

No. 34356-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE G. BARBOZA CORTES,

Appellant.

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

The Honorable Judge T.W. Small

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Jill S. Reuter, WSBA #38374
Nichols and Reuter, PLLC
Eastern Washington Appellate Law
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
admin@ewalaw.com

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A. SUMMARY OF ARGUMENT

Jose G. Barboza Cortes deposited four checks into his checking account, which were made payable to people other than himself, and drawn on bank accounts other than his own. After obtaining this deposit information from Mr. Barboza's bank, a police officer applied for and obtained a search warrant for Mr. Barboza's residence. During the execution of the search warrant, police officers found methamphetamine and a firearm.

Following a jury trial, Mr. Barboza was convicted of nine counts based upon these events: unlawful possession of a controlled substance – methamphetamine; second degree unlawful possession of a firearm; three counts of third degree possession of stolen property; and four counts of second degree identity theft.

Mr. Barboza now appeals, arguing the following: the trial court should have suppressed the evidence seized from his home pursuant to the search warrant; two of his three convictions for third degree possession of stolen property violate the prohibition against double jeopardy; and he was deprived of his constitutional right to a unanimous jury verdict on his convictions for second degree unlawful possession of a firearm and second degree identity theft, as charged in count 12.

Mr. Barboza also argues the case should also be remanded to the trial court: for resentencing, to strike two prior class C felony offenses that had

“washed out;” to strike a community custody condition that was not crime related; to strike the discretionary \$250 jury demand fee from his judgment and sentence; and to correct the judgment and sentence to remove the \$250 drug enforcement fund cost.

Mr. Barboza also preemptively objects to the imposition of any appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Barboza’s motion to suppress the evidence seized from Mr. Barboza’s home pursuant to the search warrant, because the affidavit does not provide probable cause to issue the search warrant for the home.
2. The trial court erred by convicting Mr. Barboza of three counts of third degree possession of stolen property (counts 3, 6, and 9), where entry of these three convictions violated Mr. Barboza’s double jeopardy rights.
3. The trial court violated Mr. Barboza’s right to a unanimous jury verdict for unlawful possession of a firearm, as charged in count 2, because one of the alternative means was not supported by sufficient evidence.
4. The trial court violated Mr. Barboza’s constitutional right to a unanimous jury verdict for second degree identity theft, as charged in count 12, because one of the alternative means was not supported by sufficient evidence.
5. The trial court erred by sentencing Mr. Barboza based upon an offender score of eight, where the trial court miscalculated his offender score by two points when it included two prior class C felony offenses that had “washed out.”

6. The trial court erred in imposing a condition of community custody prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of alcoholic beverages.
7. The judgment and sentence should be corrected to remove the \$250 drug enforcement fund cost, because the trial court did not impose this cost.
8. The trial court erred by imposing a \$250 jury demand fee, because this cost was unsupported by the record on Mr. Barboza's ability to pay legal financial obligations, and the trial court erred by failing to conduct a sufficient inquiry into Mr. Barboza's likely present or future ability to pay.
9. An award of costs on appeal against Mr. Barboza would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court should have suppressed the evidence seized from Mr. Barboza's home pursuant to the search warrant, because the affidavit does not provide probable cause to issue the search warrant for the home.

Issue 2: Whether the trial court erred by convicting Mr. Barboza of three counts of third degree possession of stolen property (counts 3, 6, and 9), where entry of these three convictions violated Mr. Barboza's double jeopardy rights.

Issue 3: Whether the trial court violated Mr. Barboza's constitutional right to a unanimous jury verdict, on count 2 and count 12.

- a. The trial court violated Mr. Barboza's right to a unanimous jury verdict for unlawful possession of a firearm, as charged in count 2, because one of the alternative means was not supported by sufficient evidence.
- b. The trial court violated Mr. Barboza's constitutional right to a unanimous jury verdict for second degree identity theft, as charged in count 12, because one of the alternative means was not supported by sufficient evidence.

Issue 4: Whether the trial court erred by sentencing Mr. Barboza based upon an offender score of eight, where the trial court miscalculated his offender score by two points when it included two prior class C felony offenses that had “washed out.”

Issue 5: Whether the trial court erred in imposing a condition of community custody prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of alcoholic beverages.

Issue 6: Whether the judgment and sentence contains an error that should be corrected: it indicates a \$250 drug enforcement fund cost was imposed, and the trial court did not impose this cost.

Issue 7: Whether the trial court erred by imposing a \$250 jury demand fee, because this cost was unsupported by the record on Mr. Barboza’s ability to pay legal financial obligations, and the trial court did not conduct a sufficient inquiry into Mr. Barboza’s present or likely future ability to pay.

Issue 8: Whether this Court should deny costs against Mr. Barboza on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

In January 2015, Juliana Garcia Estrada was collecting cash and checks for a fundraiser she was involved with. (RP¹ 312-313). The checks were written out to the “MASK Program” or “Wenatchee Valley College.” (RP 313). On January 16, 2015, Ms. Garcia’s backpack containing the cash and checks was taken from her car. (RP 313-314; 327-330). She called the police that day and reported “her . . . backpack was taken, which contained school books; \$1,015;

¹ The Report of Proceedings consists of seven consecutively paginated volumes, containing several hearings, the jury trial, and sentencing, reported by Karen E. Komoto, and two separately paginated volumes containing several hearings, reported by LuAnne Nelson. The seven volumes reported by Ms. Komoto are referred to herein as “RP.” References to other volumes include the date.

checks for \$230, which were made out to a fundraiser she was doing, for the college; and some Applebee's breakfast coupons she was selling." (RP 315; 327-328).

Wenatchee Police Department Corporal Tim Lykken responded to Ms. Garcia's residence that day. (RP 327-328). Corporal Lykken located a shoe print in the snow next to Ms. Garcia's car, and photographed it. (RP 328-329; Pl.'s Ex. 46).

On January 27, 2015, Jose G. Barboza Cortes deposited four checks into his checking account at the Cashmere Valley Bank, by using the ATM. (RP 167-171, 174-178, 204-206, 213-217; 219-220, 242, 348-350, 378-379; Pl.'s Ex. 1, 4-8).

Three of the checks were made payable to "WVC" or "Wenatchee Valley College," and were drawn from the bank accounts of three different people, Michelle Mahoney-Holland, Tamara Grigg, and Jennifer Sanon. (RP 186-190, 204-206, 213-217; 219-220; Pl.'s Ex. 5-7).

The fourth check listed "Dava Construction Co" in the top left corner, and was made payable to "Francisco Villa" and signed by "Tom Collins." (RP 190-191, 209-212; Pl.'s Ex. 4). This check had a U.S. Bank logo across the top. (RP 210; Pl.'s Ex. 4).

After obtaining this deposit information from the Cashmere Valley Bank, Wenatchee Police Department Corporal Nathan Hahn applied for and obtained a

search warrant for Mr. Barboza's residence. (CP 84-89; RP 241-243, 342-343).

The affidavit for the search warrant sought to seize the following evidence: a backpack; specified books; a folder; checks made out to "MASK" or "Wenatchee Valley College (WVC)"; fundraiser tickets; a debit card belonging to Mr. Barboza; Nike shoes; and indicia of residency. (CP 86). The affidavit for the search warrant outlined the facts in support of probable cause to search Mr. Barboza's residence, including the missing items reported by Ms. Garcia; the shoe print photographed by Corporal Lykken; the four checks deposited into Mr. Barboza's Cashmere Valley Bank account; and a video of the ATM deposits. (CP 87-89). The affidavit also stated Mr. Barboza's residence was the same address listed on his Cashmere Valley Bank contact information. (CP 89).

During the execution of the search warrant, police officers found methamphetamine and a firearm in Mr. Barboza's residence. (RP 147-149, 283-284, 287-288, 292-293, 298-299, 301-304, 306, 319, 344-348, 357-362; Pl.'s Ex. 3). Corporal Hahn applied for additional search warrants for these items. (RP 363-364, 380-381).

Following the execution of the search warrant, a pair of Nike shoes were seized from Mr. Barboza. (RP 393-395; Pl.'s Ex. 49). The bottom of these shoes did not match the shoe print found in the snow next to Ms. Garcia's car by Corporal Lykken. (RP 327-329, 394; Pl.'s Ex. 46, 49).

The State charged Mr. Barboza with the following nine counts²: one count of unlawful possession of a controlled substance – methamphetamine, with intent to deliver (count 1)³; one count of second degree unlawful possession of a firearm (count 2); three counts of third degree possession of stolen property (counts 3, 6, and 9); and four counts of second degree identity theft (counts 5, 8, 10, and 12). (CP 197-204).

The three counts of third degree possession of stolen property counts alleged that Mr. Barboza possessed stolen property on January 27, 2015, in the form of the three checks made payable to “WVC” or “Wenatchee Valley College,” drawn from the bank accounts of Ms. Mahoney-Holland, Ms. Grigg, and Ms. Sanon. (CP 199-200, 202).

Mr. Barboza moved to suppress the evidence found in his residence, arguing the search warrant affidavit lacked probable cause to issue a search warrant, by not providing a nexus between the place to be searched and the items sought. (CP 76-83).

After hearing argument from the parties, the trial court denied Mr. Barboza’s motion to suppress. (RP (Dec. 10, 2015) 35-40; RP 47-51). The trial

² The State also charged Mr. Barboza with three counts of forgery (counts 4, 7, and 11). (CP 199, 201, 203). The jury acquitted Mr. Barboza of these charges. (CP 270, 273, 277). Therefore, they are not on appeal here.

³ The State also alleged a firearm enhancement and a school bus stop enhancement on this charge. (CP 198). The jury did not find these enhancements. (CP 265-266). Therefore, they are not on appeal here.

court entered findings of fact and conclusions of law on the motion. (CP 311-313). The trial court concluded:

[T]he items sought in the search warrant of the defendant where items [sic] which would be reasonable to infer would be in the defendant's residence, namely, his shoes, debit card, indicia of residency. In addition the defendant would have had the opportunity to have taken the stolen items to his home and it is reasonable to infer that the stolen property would be hidden in his residence.

(CP 312-313).

The case proceeded to a jury trial. (RP 91-458; 515-633). At the jury trial, witnesses testified consisted with the facts stated above. (RP 133-395). In addition, Ms. Garcia testified she has not met Mr. Barboza; there is no reason why he would have the checks; and she did not negotiate any of the checks away to anyone. (RP 315).

Ms. Mahoney-Holland testified she is not aware of any reason why Mr. Barboza would have deposited the check she wrote, check #6059 in the amount of \$10.00, into his own account. (RP 213-214, 216; Pl.'s Ex. 5).

Ms. Grigg testified she does not know of any reason why Mr. Barboza would have the check she wrote, check #2529 in the amount of \$20.00. (RP 204, 206; Pl.'s Ex. 6).

Ms. Sanon testified she cannot think of any reason why Mr. Barboza would have deposited the check she wrote, check #7350 in the amount of \$20.00, into his own checking account. (RP 219-220; Pl.'s Ex. 7).

Shelly Bedolla testified Dava Construction is a company ran by her and her husband. (RP 209-210). She testified they do not bank with U.S. Bank. (RP 210). Ms. Bedolla testified the company name and address listed in the top left corner of the check deposited by Mr. Barboza was their company name and address. (RP 210; Pl.'s Ex. 4). She testified the check was not one of their business checks, and that she does not know an individual named Tom Collins or Francisco Villa. (RP 210-211).

There was no testimony presented that Mr. Barboza owned the firearm found in his residence. (RP 133-395).

Defense counsel proposed the following jury instruction for count 2, second degree unlawful possession of a firearm, that in order to convict Mr. Barboza of second degree unlawful possession of a firearm, it had to find the following elements, beyond a reasonable doubt:

- (1) That on or about the second day of February, 2015, the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a felony; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

(CP 195-196).

Instead, as proposed by the State, the trial court instructed the jury that in order to convict Mr. Barboza of second degree unlawful possession of a firearm, it had to find the following elements, beyond a reasonable doubt:

(1) That on or about the 5th day of February, 2015, the defendant knowingly owned, possessed or had in his control a firearm;

(2) That prior to owning, possessing, or having the firearm under his control, the defendant had been convicted of a felony; and

(3) That the acts occurred in the State of Washington.

(CP 207, 225; RP 603-604).

In addition, for count 1, the trial court instructed the jury on the lesser-included offense of unlawful possession of a controlled substance – methamphetamine. (CP 222-223; RP 602-603).

For the three counts of third degree possession of stolen property (counts 3, 6, and 9), the trial court instructed the jury that in order to convict Mr. Barboza, it had to find the following elements, beyond a reasonable doubt:

(1) That on or about the 27th day of January, 2015, the defendant knowingly possessed, received, retained, concealed, or disposed of stolen property, to wit:

[for count 3: check #6059 in the amount of \$10.00, drawn on the Cashmere Valley Bank account of [Ms.] Mahoney-Holland]

[for count 6: check #2529 in the amount of \$20.00, drawn on the Peoples Bank account of [Ms.] Grigg]

[for count 9: check #7350 in the amount of \$20.00 drawn on the Cascades National Bank account of [Ms.] Sanon];

(2) That the defendant acted with knowledge that the property had been stolen;

(3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto; and

(4) That the acts occurred in the State of Washington.

(CP 230, 245, 248; RP 606-607, 612, 614-615).

For count 12, the trial court instructed the jury that in order to convict Mr. Barboza of second degree identity theft, it had to find the following elements, beyond a reasonable doubt:

- (1) That on or about the 27th day of January, 2015, the defendant knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, whether that person is living or dead, to wit: Dava Construction Company;
- (2) That the defendant did so with the intent to commit, or to aid or abet any crime; and
- (3) That the acts occurred in the State of Washington.

(CP 251; RP 617-618).

Mr. Barboza did not object to the jury instructions, as given. (RP 398, 596-626).

The jury found Mr. Barboza guilty of the following: the lesser-included offense of unlawful possession of a controlled substance – methamphetamine; second degree unlawful possession of a firearm (count 2); three counts of third degree possession of stolen property (counts 3, 6, and 9); and four counts of second degree identity theft (counts 5, 8, 10, and 12). (CP 264-278; RP 626-632).

At sentencing, the trial court sentenced Mr. Barboza based upon an offender score of eight, which included five current offenses, and the following three prior convictions: (1) unlawful possession of cocaine, date of crime December 3, 2005, date of sentence February 22, 2006; (2) unlawful possession of cocaine, date of crime September 7, 2008, date of sentence December 8, 2008; and (3) unlawful possession of methamphetamine, date of crime January 5, 2015,

date of sentence February 10, 2016. (CP 283, 285, 293-295; RP 470, 477-481, 481-482). Defense counsel acknowledged Mr. Barboza had these three prior convictions. (RP 477-478).

The trial court imposed a term of community custody of twelve months. (CP 287; RP 482). The trial court imposed the following community custody condition, among others: “[t]he defendant . . . shall not frequent places whose principal source of income is the sale of alcoholic beverages, i.e. taverns and cocktail lounges.” (CP 296). Mr. Barboza did not object to this condition. (RP 482, 484).

Mr. Barboza informed the trial court he was from Mexico, and would probably go back to his hometown. (RP 481). The trial court asked Mr. Barboza “what kind of income are we looking at[,]” and Mr. Barboza responded “I can’t really tell you that, because I’ve never been there.” (RP 481).

The trial court imposed the following legal financial obligations: \$500 victim assessment; \$200 criminal filing fee; \$100 crime lab fee; \$100 DNA collection fee; and \$250 jury demand fee. (CP 288-289; RP 482-484).

The trial court then stated: “[t]he Court won’t impose any attorney’s fees recoupment or drug fund penalty, because of the prospect that Mr. [Barboza] is not going to have much money, after he’s released.” (RP 483). The judgment and sentence imposes the following cost: “\$250 Drug enforcement fund of Wenatchee Dry Fund.” (CP 288).

Mr. Barboza did not object to the entry of the legal financial obligations.
(RP 483-484).

The Judgment and Sentence contains the following boilerplate language:

2.5 Legal Financial Obligations/Restitution: The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

(CP 286).

The Judgment and Sentence states the trial court made the following specific finding: "[t]he defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." (CP 286).

The Judgment and Sentence also contains the following boilerplate language: "[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations." (CP 289).

Mr. Barboza timely appealed. (CP 305-306). The trial court entered an Order of Indigency, granting Mr. Barboza a right to review at public expense.
(CP 300-302, 315-320, 325).

E. ARGUMENT

Issue 1: Whether the trial court should have suppressed the evidence seized from Mr. Barboza's home pursuant to the search warrant, because the affidavit does not provide probable cause to issue the search warrant for the home.

The affidavit in support of the search warrant issued for Mr. Barboza's home did not provide probable cause to issue the search warrant, because the

affidavit did not contain a nexus between the items to be seized and the place to be searched. Therefore, the trial court should have suppressed the evidence seized from Mr. Barboza's residence pursuant to the search warrant, and Mr. Barboza's convictions for unlawful possession of a controlled substance – methamphetamine and second degree unlawful possession of a firearm (count 2) should be reversed and dismissed with prejudice.

Mr. Barboza incorporates by reference the arguments set forth on pages 9-12 in the Brief of Appellant filed on November 11, 2016, and also submits this additional argument below. *See* Appellant's Opening Brief pgs. 9-12.

The Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington Constitution protect citizens from unreasonable searches and seizures, and provide that a search warrant may only be issued upon a showing of probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). A search warrant "must be supported by an affidavit that particularly identifies the place to be searched and items to be seized." *Id.* at 359.

While the courts must evaluate an affidavit in a commonsense, rather than a hypertechnical, manner, "the [reviewing] court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Id.* at 360 (citations omitted) (internal quotation marks omitted) (alteration in original). The existence of probable cause is a legal question which the reviewing court considers *de novo*. *State v. Chamberlin*, 161

Wn.2d 30, 40, 162 P.3d 389 (2007). Review of the issuing judge's decision to issue a search warrant is limited to the four corners of the affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

In order for an affidavit to establish probable cause, it "must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." *Lyons*, 174 Wn.2d at 360 (citing *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)). "[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

"Probable cause to believe a person has committed a crime does not necessarily give rise to probable cause to search that person's home." *State v. Dunn*, 186 Wn. App. 889, 897, 348 P.3d 791 (2015) (citing *Thein*, 138 Wn.2d at 148). "Nonetheless, it may be proper to infer that stolen property is at a perpetrator's residence, especially if the property is bulky, and if the perpetrator had an opportunity to return home before his apprehension by the police." *Id.* Probable cause is evaluated on a case-by-case basis. *Thein*, 138 Wn.2d at 149.

In *Dunn*, witnesses saw the defendant driving a pickup truck with an ATV in the bed of the truck. *Dunn*, 186 Wn. App. at 892. The next day, a property

owner reported the truck, an ATV, and other large items of personal property missing. *Id.* A judge issued a search warrant for the defendant's home and adjacent buildings, located on the same road where the defendant was seen driving the truck. *Id.* The trial court granted a motion to suppress the evidence found the defendant's home pursuant to the search warrant, and the State appealed to this Court. *Id.*

On appeal, this Court reversed the suppression order, concluding "the affidavit contains specific facts to establish a reasonable nexus between the items to be seized and the place to be searched." *Id.* at 892, 899-900. This Court found it was reasonable for the trial court to conclude the missing items would be found at the defendant's residence. *Id.* at 899. The Court reasoned the defendant's home is located on the same street where the defendant was seen driving in the truck, and "the items stolen were not inherently incriminating in the same way as narcotics, and many of the items were bulky and therefore, likely to be hidden instead a building." *Id.* This Court further reasoned "[t]he judge issuing the warrant was entitled to draw the reasonable inference that [the defendant] was driving to his residence with the missing property, and that the property would likely be found there." *Id.*

Here, the affidavit submitted in support of the search warrant for Mr. Barboza's home does not establish the second nexus required to establish probable cause, a nexus between the item to be seized (a backpack; specified

books; a folder; checks made out to “MASK” or “Wenatchee Valley College (WVC)””; fundraiser tickets; a debit card belonging to Mr. Barboza; Nike shoes; and indicia of residency) and the place to be searched (Mr. Barboza’s home). (CP 86-89); *see also Thein*, 138 Wn.2d at 140 (quoting *Goble*, 88 Wn. App. at 509).

It was not reasonable for the trial court to conclude these items would be found at Mr. Barboza’s residence. Unlike *Dunn*, the items to be seized were not bulky. *See Dunn*, 186 Wn. App. at 897, 899. To the contrary, the items to be seized were of a size that could be stored on Mr. Barboza’s person or in a vehicle. (CP 86).

Further, unlike *Dunn*, the affidavit contains no facts linking Mr. Barboza’s home with the evidence sought. *See Dunn*, 186 Wn. App. at 899; CP 86-89. The affidavit only stated that Mr. Barboza’s residence was the same address listed on his Cashmere Valley Bank contact information. (CP 89). The affidavit contained no facts, for example, that the ATM was located in close proximity to Mr. Barboza’s home. (CP 86-89). To the contrary, the affidavit stated the ATM was located on a different street than Mr. Barboza’s home. (CP 88-89).

The facts in the search warrant affidavit fail to establish a nexus between Mr. Barboza’s home and evidence sought. *Thein*, 138 Wn.2d at 140 (quoting *Goble*, 88 Wn. App. at 509); *Dunn*, 186 Wn. App. at 895-900; CP 86-89. Accordingly, the evidence found in Mr. Barboza’s home pursuant to the search warrant should have been suppressed.

Issue 2: Whether the trial court erred by convicting Mr. Barboza of three counts of third degree possession of stolen property (counts 3, 6, and 9), where entry of these three convictions violated Mr. Barboza’s double jeopardy rights.

Mr. Barboza’s three convictions for third degree possession of stolen property constitute the same offense for double jeopardy purposes. Simultaneous possession of various items of property stolen from multiple owners constitutes one unit of prosecution of the crime of possession of stolen property. Therefore, Mr. Barboza can only be convicted of one count of possession of stolen property, and the other two counts must be reversed and dismissed with prejudice.

The Fifth Amendment to the United States Constitution provides that no “person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Article I, section 9 of the Washington Constitution provides, “[n]o person shall ... be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. “A defendant may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple convictions for the same offense.” *State v. Hall*, 168 Wn.2d 726, 729–30, 230 P.3d 1048 (2010).

Although Mr. Barboza did not raise this argument in the trial court, a double jeopardy argument may be considered for the first time on appeal, “because it implicates a manifest error affecting a constitutional right.” *State v. Allen*, 150 Wn. App. 300, 312, 207 P.3d 483 (2009) (citing *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000)).

There are two different tests for determining whether multiple convictions violate a defendant's double jeopardy rights. *See State v. Adel*, 136 Wn.2d 629, 632-35, 965 P.2d 1072 (1998). First, where a defendant has multiple convictions for violating several statutory provisions, the "same evidence" test is applied. *Id.* at 632-33. Second, where a defendant has multiple convictions for violating the same statute, the "unit of prosecution" test is applied. *Id.* at 634.

Under the unit of prosecution test, "[t]he proper inquiry . . . is what 'unit of prosecution' has the Legislature intended as the punishable act under the specific criminal statute." *Id.* "When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime." *Id.*

Here, Mr. Barboza was convicted of three counts of third degree possession of stolen property (counts 3, 6, and 9), under RCW 9A.56.170(1). (CP 199-200, 202, 269, 272, 275). Because Mr. Barboza has multiple convictions for violating the same statute, the proper test to apply is the "unit of prosecution" test. *See Adel*, 136 Wn.2d at 634.

In *State v. McReynolds*, this Court held that the unit of prosecution for possession of stolen property is a single possession, and therefore, separate convictions for the single possession of stolen property violate the prohibition against double jeopardy. *State v. McReynolds*, 117 Wn. App. 309, 340, 71 P.3d

663 (2003). In *McReynolds*, two defendants were convicted of multiple counts of first and second degree possession of stolen property, based on possession during the same 15-day time frame of various items of property from multiple owners. *Id.* at 332-333. This Court held that each defendant could only be convicted of one count of possession of stolen property. *Id.* at 331-40, 344. This Court found that “possession of property owned by different persons is only a single crime[.]” *Id.* at 336.

Here, Mr. Barboza’s simultaneous possession of stolen property (checks), belonging to Ms. Mahoney-Holland, Ms. Grigg, and Ms. Sanon, constitutes one offense. *See McReynolds*, 117 Wn. App. at 331-40; CP 199-200, 202, 230, 245, 248, 269, 272, 275. His three separate convictions for this one offense violate the prohibition against double jeopardy. *See McReynolds*, 117 Wn. App. at 340. Therefore, Mr. Barboza can only be convicted of one count of third degree possession of stolen property, and two of the three counts (counts 3, 6, and 9) must be reversed and dismissed with prejudice.

Issue 3: Whether the trial court violated Mr. Barboza’s constitutional right to a unanimous jury verdict, on count 2 and count 12.

Mr. Barboza should receive a new trial on the second degree unlawful possession of a firearm charge (count 2), and on second degree identity theft (count 12), because the jury was not instructed that it had to be unanimous on the means of committing each crime, and sufficient evidence does not support each means put before the jury.

For the second degree unlawful possession of a firearm charge (count 2), the jury was not instructed that it had to be unanimous on whether Mr. Barboza knowingly owned, possessed, or had in his control a firearm, and sufficient evidence does not establish that Mr. Barboza owned the firearm found in his residence. For the second degree identity theft charge (count 12), the jury was not instructed that it had to be unanimous on whether Mr. Barboza knowingly obtained, possessed, used, or transferred (1) a means of identification or (2) financial information of another person, and sufficient evidence does not establish the “financial information” alternative means. Therefore, the lack of a unanimity instruction on count 2 and count 12 violated Mr. Barboza’s constitutional right to a unanimous jury verdict.

“[T]he right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal.” *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985); *State v. Martin*, 69 Wn. App. 686, 689, 849 P.2d 1289 (1993) (Even if instructing the jury on an alternate means that is unsupported by the evidence was “plainly the result of oversight, the giving of this erroneous instruction is not trivial... and may be raised for the first time on appeal.”); *see also* RAP 2.5(a).

“An alternative means crime is one where the legislature has provided that the State may prove the proscribed criminal conduct in a variety of ways.” *State v. Armstrong*, 394 P.3d 373, 377 (Wash. 2017).

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). “But in alternative means cases, where substantial evidence supports both alternative means submitted to the jury, unanimity as to the means is not required.” *Armstrong*, 394 P.3d at 377; *see also State v. Woodlyn*, 392 P.3d 1062, 1066 (Wash. 2017) (stating “[w]hen there is sufficient evidence to support each alternative means, Washington defendants do not enjoy a recognized right to express unanimity.”). “When one element of the crime can be satisfied by alternative means, jury unanimity is satisfied if the jury unanimously agrees the State proved that element beyond a reasonable doubt and the evidence was sufficient for each alternative means of committing that element.” *Id.* at 379; *see also Woodlyn*, 392 P.3d at 1067 (stating “[a] general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence.”).

However, “if there is insufficient evidence to support *any* of the means, a ‘particularized expression’ of juror unanimity is required.” *Woodlyn*, 392 P.3d at 1067 (quoting *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014)). “When there is insufficient evidence to support one of the alternative means charged and the jury does not specify that it unanimously agreed on the other alternative, we are faced with the danger that the jury rested its verdict on an invalid ground.” *Armstrong*, 394 P.3d at 379. In this situation, the conviction must be reversed. *Id.*

In *Woodlyn*, our Supreme Court rejected a harmless error approach that “a complete *lack* of evidence for one alternative allows courts to ‘rule out’ the possibility that any member of the jury relied on the factually unsupported means.” *Woodlyn*, 392 P.3d at 1067. Instead, the Court found that “[a]bsent some form of colloquy or explicit instruction, we cannot assume that every member of the jury relied solely on the supported alternative.” *Id.*

- a. The trial court violated Mr. Barboza’s right to a unanimous jury verdict for unlawful possession of a firearm, as charged in count 2, because one of the alternative means was not supported by sufficient evidence.**

For the second degree unlawful possession of a firearm charge (count 2), the jury was not instructed that it had to be unanimous on whether Mr. Barboza knowingly owned, possessed, or had in his control a firearm, and sufficient evidence does not establish that Mr. Barboza owned the firearm found in his residence. Therefore, the lack of a unanimity instruction on count 2 violated Mr. Barboza’s constitutional right to a unanimous jury verdict.

“Second degree unlawful possession of a firearm is an alternative means offense committed when a convicted felon (1) owns, (2) possesses, or (3) controls a firearm.” *State v. Holt*, 119 Wn. App. 712, 718, 82 P.3d 688 (2004), *overruled on other grounds by State v. Willis*, 153 Wn.2d 366, 103 P.3d 1213 (2005).

Here, the jury was instructed on three alternative means of committing second degree unlawful possession of a firearm, “[1] owned, [2] possessed, or [3] had in his control a firearm.” (CP 225; RP 603-604); *see also Holt*, 119 Wn. App.

at 718. The jury was not provided an instruction that it must be unanimous in its verdict as to these three alternative means. (CP 225).

Further, there was insufficient evidence to support the alternative means that Mr. Barboza owned a firearm, because there was no evidence presented at trial that Mr. Barboza owned the firearm found in his residence. (RP 133-395). Therefore, a particularized expression of juror unanimity on the alternative means was required. *Woodlyn*, 392 P.3d at 1067 (quoting *Owens*, 180 Wn.2d at 95). Because none was given, Mr. Barboza's conviction for second degree unlawful possession of a firearm must be reversed. *See Armstrong*, 394 P.3d at 379. It cannot be assumed that every member of the jury relied solely on the supported alternatives of "possession" and "control." *See Woodlyn*, 392 P.3d at 1067; *Holt*, 119 Wn. App. at 718.

The lack of a unanimity instruction deprived Mr. Barboza of his constitutional right to a unanimous jury verdict, and therefore, his conviction for second degree unlawful possession of a firearm should be reversed and remanded for a new trial.

b. The trial court violated Mr. Barboza's constitutional right to a unanimous jury verdict for second degree identity theft, as charged in count 12, because one of the alternative means was not supported by sufficient evidence.

For the second degree identity theft charge (count 12), the jury was not instructed that it had to be unanimous on whether Mr. Barboza knowingly obtained, possessed, used, or transferred (1) a means of identification or (2)

financial information of another person, and sufficient evidence does not establish the “financial information” alternative means. Therefore, the lack of a unanimity instruction on count 12 violated Mr. Barboza’s constitutional right to a unanimous jury verdict.

Identity theft is defined as follows:

No person may knowingly obtain, possess, use, or transfer *a means of identification or financial information* of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.020(1) (emphasis added); *see also* CP 251; RP 617-618.

For purposes of identity theft, “means of identification” is defined as follows:

“Means of identification” means information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; and other information that could be used to identify the person, including unique biometric data.

RCW 9.35.005(3).

For purposes of identity theft, “financial information” is defined as follows:

“Financial information” means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:

- (a) Account numbers and balances;
- (b) Transactional information concerning an account; and
- (c) Codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers, state identification numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

RCW 9.35.005(1).

In *State v. Butler*, the Court of Appeals held that the four verbs describing identity theft, “obtain, possess, use, or transfer” are not distinct alternative means. *State v. Butler*, 194 Wn. App. 525, 527-30, 374 P.3d 1232 (2016). However, Mr. Barboza argues here that the statutory terms “means of identification” and “financial information” establish that identity theft can be committed in two distinct ways, and is therefore an alternative means crime. This question was not presented nor decided in *Butler*. See *Butler*, 194 Wn. App. at 527-30.

As acknowledged above, “[a]n alternative means crime is one where the legislature has provided that the State may prove the proscribed criminal conduct in a variety of ways.” *Armstrong*, 394 P.3d at 377. “[W]hether a statute provides an alternative means for committing a particular crime is left to judicial determination.” *Butler*, 194 Wn. App. at 528 (citing *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010)). Questions of statutory interpretation are reviewed de novo, and statutes are

interpreted to give effect to legislative intent. *Id.* (citing *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010)).

To determine whether a statute contains alternative means, “[t]he statutory analysis focuses on whether each alleged alternative describes distinct acts that amount to the same crime.” *Id.* (internal quotation marks omitted) (quoting *State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015)). “The more varied the criminal conduct, the more likely the statute describes alternative means.” *Id.* (citing *Sandholm*, 184 Wn.2d at 734). The analysis focuses on “the different underlying acts that could constitute the same crime.” *Id.* (citing *Owens*, 180 Wn.2d at 96-97). “The various underlying acts must vary significantly to constitute distinct alternative means.” *Id.* (citing *Owens*, 180 Wn.2d at 97). Further, the statutory analysis “place[s] less weight on the use of the disjunctive ‘or’ and more weight on the distinctiveness of the criminal conduct.” *Id.* (citing *Sandholm*, 184 Wn.2d at 726).

Turning to the identity theft statute at issue, RCW 9.35.020(1), (1) knowingly obtaining, possessing, using, or transferring “means of identification,” and (2) knowingly obtaining, possessing, using, or transferring “financial information,” describe distinct acts that amount to the same crime. “Means of identification” and “financial information” are distinct items. *See* RCW 9.35.005(1) (defining “financial information”)

and RCW 9.35.005(3) (defining “means of identification”). A person could knowingly obtain, possess, use, or transfer “means of identification” without simultaneously knowingly obtaining, possessing, using, or transferring “financial information.” See *Butler*, 194 Wn. App. at 530 (in determining identity theft is not an alternative means crime, based upon statutory language not challenged here, reasoning “[b]ecause no single action in the statute could be completed without simultaneously completing at least one other action, the various acts are too similar to constitute distinct alternative means.”). Accordingly, (1) knowingly obtaining, possessing, using, or transferring “means of identification,” and (2) knowingly obtaining, possessing, using, or transferring “financial information,” are alternative means of committing identify theft.

Here, for count 12, the jury was instructed on two alternative means of committing second degree identity theft, that Mr. Barboza knowingly obtained, possessed, used, or transferred (1) a means of identification or (2) financial information of another person, Dava Construction Company. (CP 251; RP 617-618). The jury was not provided an instruction that it must be unanimous in its verdict as to these two alternative means, “means of identification” of Dava Construction Company and “financial information” of Dava Construction Company. (CP 251; RP 617-618).

Further, there was insufficient evidence to support the alternative means that Mr. Barboza knowingly obtained, possessed, used, or transferred “financial information” of Dava Construction Company. (CP 251; RP 617-618). There was no evidence presented at trial that Mr. Barboza had any financial information belonging to Dava Construction Company. (RP 209-211; Pl.’s Ex. 4); *see also* RCW 9.35.005(1) (defining “financial information”). Ms. Bedolla testified the check deposited into Mr. Barboza’s bank account, although it listed her company name and address, was not one of their business checks, and that they do not bank with U.S. Bank, the financial institution listed on this check. (RP 210-211; Pl.’s Ex. 4).

Therefore, a particularized expression of juror unanimity on the alternative means was required. *Woodlyn*, 392 P.3d at 1067 (quoting *Owens*, 180 Wn.2d at 95). Because none was given, Mr. Barboza’s conviction for second degree identity theft, as charged in count 12, must be reversed. *See Armstrong*, 394 P.3d at 379. It cannot be assumed that every member of the jury relied solely on the supported “means of identification” alternative. *See Woodlyn*, 392 P.3d at 1067.

The lack of a unanimity instruction deprived Mr. Barboza of his constitutional right to a unanimous jury verdict, and therefore, his

conviction for second degree unlawful possession of a firearm should be reversed and remanded for a new trial.

Issue 4: Whether the trial court erred by sentencing Mr. Barboza based upon an offender score of eight, where the trial court miscalculated his offender score by two points when it included two prior class C felony offenses that had “washed out.”

The trial court erred by sentencing Mr. Barboza based upon an offender score of eight, where his offender score mistakenly included two points for two prior class C felony offenses that had “washed out.” This matter should be remanded for resentencing.

A trial court’s calculation of a defendant’s offender score is reviewed de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). An offender may challenge erroneous sentences lacking statutory authority for the first time on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score by adding current offenses, prior convictions, and juvenile adjudications. RCW 9.94A.030(11); RCW 9.94A.525; RCW 9.94A.589(1)(a).

When calculating the offender score for nonviolent offenses, as is the case here,⁴ prior convictions add “one point for each adult prior felony conviction” RCW 9.94A.525(7).

Conversely, a prior conviction “washes out” and is not included in the offender score calculation, as set forth below:

[C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent *five consecutive years* in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c) (emphasis added).

Mr. Barboza’s prior class C felony offenses, for unlawful possession of cocaine, committed in 2005 and 2008, should have been excluded from his offender score calculation, because Mr. Barboza spent at least five consecutive years in the community without committing a crime. *See* CP 285; RCW 9.94A.525(2)(c); RCW 69.50.4013(2) (possession of a controlled substance is a class C felony). Mr. Barboza was crime-free between 2008 and 2015. (CP 285). Even assuming the

⁴ Mr. Barboza was convicted in this case of the following nonviolent felony offenses: unlawful possession of a controlled substance – methamphetamine (RCW 69.50.4013(1), (2)); second degree unlawful possession of a firearm (RCW 9.41.040(2)); and four counts of second degree identity theft (RCW 9.35.020(1), (3)). *See* RCW 9.94A.030(34) (defining “[n]onviolent offense” as “an offense which is not a violent offense.”); RCW 9.94A.030(55) (defining “[v]iolent offense”).

worst case scenario that Mr. Barboza had no credit for time served, received no good time credits, and received a high-end standard range sentence of 6 months⁵ for his 2008 unlawful possession of cocaine offense – he would still have been released on June 8, 2009, more than five years before his unlawful possession of methamphetamine offense on January 5, 2015. (CP 285).

The five-plus-years spent in the community without committing a crime between 2008 and Mr. Barboza's next offense on January 5, 2015 results in the class C felony offenses from 2005 and 2008 washing out. *See* RCW 9.94A.525(2)(c). Therefore, the two unlawful possession of cocaine prior convictions, which added two points to Mr. Barboza's offense score in this case, should be stricken. *See* RCW 9.94A.525(7).

Mr. Barboza's offender score was calculated two points too high when his two washed out prior unlawful possession of cocaine offenses were included. Accordingly, the case should be remanded for resentencing.

⁵ *See* RCW 9.94A.517(1) (2008) and RCW 9.94A.518 (2008), standard range of 0-6 months as scored based upon Mr. Barboza's one prior conviction of unlawful possession of cocaine in 2005.

Issue 5: Whether the trial court erred in imposing a condition of community custody prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of alcoholic beverages.

The trial court imposed a community custody condition prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of alcoholic beverages. (CP 296). This condition should be stricken, because it is not crime-related.

A defendant may object to community custody conditions for the first time on appeal. *See State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)).

When an offender is sentenced for unlawful possession of a controlled substance - methamphetamine, or second degree identify theft, the trial court shall impose a term of community custody of twelve months. *See RCW 9.94A.701(3)* (authorizing twelve months of community custody for “[a]ny crime against persons under RCW

9.94A.411(2)” and “[a] felony offense under chapter 69.50”); RCW 9.94A.411(2)(a) (second degree identity theft is a crime against persons); RCW 69.50.4013(2) (unlawful possession of a controlled substance - methamphetamine, is a class C felony).

“As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). “‘Crime-related prohibition’ means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. . . .” RCW 9.94A.030(10).

Here, the trial court imposed a term of community custody of twelve months. (CP 287; RP 482). The trial court imposed the following community custody condition, among others: “[t]he defendant . . . shall not frequent places whose principal source of income is the sale of alcoholic beverages, i.e. taverns and cocktail lounges.” (CP 296).

A trial court has the authority to prohibit alcohol possession and consumption as a community custody condition, regardless of the nature of the underlying offense. *See* RCW 9.94A.703(3)(e) (stating “[a]s part of any term of community custody, the court may order an offender to . . . [r]efrain from possessing or consuming alcohol . . .”). However, a trial court lacks authority to prohibit the purchase of alcohol unless alcohol is

“reasonably related to the circumstances of [the defendant's] alleged offenses.” *State v. McKee*, 141 Wn. App. 22, 34, 167 P.3d 575 (2007).

Here, frequenting places whose principal source of income is the sale of alcoholic beverages does not reasonably relate to the circumstances of Mr. Barboza’s offenses of unlawful possession of a controlled substance - methamphetamine, and second degree identify theft. *See McKee*, 141 Wn. App. at 34. There was no evidence presented at trial that alcohol was involved in these offenses. (RP 133-395); *see also* RCW 9.94A.030(10) (defining “crime-related prohibition”).

Therefore, the trial court erred by imposing the community custody condition prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of alcoholic beverages, because the condition is not crime-related. *See, e.g., State v. Salters*, No. 47147-7-II, 2016 WL 237788, at *2 (Wash. Ct. App. Jan. 19, 2016) (finding the trial court exceeded its sentencing authority when it imposed a community custody condition ordering the defendant “not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor[,]” where the record did not indicate alcohol contributed to the defendant’s crimes); *State v. Rieker*, No. 32174-6-III, 2015 WL 5618876, at *11 (Wash. Ct. App. Sept. 24, 2015) (finding the trial court exceeded its sentencing authority when it imposed a community custody condition

prohibiting the defendant from frequenting taverns and bars, where there was no evidence that the defendant consumed alcohol or that alcohol led to his crimes); *State v. Thompson*, No. 45929-9-II, 2014 WL 6975963, at *1-2 (Wash. Ct. App. Dec. 9, 2014) (finding the trial court erred by imposing a community custody condition prohibiting the defendant from entering places whose primary business is the sale of liquor, where the condition did not reasonably relate to the circumstances of the defendant's offense of possession of methamphetamine); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Accordingly, this court should remand this case with an order that the trial court strike the community custody condition prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of alcoholic beverages. (CP 296); *see also State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (where the trial court lacked authority to impose a community custody condition, the appropriate remedy was remand to strike the condition).

Issue 6: Whether the judgment and sentence contains an error that should be corrected: it indicates a \$250 drug enforcement fund cost was imposed, and the trial court did not impose this cost.

The judgment and sentence indicates a \$250 drug enforcement fund cost was imposed, but the trial court did not impose this cost. (CP

288; RP 483-484). At sentencing, the trial court stated: “[t]he Court won’t impose any attorney’s fees recoupment or drug fund penalty, because of the prospect that Mr. [Barboza] is not going to have much money, after he’s released.” (RP 483). The judgment and sentence imposes the following cost: “\$250 Drug enforcement fund of Wenatchee Dry Fund.” (CP 288).

Therefore, this court should remand this case for correction of the judgment and sentence to remove the \$250 drug enforcement fund cost. *See, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, incorrectly stating the terms of confinement imposed).

Issue 7: Whether the trial court erred by imposing a \$250 jury demand fee, because this cost was unsupported by the record on Mr. Barboza’s ability to pay legal financial obligations, and the trial court did not conduct a sufficient inquiry into Mr. Barboza’s present or likely future ability to pay.

Mr. Barboza requests this Court remand this case for resentencing and direct the trial court to strike the \$250 jury demand fee from his judgment and sentence. (CP 289). The trial court’s finding that Mr. Barboza had the ability or likely future ability to pay was not supported by

the record. (CP 286; RP 481-484). The imposition of discretionary costs is inconsistent with the principles enumerated in *Blazina*, *infra*, *Blank*, *infra*, and *Mahone*, *infra*.

As a threshold matter, “[a] defendant who makes no objection to the imposition of discretionary LFOs [legal financial obligations] at sentencing is not automatically entitled to review.” *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Instead, “RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right . . . [and] [e]ach appellate court must make its own decision to accept discretionary review.” *Id.* at 834-35.

Mr. Barboza asks this Court to exercise its discretion under RAP 2.5(a) to decide the LFO issue for the first time on appeal. *See id.* The factors identified by this Court when deciding whether to exercise its discretion to decide the LFO issue weigh in favor of deciding the issue. *See State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 693, 370 P.3d 989 (2016) (stating “[a]n approach favored by this author is to consider the administrative burden and expense of bringing a defendant to court for a new hearing, versus the likelihood that the discretionary LFO result will change.”). The trial court would not have to hold a resentencing hearing only to address this issue, because remand is already required to address other issues, set forth above. In addition, there is a high likelihood that a

new sentencing hearing would change the LFO amount, given Mr. Barboza's report as to continued indigency, filed in this Court on the same day as this supplemental opening brief, stating that Mr. Barboza owns no real property, no personal property other than his personal effects, and has no income from any source.

Turning to the substantive issue, the court may order a defendant to pay LFOs, including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2).

Mr. Barboza was ordered to pay mandatory court costs (\$500 victim assessment, \$200 criminal filing fee, \$100 crime lab fee, and \$100 DNA collection fee) and discretionary court costs (\$250 jury demand fee). (CP 288-289; RP 482-484); *see also In re Personal Restraint of Dove*, 196 Wn. App. 148, 152, 381 P.3d 1280 (2016) (acknowledging that a \$500 crime victim assessment, a \$200 criminal filing fee, and a \$100 DNA fee are mandatory LFOs); RCW 43.43.690(1) (\$100 crime lab fee shall be imposed when "a crime laboratory analysis was performed by a state crime laboratory[.]"); *State v. Hensley*, No. 33170-9-III, 2016 WL 5921537, at *3 (Wash. Ct. App. Oct. 11, 2016) (finding that a \$250 jury demand fee was a discretionary cost); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority); *State v. Clark*, 195 Wn. App.

868, 872-73, 381 P.3d (2016), *review granted in part*, 187 Wn.2d 1009 (2017) (assuming a \$250 jury demand fee was a discretionary cost).

“Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay.” *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). The applicable statute states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant’s current or future ability to pay based on the particular facts of the defendant’s case. *Blazina*, 182 Wn.2d at 834. The record must reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id.* at 837–39. This inquiry requires the court to consider important factors, such as incarceration and a defendant’s other debts. *Id.* at 838-39.

“[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Blazina*, 182 Wn.2d at 838 (quoting RCW 10.01.160(3)). “[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets “the GR 34 standard of indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants’ inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants’ lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 834–837. “Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs.” *Id.* at 837.

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant's ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). Where a finding of fact is entered, it "is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Id.* (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Here, the court found "[t]he defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." (CP 286). But this finding was clearly erroneous. Mr. Barboza informed the trial court he was from Mexico, and would probably go back to his hometown. (RP 481). The trial court asked Mr. Barboza "what kind of income are we looking at[,]" and Mr. Barboza responded "I can't really tell you that, because I've never been there." (RP 481). Following these statements, the trial court declined to impose "any attorney's fees recoupment or drug fund penalty, because of the prospect that Mr.

[Barboza] is not going to have much money, after he's released." (RP 483). Imposing a \$250 jury demand fee was inconsistent with this record, which showed that Mr. Barboza did not have an ability to pay legal financial obligations, given the uncertainty of any income in the future. (RP 481-484).

In addition, although the trial court asked Mr. Barboza about employment, it did not consider Mr. Barboza's property, assets, or any other income. (RP 481-484); *see also Blazina*, 182 Wn.2d at 838 (stating that "the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.") (quoting RCW 10.01.160(3)). Mr. Barboza's report as to continued indigency, filed in this Court on the same day as this supplemental opening brief, states that Mr. Barboza owns no real property, no personal property other than his personal effects, and has no income from any source. Assuming this was also the case prior to sentencing in this case, the lack of property, assets, or other income weighs against a finding that Mr. Barboza has the current or future ability to pay LFOs.

The court's finding that Mr. Barboza had the present or likely future ability to pay LFOs is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343. In addition, the

court's finding that Mr. Barboza had the present or likely future ability to pay LFOs was not made after a sufficient individualized inquiry.

The finding on Mr. Barboza's ability to pay LFOs should be set aside, and \$250 jury demand fee should be stricken from Mr. Barboza's judgment and sentence.

Issue 8: Whether this Court should deny costs against Mr. Barboza on appeal in the event the State is the substantially prevailing party.

Mr. Barboza preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

At sentencing, the trial court inquired into Mr. Barboza's future prospects for income. (RP 481-484). After Mr. Barboza could not tell the court what type of income he would be looking at, the trial court imposed mandatory, and one discretionary, LFOs. (CP 288-289; RP 481-484). Subsequently, the trial court entered an Order of Indigency. (CP 300-302, 315-320, 325).

An order finding Mr. Barboza indigent was entered by the trial court, and there has been no known improvement to this indigent status.

(CP 300-302, 315-320, 325). To the contrary, Mr. Barboza’s report as to continued indigency, filed in this Court on the same day as this supplemental opening brief, shows that Mr. Barboza remains indigent. The report, filed over nine months after the date of sentencing, shows that Mr. Barboza’s financial circumstances have not improved.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *Blazina*, 182 Wn.2d at 835. In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after

an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Barboza has demonstrated his indigency and current and future inability to pay costs. In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs, as suggested by the trial court in this case. See *Blazina*, 182 Wn.2d at 832, n.1. Mr. Barboza would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (because motion for

remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State’s collection efforts. *See Lundy*, 176 Wn. App. 96; 103 RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. Mr. Barboza met this standard for indigency. (CP 300-302, 315-320, 325).

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); (CP 300-302, 315-320, 325). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3)

indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Barboza to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Barboza’s report as to continued indigency, filed in this Court on the same day as this supplemental opening brief, shows that Mr. Barboza remains indigent.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the “supreme court . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State’s requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of

indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. RAP 14.2.

There is no evidence Mr. Barboza's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Barboza remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

Mr. Barboza's convictions for unlawful possession of a controlled substance – methamphetamine and second degree unlawful possession of a firearm (count 2) should be reversed and dismissed with prejudice because the trial court should have suppressed the evidence seized from Mr. Barboza's residence pursuant to the search warrant.

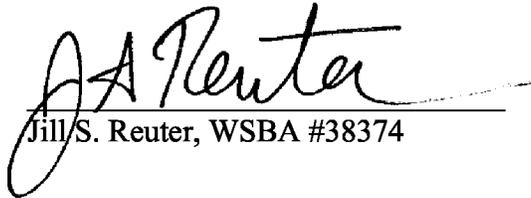
Two of Mr. Barboza's three convictions for third degree possession of stolen property (counts 3, 6, and 9) must be reversed and dismissed with prejudice, because they violate the prohibition against double jeopardy.

Mr. Barboza's convictions for second degree unlawful possession of a firearm (count 2) and second degree identity theft (count 12) should be reversed and remanded for a new trial, because he was deprived of his constitutional right to a unanimous jury verdict.

The case should also be remanded to the trial court: (1) for resentencing, to strike the two prior class C felony offenses, for unlawful possession of cocaine, that had "washed out;" (2) to strike the community custody condition prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of alcoholic beverages; (3) to strike the \$250 jury demand fee from his judgment and sentence; and (4) to correct the judgment and sentence to remove the \$250 drug enforcement fund cost.

Finally, Mr. Barboza asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 19th day of June, 2017.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

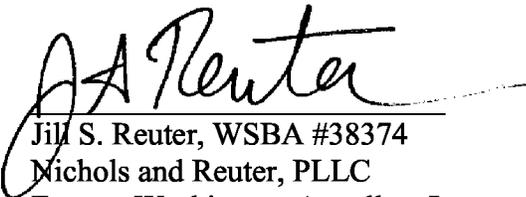
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34356-1-III
vs.)
JOSE G. BARBOZA CORTES)
Defendant/Appellant)
PROOF OF SERVICE)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 19, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's supplemental opening brief to:

Jose G. Barboza Cortes, DOC #891877
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Having obtained prior permission from the Chelan County Prosecutor's Office, I also served the Respondent State of Washington at prosecuting.attorney@co.chelan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 19th day of June, 2017.


Jill S. Reuter, WSBA #38374
Nichols and Reuter, PLLC
Eastern Washington Appellate Law
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
admin@ewalaw.com

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

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