-86) Finally, in closing argument the defendant *argued* he was driving the vehicle involved in the assault, but argued that he did not know it was a law enforcement officer because of the lack of markings on the car and lack of police officer's uniform. (1RP 153-55) The smashing of the officer's car was because the

defendant “was simply reacting to get away.” (IRP 156, l. 25) There is no harmful error resulting from the trial court’s additional responsive instruction.

**B. SERGEANT VIGESAA’S TESTIMONY DID NOT UNFAIRLY IMPUGN THE DEFENDANT BY IMPLICATION. TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL.**

**1. Standard of Review**

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (applying the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

**2. Discussion**

The defendant claims that trial counsel was ineffective for failing to object to testimony from one officer regarding his assignment to the patrol anticrime team; and claims that this testimony might *suggest* that the defendant was a bad guy who was being investigated because of that

fact. Appellant's Br, p. 22. This argument is without factual or legal support. The testimony at trial clearly established two things. First and most importantly, Officers Howe and Vigesaa were investigating an *unrelated* matter when they saw a recently stolen vehicle. (RP 26) Secondly, the officers recognized the vehicle as stolen because their specialty is to recover stolen vehicles. 1RP 26. The officers receive a special list of recently stolen vehicles daily. *Id.* Neither officer claimed to recognize the defendant from prior incidents, or as a suspect generally in their line of work. Therefore, this unpreserved allegation is not reviewable. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926-927.

Admission of an improper opinion may be challenged for the first time on appeal if it is a manifest constitutional error affecting the defendant's constitutional right to a jury trial. *See*, RAP 2.5(a)(3). To demonstrate a manifest error, the defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. *Kirkman*, 159 Wn.2d at 926-27. Manifest constitutional error requires an explicit or nearly explicit opinion on defendant's guilt. *Kirkman*, 159 Wn.2d at 936. Even assuming Sgt. Vigesaa's statement constitutes an improper opinion, the defendant fails to identify actual prejudice or practical and identifiable consequences requiring reversal here. Furthermore, the State never mentions Sgt. Vigesaa in its closing

argument, never mind the *suggestion* that the defendant was somehow subject to a prior investigation, or that Vigesaa knew him beforehand. During closing argument, defense counsel's main defense was that the defendant did not recognize Officer Howe *because* of his undercover status. 1RP 157.

Additionally, the record shows that defense counsel had a strategic purpose for not objecting to this evidence. The defendant did not object because no harm was done where the *testimony* established that the officers were not investigating the defendant, but were there on an unrelated matter, and where an objection to the testimony might only highlight the officer's training and experience. *See, State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel). The decision not to object was a legitimate tactical decision, likely intended to avoid drawing unfavorable juror attention. *See, State v. Gladden*, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003) (failure to object to reference to defendant's criminal history could be described as legitimate trial tactic because counsel wanted to avoid drawing attention to the remark); *see also, State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, (1989) (the decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to

the State's case, will the failure to object constitute incompetence of counsel justifying reversal.).

A review of the whole record establishes the defendant's attorney was capable and was able to object to evidence and testimony if it benefited the defendant. He made seven objections in a very short case, the majority of which were sustained.<sup>3</sup> The ineffective assistance of counsel claim is without merit.

**C. THE MISDEMEANOR CONVICTION FOR COUNT 6;  
FAILURE TO REMAIN AT THE SCENE OF AN  
ACCIDENT INVOLVING AN "UNATTENDED VEHICLE  
MUST BE DISMISSED.**

Defendant was charged in the information with one count of misdemeanor failure to remain at the scene of an accident involving an unattended vehicle under RCW 46.52.010(1). (CP 32) However, the jury was instructed on failure to remain at the scene of an accident involving property fixed, placed, or adjacent to the public highway, which had different elements than the unattended vehicle charge. RCW 46.52.010(1). (CP 109) The defendant correctly asserts that this charge must be reversed and dismissed. Resentencing is not necessary, as the misdemeanor crime is not included in the SRA, did not affect the standard range calculations as it was not countable criminal history, and

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<sup>3</sup> 1RP 69, (witness lacks knowledge to answer question); 1RP 82 (hearsay), 1RP 90 (form of question – sarcasm); 1RP 113, (beyond scope); 1RP 113, (beyond scope); 1RP 116 (beyond scope); 1RP 116 (beyond scope).

the 90 days of jail time imposed was run concurrently with the longer felony sentences.

**D. THE RESTITUTION ORDER WAS SIGNED AND AGREED TO BY DEFENDANT, THROUGH HIS COUNSEL, SO NO ISSUE REMAINS IN THIS REGARD.**

Defendant, on appeal, now claims that restitution was set without a hearing to establish further evidence regarding the amount of restitution owed. However, the restitution order was agreed to by the defendant, through his counsel's signature, and appears to be a precise accounting, including claim numbers and amounts owing expressed to the penny. It was signed by the trial court after it was signed and presented by the parties. In determining the amount of restitution, a trial court may rely on a defendant's admission or acknowledgment of the amount of restitution. *State v. Gray*, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012); *State v. Hunsicker*, 129 Wn.2d 554, 558–59, 919 P.2d 79 (1996). The sentencing judge may rely on what is acknowledged, admitted, or shown at trial to impose restitution. *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834 (1998). No hearing was necessary because of the agreement. No objection was made preserving the issue for appeal. RAP 2.5(a).

**E. THE \$25.00 PER MONTH FOR THE MANDATORY COURT COSTS INCLUDING RESTITUTION IS NOT SUBJECT TO REVIEW.**

RCW 9.94A.753, as pertinent here, provides in part:

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.

The trial court made the appropriate considerations: "I'll start payments, sir, at the lowest amount that I can, which would be I think probably \$25 a month is as low as I can go. Even though you're incarcerated, I'm going to start your payments April of 2015." (3RP 21) The court considered the amount owed, the fact the offender would be in custody, and his lack of assets. Defendant would be in custody for ten years so the court set the amount at the very minimum. *Id.* The \$25.00 per month is a reasonable amount; the defendant has food and lodging provided at State expense.

The defendant failed to object to the imposition of his LFOs; therefore, he failed to preserve the matter for appeal. In its consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court determined that the discretionary LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *Id.* at 830. No constitutional issue is involved. And, as set forth later, the statutory

violation existing in *Blazina* applied to discretionary LFOs, not mandatory LFOs. However, the *Blazina* court exercised its discretion in favor of accepting review due to the nationwide importance of LFO issues, and to provide guidance to our trial courts. *Id.* at 830. That guidance has been provided. *Blazina* was decided on March 12, 2015, after the sentencing in the instant case which occurred on January 21, 2015. There is no nationwide or statewide import to this present case, and review should not be granted where the defendant failed to object and thereby allow the trial court the ability to make further inquiry as to his ability to pay, if necessary. Statewide appellate procedural rules are of more import in the present case.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (2013). This principle is embodied federally in Fed. R. Crim P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *State v. Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed by this court in *Strine*,

where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

*State v. Strine*, 176 Wn. 2d at 749-50.

Therefore, policy and the rule both favor not allowing review of this statutory, non-constitutional LFO issue.

Secondly, the LFOs ordered are mandatory LFOs. (CP 250 [top of page]; CP 257-58). The \$500 victim assessment, \$100 DNA (deoxyribonucleic acid) collection fee, and \$200 criminal filing fee are each required irrespective of the defendant's ability to pay. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Crime victim assessments, DNA fees, drug crime fees, and criminal filing fees are mandatory LFOs and the trial court lacks discretion to consider a defendant's ability to pay when imposing them. *Lundy*, 176 Wn. App. at 102. To the extent that the

trial court imposed mandatory LFOs, there is no error in the defendant's sentence.

RCW 10.01.160(3) requires that the court make an individualized determination of the defendant's ability to pay *discretionary* LFOs at the time of sentencing. No discretionary LFO's were present in this case; therefore, the court did not need to consider the defendant's ability to pay at the time of sentencing.

**F. THE COMMUNITY CUSTODY CONDITION THAT DEFENDANT NOT USE OR POSSESS MARIJUANA OR THC WAS APPROPRIATE.**

This court reviews crime-related community custody conditions for an abuse of discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791–92, 239 P.3d 1059 (2010); *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A court abuses its discretion when it adopts a view that no reasonable judge would take. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Stated differently, a trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Appellant argues the trial court exceeded its authority when imposing a community custody condition that the defendant not possess or

consume controlled substances, including marijuana, during the pendency of his community custody.

During trial, the defendant's best friend, Benjamin West, testified that he and the defendant were using meth at the time of these crimes. (1RP 92-93) He described the defendant as a heavy meth user, a "smoker" who would only go to sleep if he had to sleep. (1RP 92-93)

At sentencing, the defendant's father argued for drug treatment, stating:

And what he needs is to get out of here and go into some mandated treatment where they watch him for a year so he can stay sober enough to -- you know, he's just got to stay sober for a year. And somebody's got to see to it that that happens, you know, with treatment and all that stuff because it worked for me, and it can work for him. So anyway, I pray to God, you know, I mean, it's a long time, you know, and I want to be alive to help him when he gets out, so any way.

3RP 7.

The trial court also observed that the defendant's crimes were drug related:

It's clear to me that you have a long term issue with substance abuse, and that's probably why you're committing the majority of these crimes and you're on this spin that never seems to end. I wish I had options other than sending you to prison, but sometimes it seems like there's nothing else I can do.

3RP 19.

This evidence supports the trial court's order prohibiting drug possession, including marijuana. This is a tacit finding that the crimes were drug-related and the drug prohibition crime related.

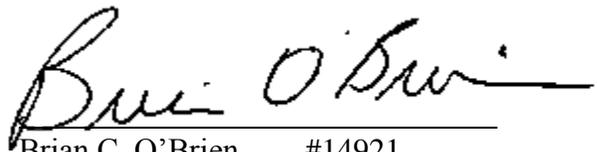
Additionally, the order precluding marijuana possession is simply a clarification that marijuana is a controlled substance for the purposes of the sentencing, even though it is a controlled substance that is conditionally lawful in our state. There is no error here. Possession is prohibited because it is still a controlled substance federally, and it cannot be used without a prescription. There was no abuse of discretion here.

#### V. CONCLUSION

For the above stated reasons this Court should affirm the lower court other than on count six. Count six should be reversed with instructions that the court delete the conviction from the judgment and sentence.

Dated this 17<sup>th</sup> day of September, 2015.

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

STATE OF WASHINGTON,

Respondent,

v.

CALEB EARL LOUTZENHISER,

Appellant,

NO. 33136-9-III

CERTIFICATE OF MAILING

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I certify under penalty of perjury under the laws of the State of Washington, that on September 17, 2015, I e-mailed a copy of the BRIEF OF RESPONDENT in this matter, pursuant to the parties' agreement, to:

Kristina M. Nichols  
Wa.appeals@gmail.com

and mailed a copy to:

Caleb Earl Loutzenhiser, #881709  
Airway Heights Corrections Center  
P.O. Box 1899  
Airway Heights, WA 99001-1899

9/17/2015

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)