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Court of Appeals

NO. 74055-5-I

Division I

State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER DREEWES,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Several electronic, banking and personal items were stolen from Jennifer Dreewes's vehicle while it was parked in Marysville. She reported the incident to the police and looked for information on the potential thief and the location of her belongings. One of her Facebook friends, Michelle Thomas, was interested in becoming a bounty hunter and decided to use the incident as a test case. Ms. Thomas and her boyfriend entered a private residence and held a family at gunpoint, apparently in an attempt to track down Ms. Dreewes's belongings and the vehicle prowl suspect. Ms. Thomas was offered a reduced sentence to testify against Ms. Dreewes, who was ultimately convicted as an accomplice to burglary and assault of the homeowner, even though Ms. Dreewes was not present for the incident, and the evidence did not show that she encouraged Ms. Thomas to commit those crimes.

B. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to prove beyond a reasonable doubt that Jennifer Dreewes had knowledge of the crime of burglary.

2. The evidence is insufficient to prove beyond a reasonable doubt that Jennifer Dreewes had knowledge of the crime of assault of Marty Brewer-Slater.

3. The trial court abused its discretion in admitting the Facebook records at Exhibit 52.

4. The prosecutor's argument that the State could have charged Jennifer Dreewes with other crimes was flagrant and ill-intentioned misconduct.

5. The trial court erred in imposing \$600 in legal financial obligations (LFOs) where Jennifer Dreewes is indigent and the trial court failed to make an individualized inquiry into her ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An individual may be held liable as an accomplice only if she provides assistance or encouragement knowing of the crime with which she is charged. Where the evidence was insufficient to show Jennifer Dreewes knew Michelle Thomas or another would unlawfully enter or remain in a building with intent to commit a crime therein, is the conviction for first degree burglary supported by insufficient evidence?

2. Where the evidence shows Ms. Dreewes lacked knowledge of an assault against Marty Brewer-Slater, is the evidence insufficient to convict her of second degree assault against Marty Brewer-Slater?

3. As the proponent of the 25 pages of Facebook messages at Exhibit 52, the State had to prove the messages were authentic communications between Jennifer Dreewes and Michelle Thomas. Did the trial court abuse its discretion in admitting the exhibit, where Michelle Thomas was not familiar with data fields set forth in the exhibit and could not verify the accuracy of the conversation, and where the State could not show the exhibit was a business record of Facebook?

4. As quasi-judicial officers, prosecutors have the obligation to ensure an accused person receives a constitutionally-required fair and impartial trial. A prosecutor commits misconduct if he or she appeals to the jury's prejudices and passions and encourages a decision on improper grounds. Such misconduct is flagrant and ill-intentioned if it could not have been cured by an instruction. Was the prosecutor's argument that Jennifer Dreewes was culpable for more than the charged crimes an improper appeal to the jury's passions and prejudices that requires reversal, because it could not have been stricken from the jurors' minds through an instruction?

5. RCW 10.01.160 mandates the waiver of costs and fees for indigent defendants. "[A] trial court has a statutory obligation to make

an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). While the trial court recognized Ms. Dreewes's indigency and her inability to pay costs while incarcerated, the court imposed \$600 in LFOs, with interest accruing immediately, without considering Ms. Dreewes's inability to pay. Should this Court remand with instructions to strike the LFOs?

D. STATEMENT OF THE CASE

Michelle Thomas and her boyfriend Don Parrish, apparently high on drugs and armed with guns, zip ties and duct tape, entered the Marysville home of the Brewer-Slater family on January 23, 2014.¹ Rohen Brewer-Slater, his wife Marty, his daughter Eonone and her boyfriend James Meline were all home at the time. RP 115-22, 148-50. Ms. Thomas and Mr. Parrish first knocked at the front door. RP 121. Mr. Brewer-Slater did not recognize them through the peephole and his daughter was not expecting anyone. RP 121-22, 172, 190-91.

¹ RP 114-20, 124, 166, 177, 179, 186-87, 202, 228-29, 288, 314-16. The verbatim report of proceedings of trial and sentencing is contained in five consecutively-paginated volumes referred to herein by "RP" and the page number. The pre-trial volumes are referenced by date, e.g. "RP (7/18/14)" and the page number.

Rohen Brewer-Slater “cracked” open the door to ask what the two strangers wanted, and the man replied they were looking for various people like Vanessa, Nessa, Tammy, Tanya, Joseph and/or Joe. RP 122, 151-52, 174-75, 185-86, 193. Mr. Brewer-Slater told the man those individuals were not in the home, but Mr. Parrish said “yeah, right” and pushed through the door pointing a newly-revealed gun. RP 123. The couple locked the front door behind them, preventing the family from exiting. RP 124.

Ms. Thomas and Mr. Parrish issued various commands to the family members, directing them where to stand. RP 127-29, 174. Mr. Parrish asked and looked for computers, laptops and cell phones in the home and they continued to ask for people the family did not recognize. RP 123-24, 167, 175, 193. Rohen Brewer-Slater eventually grabbed a small pistol from Ms. Thomas, who ran outside after Mr. Parrish hit Rohen in the face with the butt of his rifle. RP 129-30, 156-57, 179.

Mr. Parrish apparently tried to leave as well but the family pulled him to ground. RP 131, 194-95. Mr. Parrish pointed his gun at Marty Brewer-Slater and pulled the trigger but the safety was locked and she was able to spray him with bear mace. RP 132-33, 156-58, 177-79. Rohen Brewer-Slater followed Mr. Parrish out of the house

and around the neighborhood, eventually turning Mr. Parrish over to the police. RP 134-37, 180.

Michelle Thomas remained in the neighborhood and turned herself in to police. RP 244-46, 325. She subsequently pled guilty to burglary in the first degree and second degree assault. RP 326-27. The State promised her time off her sentence if she testified against Jennifer Dreewes. RP 327-28.

Jennifer Dreewes was not present for any of these events. *E.g.*, RP 145-46, 167, 187. Within the last year, Jennifer Dreewes and Michelle Thomas had become reacquainted through Facebook, a social networking site; the two had attended high school together 20 years earlier. RP 288-89, 330-31.

Over Ms. Dreewes's objections for lack of foundation and authenticity, the trial court admitted a series of Facebook conversations purportedly between Ms. Dreewes and Ms. Thomas. 9/8/14 RP 28-41; RP 207-15. The exhibit was not admitted as a Facebook business record, but through Michelle Thomas's testimony. RP 10-13, 207-15. However, Ms. Thomas was not familiar with some of the content in the exhibit and could not recall word-for-word her conversations with Ms. Dreewes. RP 302-14. Nevertheless, the trial court allowed Ms.

Thomas to read from the exhibit during her testimony and the exhibit was also admitted for substantive purposes. RP 310-13.

The State argued the Facebook conversations showed Ms. Dreewes was accountable for Ms. Thomas and Mr. Parrish's actions at the Brewer-Slater home as an accomplice. *E.g.*, RP 538-42, 544-45; *see* CP 73-74 (second amended information).

Two weeks earlier, Jennifer Dreewes's laptop, iPhone, business checks, credit cards, and wedding rings had been taken from her vehicle while parked outside her mother's home in Marysville. RP 252-57, 504. She reported the incident to the police and her Facebook friends, and provided new information to the police as they investigated the case. *E.g.*, RP 252-58, 290, 292, 371-72. Ms. Dreewes offered a small reward for information about the person who thieved these items from her. RP 292, 297, 504-05.

As an unemployed single mother, Michelle Thomas was interested in helping, and learned a name for the suspect, who was thought to have pink hair, and obtained a photo that she posted on Facebook. RP 292-93, 297; *see* 336-37.² Ms. Thomas later admitted

² The Brewer-Slaters had permitted a homeless woman named Sonya, who had pink hair, to stay with them early in January 2014. Sonya stayed for only one or two nights because the family was

she had thoughts of becoming a bounty hunter and considered finding this pink-haired suspect a good test case. RP 331, 464.

Ms. Thomas and Ms. Dreewes joked about giving the pink-haired suspect black eyes, getting Ms. Dreewes's property back, and bringing the woman to Ms. Dreewes. RP 291-92, 294-97, 299-300, 328, 344-45. Ms. Thomas was intoxicated or high on illegal substances during some of the message exchanges with Ms. Dreewes. RP 334-35. In Ms. Thomas's opinion, the Facebook conversation eventually became serious. RP 328-29.

Michelle Thomas offered to go to the house where the pink-haired girl was suspected to live. RP 298-300, 308-10. In response to Ms. Thomas's inquiry, Ms. Dreewes messaged that she was told four to five people were at the address and "don't go there unless packing." RP 313-14; Exhibit 52, p.3810. Ms. Thomas reported to Ms. Dreewes that Ms. Thomas went to the house, but no one answered the door and the doors and windows were locked. Exhibit 52, p.3813. She would check the house again. *Id.* Ms. Dreewes thanked her. *Id.*

concerned she was using drugs and returned to the house with items that did not appear to be hers. RP 117-18, 140-41, 150-51, 159, 162-65, 198-99, 200-01. Marty Brewer-Slater testified Ms. Thomas and Mr. Parrish asked "Where's the girl with the pink hair?" RP 159.

Later, Michelle Thomas and Don Parrish entered the Brewer-Slater home as set forth above.

The jury convicted Ms. Dreewes of first degree burglary while armed with a firearm and second degree assault of Marty Brewer-Slater. CP 7-9.

Jennifer Dreewes had no prior criminal record, and was sentenced to a total of 90-months incarceration. CP 58-68. Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. Insufficient evidence supports the convictions based on accomplice liability where Jennifer Dreewes had no knowledge of the crimes committed.

- a. An individual must have knowledge of the crime committed to be liable as an accomplice to that crime.

To be legally culpable for the actions of another, the State must prove beyond a reasonable doubt that the person is guilty as an accomplice. RCW 9A.08.020; *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2001); U.S. const. amend. XIV; Const. art. I, §§ 21, 22. A person may be convicted as an accomplice to another's crime only if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3)(a). The State must present evidence sufficient to prove the putative accomplice had general knowledge of the charged crime beyond a reasonable doubt.³

The State must prove an accomplice has knowledge of the charged crime in particular. “The legislature . . . intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has ‘knowledge[.]’” *Roberts*, 142 Wn.2d at 511 (quoting RCW 9A.08.020).

Accomplice liability cannot be premised on strict liability.

“[K]nowledge by the accomplice that the principal intends to commit ‘a crime’ does not impose strict liability for any and all offenses that

³ *E.g.*, *Cronin*, 142 Wn.2d 568 (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); *State v. McCullum*, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983); *State v. Green*, 94 Wn.2d 216, 224, 616 P.2d 628 (1980)).

On a challenge to the sufficiency of the evidence, a conviction must be reversed when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

follow.” *Roberts*, 142 Wn.2d at 511; *accord id.* at 510-13. “The statutory language requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged.” *Cronin*, 142 Wn.2d at 579 (emphasis added). “[T]he fact that a purported accomplice knows that the principal intends to commit ‘a crime’ does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal.” *Id.* at 579.

“While an accomplice may be convicted of a higher degree of the general crime [s]he sought to facilitate, [s]he may not be convicted of a separate crime absent specific knowledge of that general crime.” *State v. King*, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002) (citing *In re Pers. Restraint of Sarausad*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001)), *rev. denied*, 149 Wn.2d 1013, 1015 (2003). For instance, a defendant cannot be convicted of robbery as an accomplice if she intends merely that the principal commit theft. *State v. Grendahl*, 110 Wn. App. 905, 911, 43 P.3d 76 (2002).

State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015), presents another example. To convict Allen as an accomplice to first degree premeditated murder, “the State was required to prove that

Allen actually knew that he was promoting or facilitating [another person] in the commission of first degree premeditated murder.” 182 Wn.2d at 374. The jury can convict only on the defendant’s “actual knowledge that principal was engaging in the crime eventually charged” and not upon what he “should have known.” *Id.* (citing *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980)).

Accomplice liability does not extend to acts or crimes that are merely foreseeable. *State v. Stein*, 144 Wn.2d 235, 246, 27 P.3d 184 (2001).

b. The State’s evidence was insufficient to prove Jennifer Dreewes had knowledge of the crime of burglary.

The State charged Ms. Dreewes with the crime of burglary. CP 73-74. However, the evidence is insufficient to show Ms. Dreewes knew she was promoting or facilitating burglary.

A burglar must have the mens rea to commit a crime against a person or property in an unlawfully entered building. *State v. Bolar*, 118 Wn. App. 490, 503, 78 P.3d 1012, 1019 (2003); RCW 9A.52.020, -.030; CP 19 (to-convict instruction). The evidence does not show Ms. Dreewes’s knowledge of unlawful entry.

The Facebook messages between Ms. Dreewes and Ms. Thomas focus on getting Ms. Dreewes’s property back, bringing the suspected

thief to Ms. Dreewes, and injuring the suspected thief. Exhibit 52; accord RP 301 (Thomas’s testimony that Dreewes never wavered from determination to have property returned); RP 291-94 (Thomas’s testimony that Dreewes was looking for information on the suspect, to get property back, and to injure suspect). For example, Ms. Thomas mentions “giving a good beating.” Exhibit 52, p.3792. Ms. Dreewes later states, “I need you to fuck the rest of her face up lol.” Exhibit 52, p.3793. And, Ms. Thomas responds, “Wouldn’t be just her face. She will have few broken bones to go along with it.” *Id.* But these comments do not address unlawful entry into a building.

Ms. Dreewes offers \$300 “for tracking her ass down”—not for entering into her home. Exhibit 52, p.3806. Likewise, Ms. Thomas later tells Ms. Dreewes she “Might know where [the suspected thief] is at. Want me to go check her out[.]” Exhibit 52, p.3795. And Ms. Dreewes responds “Yes!!! Pretty please and bash in her face . . . And get my shit back lol[.]” *Id.* Ms. Dreewes also tells Ms. Thomas she wants the suspected thief brought to her. *Id.* But neither party discusses entering into the suspected home or any other building.

The evidence also fairly shows, in the light most favorable to the State, Ms. Dreewes knew Ms. Thomas would be going to the

address associated with the suspected thief. Exhibit 52, pp. 3808-10. Yet, there is no discussion of breaking or barging into the home. *See id.* In fact, when Ms. Thomas asks Ms. Dreewes “what you want done with [the suspected thief] once they get there?” Ms. Dreewes replies, “If I get my laptop back but not through the cops I don’t have to tell my insurance company that just paid me \$1500 for it ‘wink wink[.]’” Exhibit 52, p.3809. Ms. Thomas clarifies that all Ms. Dreewes wants is the property:

Thomas: “so all you want is your stuff.”

Dreewes: “I want my shit . . . I want her to have 2 black eyes and her to go to jail”

Dreewes: “Is that too much? Then just my shit”

Thomas: “we can do the shit and black eyes but jail we can’t do. LOL.”

Id.

Further, Ms. Thomas told Ms. Dreewes she went by the house once and no one was home, no lights were on, and the doors and windows were locked. Exhibit 52, p.3813. Ms. Thomas did not talk about breaking in that time or in the future and Ms. Dreewes did not encourage it. *See id.* The two only discussed seizing the suspected thief and bringing her to Ms. Dreewes. Exhibit 52, p.3813-14. In the

light most favorable to the State, the jury could have interpreted these communications to be serious statements (not jokes), but the jury could not impute knowledge to Ms. Dreewes that was not there. *See* RP 295, 297, 328-29 (discussion began in jest).

Accordingly, Jennifer Dreewes cannot be held liable for complicity in burglary—even if it was foreseeable—because she did not have knowledge of that crime. *See Stein*, 144 Wn.2d at 246. At most, the State proved Ms. Dreewes knew she was promoting or facilitating theft. But knowing assistance in the acquisition of property by theft does not equate to complicity in the crimes of robbery or burglary. *Grendahl*, 110 Wn. App. at 910-11

- c. The State presented insufficient evidence to prove Jennifer Dreewes had knowledge of the crime of assault against Marty Brewer-Slater.

In addition to burglary, the State charged Jennifer Dreewes with assault of Marty Brewer-Slater. CP 73. The jury was instructed that, to convict Ms. Dreewes of assault, it had to find beyond a reasonable doubt that she “assaulted Marty Brewer-Slater with a deadly weapon[.]” CP 27.

The State presented evidence that Ms. Dreewes and Ms. Thomas discussed assaulting the suspected thief. *E.g.*, Exhibit 52, p.3792-93,

3795, 3809. Arguably, the State might have been able to charge Ms. Dreewes as an accomplice to attempted assault of the suspected thief or for criminal solicitation. *See* RCW 9A.28.020, -.030. But, the State did not prove beyond a reasonable doubt that Ms. Dreewes had knowledge of an assault on Marty Brewer-Slater. The most the State showed was that Ms. Dreewes told Ms. Thomas there could be “4-5” people in the house and “don’t go there unless packing.” Exhibit 52, p.3810.

Accomplice liability cannot be predicated on knowing that one’s acts will promote or facilitate “a crime” rather than the crime charged. *Grendahl*, 110 Wn. App. at 907. It requires knowledge of “the specific crime,” and not merely any foreseeable crime committed as a result of the complicity.” *Stein*, 144 Wn.2d at 246.

The U.S. Supreme Court recently addressed the requirements of accomplice liability with language relevant here. *Rosemond v. United States*, ___ U.S. ___, 134 S. Ct. 1240, 1245, 188 L. Ed. 2d 248 (2014). In *Rosemond*, the defendant knowingly aided in a drug sale but said he did not know the principal was armed with a gun. *Id.* at 1243. Using a gun in connection with a drug trafficking crime substantially increases the penalty for the offense. *Id.* at 1247.

The *Rosemond* Court explained that the “conduct” prong of accomplice liability would be satisfied by aiding any part of the crime; he did not need to aid the offense’s gun element. *Id.* at 1258. But the “state of mind” necessary for accomplice liability required the defendant to intend more than a simple drug crime, rather he must intend to aid “an armed” drug sale. *Id.* This intent may be proved by showing the defendant had full knowledge, in advance, of the gun’s involvement in the drug sale. *Id.* at 1249.

Advance knowledge is critical, the Court explained, because it “enables [her] to make the relevant legal (and indeed, moral) choice.” *Rosemond*, 134 S. Ct. at 1249.

When an accomplice knows beforehand of a confederate’s design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an armed offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun.

Id.

This reasoning from *Rosemond* comports with this State's common law and statutory scheme. Ms. Dreewes could only make an informed decision on complicity in the assault of Marty Brewer-Slater if she knew in advance Michelle Thomas's plan to assault others found on the property where the suspected thief was to be seized. *See Rosemond*, 134 S. Ct. at 1249. Because Ms. Dreewes (arguably) only knew of the plan to assault the suspected thief (who was not Marty Brewer-Slater), she cannot be held accountable as an accomplice to any other crime or any other person, even if it was a foreseeable crime. *Stein*, 144 Wn.2d at 246.

A few examples illustrate the point. If two conspirators agree to assault a bully at their university, one can be held accountable for the other's actions in hitting that bully. However, if the other party commits a domestic violence assault on his or her significant other after the agreement to assault a third-party bully is formed, the accomplice to the bully-assault cannot be held accountable for his or her cohort's separate act of assault against the significant other. The domestic violence assault was not "the crime" the parties had planned. The putative accomplice had no knowledge of it and no chance to withdraw.

Similarly, if Bob solicits Mary to assault his business partner at the partner's vacation home later that summer, Bob should be held accountable for Mary's assault on that individual. But if Mary also (or instead) assaults a guest or worker in the partner's vacation home, Bob did not know of that assault in advance and should not be held liable for it. Likewise, if prior to going to the partner's vacation home, Mary boards a bus, gets into a confrontation with the passenger seated next to her, and assaults that passenger (who is not the business partner), Bob cannot fairly be held liable as an accomplice to Mary's unplanned attack on an unknown traveler at an independent time.

Finally, transferred intent does not apply here. *See State v. Abuan*, 161 Wn. App. 135, 156, 257 P.3d 1 (2011). Because the jury was instructed on assault in the second degree, Marty Brewer-Slater was named in the to-convict instruction, and the jury was not instructed on transferred intent, "there is no room for a transferred intent analysis" here. *Id.*; *see State v. Elmi*, 166 Wn.2d 209, 214-18, 207 P.3d 439 (2009) (principal's specific intent for assault in the first degree of targeted victim, intent to commit great bodily harm, can transfer to unintended victim creating liability for principal; *Elmi* did not involve accomplice liability). Mr. Parrish did not assault Marty Brewer-Slater

believing she was the suspected thief. In fact, the suspected thief was not even in the home when Ms. Thomas and her compatriot entered. Transferred intent does not apply because their actions toward Marty Brewer-Slater were not intended for the suspected thief.

For the same reason, Ms. Dreewes did not have the mens rea required for accomplice liability as to Marty Brewer-Slater. She lacked knowledge that an assault would be committed against Marty Brewer-Slater. Ms. Dreewes cannot be held liable for the assault on Marty Brewer-Slater.

The State failed to prove Jennifer Dreewes knew of the assault on Marty Brewer-Slater. The second-degree assault conviction should be reversed and the charge dismissed with prejudice.

2. Michelle Thomas was unable to authenticate the extensive Facebook messages at Exhibit 52.

Before evidence can be admitted at trial, the proponent bears the burden of showing the evidence is what it purports to be. ER 901; *In re Det. of H.N.*, 188 Wn. App. 744, 751, 355 P.3d 294 (2015). Over objection, the trial court admitted the State's exhibit 52 through the lay witness Michelle Thomas. Exhibit 52 was said to be a series of Facebook communications between Ms. Thomas and Jennifer Dreewes.

This Court reviews the court’s admission of evidence for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Authentication is “the act of proving that something ([such] as a document) is true or genuine, esp[ecially] so that it may be admitted as evidence.” *Sublet v. Maryland*, 113 A.3d 695, 709 (Md. 2015) (quoting Black’s Law Dictionary 157 (10th ed. 2014)). Authentication prior to admission is “an inherent logical necessity,” not “an[] artificial principal of evidence.” *Id.* (quoting 7 J. Wigmore, Evidence § 2129 (Chadbourn Rev. 1978)) (emphasis and alteration in original). It is integral to establishing the matter’s relevancy. *Id.*

The trial court acts as a critical gatekeeper for authentication because jurors presume extensive information from a physical exhibit, including matters that might simply be implied or might simply be of logical possibility. *Sublet*, 113 A.3d at 709.

Social networking communications present significant issues for authentication because authorship can be easily concealed, accounts can be hacked, individuals may be impersonated, and host companies do not always respond fully to requests for authentication and cannot assure veracity. *See, e.g., Sublet*, 113 A.3d at 711-14; *Mississippi v. Smith*, 136 So.3d 424, 432-33 (Miss. 2014); *Connecticut v. Eleck*, 23

A.3d 818, 822-23 (Conn. App. Ct. 2011); *Griffin v. Maryland*, 19 A.3d 415, 421-22 (Md. 2011). “The potential for fabricating or tampering with electronically stored information on a social networking site, . . . poses significant challenges from the standpoint of authentication of printouts of the site.” *Griffin*, 19 A.3d at 422. The ease of fabrication by those accused of crimes, by alleged victims, and by others requires courts to engage in particular scrutiny of social media evidence. *E.g.*, *Smith*, 136 So.3d at 433; *Eleck*, 23 A.3d at 824 (proponent of Facebook evidence must show that communications derive from particular individual and not just from his or her account).

Exhibit 52 is a 25-page printout of data fields—“recipients,” “author,” “sent,” “deleted” and “body”—with the header “Facebook Business Record.” For example, the exhibit contains entries resembling this excerpt:

Recipients Jennifer Dreewes (679674926)
Michelle Thomas (100001254546922)
Author Michelle Thomas (100001254546922)
Sent 2014-01-14 21:08:49 UTC
Deleted false
Body OMG, I went over to Brian Johnson's house on sunday. He was the one voted most likely to go to school 6 days a week. So different side of the tracks we are. LOL. Im hoping that it might just lead in the direction i want.

Recipients Michelle Thomas (100001254546922)
Jennifer Dreewes (679674926)
Author Jennifer Dreewes (679674926)
Sent 2014-01-14 21:09:23 UTC
Deleted false
Body Nice! Can you say score

Exhibit 52, p.3794.

Despite being aware of Ms. Dreewes's objection to the exhibit prior to trial, the State did not present sufficient information from Facebook to authenticate the exhibit as a business record. 9/8/15 RP 28-40, 66-67; RP 10-13, 207-15.

Still, the State sought to admit this "Facebook Business Record"—as the header claims—through a lay witness, Michelle Thomas. RP 10-13, 207-15. The State argued Ms. Thomas could authenticate the record by "confirming that's her Facebook record. It's Ms. Dreewes's Facebook record, and that bears a correct and accurate conversation of what happened between them." RP 11-12. Ms. Dreewes continued to object. RP 12-13, 302-04, 310-13.

The State could not prove the authenticity of this record through Ms. Thomas. While Michelle Thomas testified she communicated with Jennifer Dreewes on Facebook, Ms. Thomas could not recall the specifics of her online conversation with Ms. Dreewes. *See* RP 312. Accordingly, Ms. Thomas simply read from the exhibit as her testimony. RP 310. Ms. Thomas did not know, at the time of trial, if the words set forth in Exhibit 52 were the words either she or Ms. Dreewes used in 2014. RP 312.

Moreover, Michelle Thomas was not familiar with the format or markings contained in Exhibit 52. RP 311 (Thomas has no idea what “UTC” means near the timestamp in Exhibit 52). She is a lay user of Facebook, not a custodian of its records. In short, defense counsel showed that Michelle Thomas could not attest to the exhibit’s authenticity. Nevertheless, the trial court allowed Ms. Thomas to read the content of the messages as portrayed in Exhibit 52 to the jury as her testimony and admitted the exhibit as a substantive, documentary exhibit for the jury to review. RP 312.

The improper admission of Exhibit 52 requires reversal. Evidentiary error is prejudicial if the admission affected the outcome within reasonable probabilities. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Exhibit 52 was the cornerstone of the State’s case against Ms. Dreewes. The State acknowledged the exhibit was “critical” to its case. 9/8/15 RP 34-36.

Although the State had other witnesses to the crimes Ms. Thomas and Mr. Parrish committed, only Ms. Thomas could testify to Ms. Dreewes’s role. As Ms. Thomas admitted, she did not recollect the specific conversation she and Ms. Dreewes had in advance of Ms. Thomas’s crimes. The lengthy document at Exhibit 52 purports to

provide precise language that the State relied on—both through Ms. Thomas’s testimony and as a physical exhibit—to connect Ms. Dreewes to the burglary and assault of Marty Brewer-Slater. The State’s extensive reliance on the exhibit in closing argument further demonstrates it was vital to the State’s case. RP 538-42, 544-45; *see Griffin*, 19 A.3d at 427 (conviction reversed where insufficiently authenticated social networking document was relied on by State in closing argument).

The erroneous admission of Exhibit 52 requires reversal and remand for a new trial.

3. The prosecutor appealed to the jury’s passions and prejudices, urging conviction on improper grounds, by arguing to the jury the State could have filed additional charges against Ms. Dreewes.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and “to act impartially in the interest only of justice.” *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *accord State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). Prosecutors must ensure justice is done and the accused receive a fair and impartial trial. *E.g., Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Prosecutorial misconduct violates a defendant's right to a fair trial where the prosecutor makes an improper statement that has a prejudicial effect. *E.g., In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009); *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). Yet here the prosecutor relied on inflammatory argument to secure a conviction.

At the end of closing argument, the prosecutor improperly appealed to the jury's passion and prejudice. The prosecutor told the jury that the State could have charged Ms. Dreewes with three other counts of assault. RP 546.

Now, recall that we just charged the crime of assault in the second degree for Marty Brewer. The State would have charged the crime of assault in the second degree for everybody in that house.

We could have added three more counts of assault in the second degree, because when you think about an assault -- and I tell you this because you're going to say, Well, **were other people assaulted in the house based on that definition?**

Yes. But the counts that you've been charged with, that you're to determine, is Marty Brewer-Slater alone.

RP 546 (emphasis added). This argument invited the jury to determine guilt on improper grounds, including that Ms. Dreewes was more

culpable than the charges reflected, that the State acted with mercy in its charging decision, and that she should be held accountable not just for the charged offenses but for all possible offenses. *See State v. Torres*, 16 Wn. App. 254, 256-57, 554 P.2d 1069 (1976).

Though a prosecutor has “wide latitude” to draw and argue reasonable inferences from the evidence, the State may not “invite the jury to decide any case based on emotional appeals.” *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). In *State v. Boehning*, the prosecutor committed reversible error when he repeatedly referred to dismissed counts and suggested that the complaining witness’s statements supported those charges. 127 Wn. App. 511, 522, 111 P.3d 899 (2005). Both the dismissed counts in *Boehning* and the uncharged acts here “were wholly irrelevant to the State’s case.” *Id.* The argument impermissibly asks the jury infer that Ms. Dreewes, like Mr. Boehning, was guilty of crimes that were not before it. *Id.*

Unobjected to misconduct requires reversal if it is “so ‘flagrant and ill intentioned’ that it causes enduring and resulting prejudice that a curative instruction could not have remedied.” *Boehning*, 127 Wn. App. at 518 (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747

(1994)). The unobjected to argument in *Boehning* “compel[led] reversal.” *Id.* at 522. The same is true here. The prosecutor’s appeal to the jury’s passion and prejudice through wholly irrelevant argument was a bell that could not be unrung by a curative instruction.

4. The Court should remand with instructions to strike the legal financial obligations imposed without an individualized inquiry into Jennifer Dreewes’s ability to pay and despite the court’s recognition that she is indigent and would be unable to pay costs while incarcerated.

A sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). This means “a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.” *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); *accord, e.g., State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016) (remanding to trial court for resentencing with “proper consideration” of defendant’s ability to pay).

The sentencing transcript reflects the court made no inquiry into Ms. Dreewes’s ability to pay costs, but found she would not be able to pay costs while serving the 90-month sentence imposed. RP 590. The court failed to conduct the individualized inquiry required by statute. However, the judgment and sentence reflects a boilerplate

finding that Ms. Dreewes has the ability to pay LFOs and imposes \$600 in LFOs plus interest and collection fees. CP 60, 63 (imposing \$500 victim assessment fee and \$100 biological sample fee). This boilerplate finding is not only unsupported but it is inconsistent with Ms. Dreewes's indigency. CP 1-3, 60, __ (Sub no. 82 (indicating Dreewes has no job, benefits or real property)); RAP 15.2(f) (continuing presumption of indigency). Accordingly, the court should remand with instructions to strike the LFOs.⁴

The State may argue that the \$500 victim assessment fee and the \$100 biological sample fee are "mandatory." In fact, this Court recently held that despite the equal hardships imposed by "mandatory" and "discretionary" LFOs, the above statutory interpretation and constitutional grounds were insufficient to reverse the imposition of "mandatory fees." *State v. Mathers*, 193 Wn. App. 913, __ P.3d __ (2016); *State v. Lewis*, No. 72637-4-I, slip op. at 4-10 (June 27, 2016); *State v. Shelton*, 72848-2-I, slip op. at 1 (June 20, 2016). These decisions were incorrectly decided, however.

⁴ The trial court waived other fees and costs because "as a matter of equity for all of the folks who are indigent, I don't see the sense of lumping on for the few people who may be more responsible and able to hire lawyers, so I just don't choose to do that." Ms. Dreewes was subsequently found indigent. CP __ (Sub no. 82).

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment “shall be imposed”); RCW 36.18.020(2)(h) (convicted criminal defendants “shall be liable” for a \$200 fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the Legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution “shall be ordered” for injury or damage absent extraordinary circumstances, but also states that “the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.” RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay

in those contexts. *See State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015) (the legislature’s choice of different language in different provisions indicates a different legislative intent).⁵

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) does not hold otherwise because that case considered a defense argument that the VPA was *unconstitutional*. The Court simply assumed that the statute mandated imposition of the penalty on indigent and non-indigent defendants alike: “The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants.” *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to “LFOs,” not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 (“we reach the merits and hold that a trial court has a statutory

⁵ The Legislature did amend the DNA statute to remove consideration of “hardship” at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs.").

Likewise, in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013), the Supreme Court held the trial court was required to waive all fees for indigent litigants under General Rule 34 despite the appearance of mandatory language ("shall") in applicable statutes. *See* RCW 36.18.020. The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Jafar*, 177 Wn.2d at 527-30. Given Jafar's indigence, the Court reasoned, "We fail to understand how, as a practical matter, Jafar could make the \$50 payment now, within 90 days, or ever." *Id.* at 529. That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837; CP 49.

Finally, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns.

U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the “criminal filing fee” across counties. *See Jafar*, 177 Wn.2d at 528-29; *Blazina*, 182 Wn.2d at 857.⁶

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94

⁶ The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that “principles of due process or equal protection” guided the court’s analysis and recognizing that failure to require waiver of fees for indigent litigants “could lead to inconsistent results and disparate treatment of similarly situated individuals”). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

S. Ct. 2116, 40 L. Ed. 2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Imposing LFOs on indigent defendants also violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Ms. Dreewes recognizes the government may have a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like her is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature’s stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because “incarceration would result only if failure to pay was willful” and not due to indigence. *Id.* at 241. This assumption was not borne out.⁷

The Court should remand with instructions to strike the LFOs imposed without an individualized inquiry of Ms. Dreewes’s ability to pay.

Finally, in the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5. As set forth above, the imposition of costs on an indigent defendant is contrary to the statutes and constitution. The presumption of indigence continues on appeal

⁷ *See, e.g.*, Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm’n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 49-55 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf; *Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).

pursuant to RAP 15.2(f). *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). The law and facts call for an exercise of this Court's discretion not to impose appellate costs against Ms. Dreewes. RAP 1.2(a), (c); RAP 2.5; *Blazina*, 182 Wn.2d at 835; *id.* at 841 (Fairhurst, J. concurring).

F. CONCLUSION

The Court should reverse and dismiss the charges with prejudice because the State failed to prove Jennifer Dreewes knew the principals would commit burglary and would assault Marty Brewer-Slater.

In the alternative, the convictions should be reversed and remanded for a new trial because the trial court admitted unauthenticated Facebook messages and the prosecutor committed misconduct by telling the jury the State could have charged Ms. Dreewes with additional crimes.

If the convictions are affirmed, the Court should remand with instructions to strike the \$600 in LFOs.

DATED this 29th day of August, 2016.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	
)	NO. 74055-5-I
)	
JENNIFER DREEWES,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SETH FINE, DPA [sfine@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] JENNIFER DREEWES 385950 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 29TH DAY OF AUGUST, 2016.

X _____ 

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