

NO. 74537-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LATOUSHA YOUNG,

Appellant.

FILED
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Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The State's charging language and argument at trial, and the court's instruction to the jury, took away from the jury the ability to decide the actual issue in this case: whether the language of a no-contact order entered for the protection of her partner rendered Latousha Young's conduct a burglary.

B. ASSIGNMENTS OF ERROR

1. As a matter of law, Latousha Young could not burglarize her mother's residence by breaking the entryway window because her mother licensed her to be on the property.

2. Instruction six is a misstatement of the law.

3. Instruction six constitutes an unconstitutional judicial comment on the evidence.

4. The trial court acted improperly when it imposed \$600 in legal financial obligations and entered a boilerplate finding on Ms. Young's ability to pay without receiving evidence related to her ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person who is licensed, invited, or otherwise privileged to enter a building cannot, as a matter of law, be convicted of burglary for

entering that building. The State charged Latousha Young with first-degree burglary for entering her mother's home, but her mother gave her blanket permission to visit. At trial, the prosecutor argued Ms. Young's entry through a window constituted burglary. Where Latousha Young was licensed, invited, or otherwise privileged to enter her mother's house does entering through a window transform the entry into the crime of burglary?

2. A Court of Appeals case holds "that the consent of a protected person cannot override a court order excluding a person from the residence." Instruction six provides "A person who is prohibited by court order from entering a premise cannot be licensed, invited, or otherwise privileged to so enter or remain on the premise by an occupant of the premise." CP 67. Is instruction six a misstatement of the law because it overstates the case law, transforming residence to premise and removing the protected person as the actor, focusing instead on the occupant of a premise?

3. Our constitution prohibits a judge from commenting on the evidence. A jury instruction that resolves a contested factual issue constitutes an improper comment on the evidence. The jury had to resolve the contested issues of the extent and effect of Janice Young's

permission to Latousha Young to enter her home and the extent of her partner's residency in that home. Is instruction six an improper comment on the evidence because it resolved these issues?

4. 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. Young was indigent, the court imposed legal financial obligations (LFOs) without mention of her inability to pay. Should this Court remand with instructions to strike LFOs?

D. STATEMENT OF THE CASE

Latousha Young has unrestricted permission to enter and visit her mother, Janice Young’s, home at 21329 2nd Drive SE in Bothell, Washington. RP (12/14/15) 54, 67. Janice¹ resides there with her partner and her partner’s minor daughter, J.T. RP (12/14/15) 42. Janice shares her master bedroom with her partner, and J.T. lives in the

¹ Because Latousha Young and her mother Janice Young share the same last name, first names are used for clarity. The protected party, Alexis S., is also referred to only by first name to maintain her privacy.

second bedroom. RP (12/14/15) 42-43, 56. Latousha comes over “quite often” to the house for visits. RP (12/14/15) 54, 67.

Latousha Young’s partner, Alexis S., stayed in Janice’s home on a temporary basis including on the night of October 4, 2015.² Alexis and her young son shared the bedroom with J.T. when they stayed at the house. RP (12/14/15) 43, 58, 72. A no-contact order prohibited Latousha from entering, remaining, or coming within 1,000 feet of Alexis’s residence, school, workplace, or person. Exhibit 23. On October 6, 2015, Alexis signed a lease on a new apartment. RP (12/14/15) 77.

Latousha Young was very intoxicated on the night of October 4, 2015. RP (12/14/15) 67-68, 108-09. She entered her mother’s home by breaking the window near the front door, went upstairs to J.T.’s bedroom, where Alexis was sleeping, and hit Alexis in the head with both fists. RP (12/14/15) 59-61, 68. Janice Young called the police, who found Latousha lying in the backyard. RP (12/14/15) 60-62, 112-13.

² At trial, witnesses testified about the night of October 4 preceding the events that would have occurred in the early morning of October 5 as well as the early morning of October 4. RP (12/14/15) 44-45, 58, 85-86. Because the exact timing is not critical, this brief simply uses the night of October 4.

The State charged Latousha Young with first-degree burglary for unlawfully entering or remaining “in the building of Janice Young, located at 21329 2nd Drive SE, Bothell, WA” and felony violation of a no-contact order. CP 128-29 (amended information), 143-44 (information).³ A jury convicted her as charged and she was sentenced to 47.5 months imprisonment. CP 17-30, 54-57.

E. ARGUMENT

1. **Ms. Young could not be convicted of burglary of her mother’s home when she was permitted to enter her mother’s home.**
 - a. The State charged Ms. Young with unlawfully entering her mother’s home and argued the jury should convict Ms. Young of burglary based on her entry into her mother’s home, not the bedroom in which Alexis was sleeping.

The State charged Ms. Young with burglary based on her entry into her mother’s house. The first amended information provides, “That the defendant, on or about the 4th day of October, 2015, with intent to commit a crime against a person or property therein, did enter and remain unlawfully in the building of Janice Young, located at 21329 2nd Drive SE, Bothell, WA” CP 128. The address

³ The State dismissed a third-degree assault charge against a law enforcement officer. CP 49-50, 129.

provided, 21329 2nd Drive SE in Bothell, is Janice Young's single-family, three-story home. RP (12/14/15) 55-56; Exhibit 1.

At trial, the State stayed true to the amended information, arguing Ms. Young's breaking of and entry through the exterior window of her mother's home formed the basis for the burglary. RP (12/14/15) 153-54 (arguing "breaking through their window" proves burglary), 161 (arguing Young did not have "permission to break through the window"), 165 (arguing Young's intent was to "break into the house unlawfully"). *Cf.* RP (12/14/15) 134-36 (State argues breaking window constitutes sufficient evidence to overcome defense motion to dismiss burglary count).

- b. Ms. Young was permitted to be in her mother's home; at most she was not licensed, invited or otherwise privileged to enter the bedroom in which Alexis was sleeping.

The evidence at trial was clear that Ms. Young had permission to be inside her mother's home. RP (12/14/15) 67. Ms. Young is "welcome at [her mother's] house"; "she doesn't have to call to ask for permission to come over to visit." *Id.*; accord RP (12/14/15) 77. In fact, Ms. Young visited her mother's house many times over the five-and-a-half years her mother lived there. RP (12/14/15) 54, 67. Although Ms. Young did not have her mother's permission to break

through the entryway window, the act of breaking that window was perhaps malicious mischief but was not burglary. RP (12/14/15) 66-67, 155; *see* RCW 9A.52.020; RCW 9A.48.070, .-080, -.090; *see State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989) (discussing distinction between burglary and malicious mischief where conduct involved kicking a window of a building); *State v. VanValkenburgh*, 70 Wn. App. 812, 856 P.2d 407 (1993) (sufficient evidence of malicious mischief for breaking building windows); *State v. Fisher*, 40 Wn. App. 888, 892, 700 P.2d 1173 (1985) (sufficient evidence of malicious mischief for shattering window of residence).

While a no-contact order prohibited certain contact between Ms. Young and Alexis, it did not prohibit Ms. Young's entry into Janice Young's home. The no-contact order prohibited Ms. Young from entering, remaining, or coming within 1,000 feet of Alexis's residence, school, workplace, or person. Exhibit 23. The State did not charge or prosecute based on Alexis's residence but upon Janice Young's home at 21329 2nd Drive SE in Bothell. Alexis's residence was not Janice Young's house. Alexis was a temporary guest sharing a bedroom with Janice's permanent resident, twelve-year-old J.T.

Janice Young's step-daughter, J.T. occupied the smaller room in Janice's home. RP (12/14/15) 42, 56. On October 4, Alexis and her son were temporarily staying in the bedroom of J.T. RP (12/14/15) 43, 56, 58.

Alexis did not occupy the entire home. When Alexis stayed, she stayed in J.T.'s bedroom. RP (12/14/15) 58. J.T. shared her bedroom with Alexis and Alexis's son. RP (12/14/15) 43, 72; *see id.* at 50, 51 (J.T. describes room as "my bedroom"). Janice, as the property owner, and her partner shared the master bedroom. RP (12/14/15) 43, 56. Janice Young controlled the other areas of the house as well. RP (12/14/15) 56 (Janice designated the bottom level a media room; describing layout of her home).

Janice Young did not consider Alexis to be a resident in her home. RP (12/14/15) 56. Janice Young testified she shared her home with her partner and her daughter, J.T. RP (12/14/15) 56. Alexis stayed with them "off and on a couple of times." RP (12/14/15) 58. As of October 4, Alexis had shared J.T.'s room for "about a month," and she signed a lease on her own apartment two days later. RP (12/14/15) 72, 77.

- c. Her mother's permission to enter was not in conflict with the protection order between Latousha Young and Alexis.

Janice Young's license to her daughter Latousha was not in conflict with the no-contact order between Latousha and Alexis. A license to enter can be impliedly limited in scope to distinguish among portions of a premise. *State v. Collins*, 110 Wn.2d 253, 254, 258, 261-62, 751 P.2d 837 (1988) ("We hold that, in some cases, depending on the actual facts of the case, a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case."). While Alexis was occupying part of J.T.'s bedroom, Janice's license to allow her daughter to enter Janice's home still applied to the remainder of the house. Janice controlled the home and Alexis had no authority or control over any part other than possibly the shared bedroom.

The no-contact order did not bar Latousha from entering 21329 2nd Drive SE, and Janice Young explicitly permitted it. The only portion of the home that Latousha was not necessarily privileged to enter was the bedroom in which Alexis was staying, due to the no-contact order.

This is consistent with both *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007), and *State v. Sanchez*, 166 Wn. App. 304, 271

P.3d 264 (2012). In *Wilson*, a no-contact order prohibited the defendant from various forms of being in personal contact with his partner but did not bar him from his residence, which he co-possessed and co-habited with the protected party. 136 Wn. App. at 604-05, 607. This Court held that “in determining whether an offender’s presence is unlawful [for purposes of burglary], courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises.” *Id.* at 606. While the no-contact order prohibited contact between Wilson and his cohabitant, it did not prohibit Wilson’s entry into his home. *Id.* at 604, 611. Because Wilson was the co-possessor of the home and present with his partner’s consent, he was licensed to enter and the burglary conviction could not stand “as a matter of law.” *Id.* at 607-09, 611-12. Wilson’s privilege to enter the property, of course, did not excuse his unlawful contact with the protected party, which violated the no-contact order.

In *Sanchez*, this Court declined to expand *Wilson* to allow a protected party to license the defendant to enter her home when that entry is explicitly in violation of a court order. 166 Wn. App. at 305. In that case, a no-contact order excluded the defendant from his ex-wife’s residence, within 300 feet of her, and from her place of work.

Id. at 306, 310. He entered her home anyway and insisted on sexual relations. *Id.* at 306. The court held that a protected-party cannot override a no-contact order by inviting the defendant onto her property where the no-contact order expressly prohibits such contact. *Id.* at 305, 307. As policy, the court recognized its holding “removes any incentive an abuser may have to pressure the protected person to consent to his presence in violation of the order.” *Id.* at 311.

Sanchez is distinct from *Wilson* both because the no-contact order in *Wilson* did not exclude Wilson from the protected party’s residence as it did in *Sanchez* and because Wilson had a possessory interest in the property, which Sanchez did not. *Id.* at 310.

Here, Alexis was the protected party but not the property owner. At most, Alexis was a temporary resident or guest in a bedroom in Janice’s house. By inviting Alexis to share J.T.’s bedroom on a temporary basis, Janice did not forfeit the right to license Latousha to enter other portions of her home. Recognizing that Janice could license Latousha to enter her home does not run afoul of the policy concerns addressed in *Sanchez*, 166 Wn. App. at 311 (policy concern that abuser would pressure protected person to consent to contact). Meanwhile, recognizing the property owner’s right to license others to lawfully

enter her property comports with the policy addressed in *Wilson*, 136 Wn. App. at 608-09.

Because the State's burglary charge and proof at trial focused exclusively on an illegal entry through the exterior window of Janice's home, and yet merely entering her mother's home was not unlawful, the jury necessarily found Ms. Young guilty on an improper basis. The burglary conviction cannot stand as a matter of law. It must be reversed and the charge dismissed. *See Wilson*, 136 Wn. App. at 612.

- d. The court's instruction on this element misstated the law and was an improper comment on the evidence.

The trial court contributed to the error by misstating the law and commenting on the evidence, over Ms. Young's objection, in instruction six. CP 67; RP (12/14/15) 142-45. On the State's request, the Court instructed the jury, "A person who is prohibited by court order from entering a premise cannot be licensed, invited, or otherwise privileged to so enter or remain on the premise by an occupant of the premise." CP 67; CP __ (Sub 36, p.5 (State's trial memo)); RP (12/14/15) 142-45.

This instruction misstated the law. *See State v. Brush*, 183 Wn.2d 550, 557-58, 353 P.3d 213 (2015) (instruction misstates the law where it inaccurately interprets case law). As discussed, *Sanchez* held

“that the consent of a protected person cannot override a court order excluding a person from the residence.” 166 Wn. App. at 310. The court’s instruction turns *Sanchez* on its head and expands it. Instead of instructing the jury that a protected person cannot override a court order excluding a person from the residence, the court instructed the jury that no occupant can privilege, invite or license another party from entering a premise from which she is prohibited by court order. *Compare Sanchez*, 166 Wn. App. at 310 with CP 67; see *Brush*, 183 Wn.2d at 558 (“legal definitions should not be fashioned out of courts’ findings regarding legal sufficiency”). The *Sanchez* court did not opine on the authority of property owners, other than the protected party, to license persons to enter their property. *Wilson* is closer on this issue and reaches a different conclusion. The *Wilson* court recognized the rights of a property owner to enter her own property and to license entry to others. *Sanchez* is also not conclusive for purposes of the court’s instructions here because the *Sanchez* court did not discuss the difference between a residence, a building, a dwelling, or a premise, particularly as applies to the situation of a houseguest.

Because the trial court not only misstated the law but resolved factual issues in its instruction, the instruction is an unconstitutional

comment on the evidence. *Brush*, 183 Wn.2d at 556-57, 558-59.

Article IV, section 16 of our state constitution does not allow judges to “charge juries with respect to matters of fact, nor comment thereon.”

Const. art. IV, § 16. An instruction that “essentially resolve[s] a contested factual issue . . . constitute[s] an improper comment on the evidence and effectively relieve[s] the prosecution of its burden.”

Brush, 183 Wn.2d at 557, 559.

It should have been an open question for the jury whether Alexis’s residence was limited to the bedroom she shared or constituted the entire home even if she did not control it. But instruction six took this issue away from the jury. The instruction also presumes Latousha Young was prohibited by court order from entering the “premise” of Janice’s home. But as discussed, that was at least an open question. She was only barred from Alexis’s residence, which is not necessarily the same as the entire premise under these unique circumstances. Because the instruction resolved disputed issues, it lessened the State’s burden and constituted a judicial comment on the evidence. *Brush*, 183 Wn.2d at 559.

A comment on the evidence is presumed prejudicial. *Id.* State cannot overcome the presumption of prejudice here because a

reasonable juror could find Alexis’s residence did not encompass the entire home and the testimony was clear that Ms. Young was otherwise authorized to enter her mother’s home. Further, the State depended upon the court’s erroneous instruction in closing argument. RP (12/14/15) 161-62. The jury then deliberated for just an hour. *See* CP __ (Sub 33, p.8). The State cannot show that “no prejudice could have resulted” from the improper instruction. *See Brush*, 183 Wn.2d at 559-60.

2. The Court should strike the \$600 in legal financial obligations because Ms. Young lacks the ability to pay.

- a. The trial court found Ms. Young unable to pay legal costs, yet imposed legal financial obligations without analyzing her ability to pay those obligations.

At sentencing, the court imposed a \$500 victim assessment; a \$100 DNA collection fee, but waived all other costs and fees. CP 24. The imposed fees bear interest at the 12 percent statutory interest rate. CP 25. The court waived all other costs, presuming these imposed costs were “the mandatory ones.” RP (12/23/15) 8, 13. The court also found Ms. Young indigent for purposes of appeal. CP __ (Subs 56, 57).

- b. The relevant statutes and rules prohibit imposing LFOs on impoverished defendants; reading these provisions otherwise violates due process and the right to equal protection.

Our legislature mandates that 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). The Supreme Court recently emphasized 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 State v. Duncan*, ___ Wn.2d ___, 2016 WL 1696698, *2-3 (Apr. 28, 2016) (remanding to trial court for resentencing with “proper consideration” of defendant’s ability to pay).

Imposing LFOs on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wn.2d at 835. LFOs accrue interest at a rate of 12 percent, so even \$600 can amount to a much greater sum over time. *Id.* at 836. All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837; *Duncan*, 2016 WL 1696698 (recognizing the “ample and increasing evidence that unpayable LFOs ‘imposed against indigent defendants’ imposed significant burdens on

offenders and our community” (quoting *Blazina*, 182 Wn.2d at 835-37)).

Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010. Further, it proves a detriment to society by increasing hardship and recidivism. *Blazina*, 182 Wn.2d at 837.

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, 1097 (2015) (the legislature’s choice of different language in different provisions indicates a different legislative intent).⁴

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant’s inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). *Curry*, however, addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and non-

⁴ 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).

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 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.”).

In fact, it does not appear that the Supreme Court has ever held that the certain LFOs are exempt from the ability-to-pay inquiry.

Although this Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 *with Blazina*, 182 Wn.2d at 830-39.

General Rule 34, which was adopted at the end of 2010, also supports Ms. Young’s position. That rule provides in part, “Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant’s ability to secure access to judicial relief from a judicial officer in the applicable court.” GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay \$50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs “shall” be imposed. *See* RCW 36.18.020.

Our Supreme 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. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.*

at 528. A contrary reading “would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees.” *Id.* at 529. Given Jafar’s indigence, the Court said, “We fail to understand how, as a practical matter, Jafar could make the \$50 payment now, within 90 days, or ever.” *Id.* 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.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply in criminal cases. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, 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).

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 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.

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. As significant studies post-dating *Blank* recognize, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. 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) (citing numerous accounts of indigent defendants jailed for inability to pay); *see Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).⁵ The risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay \$50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants 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)

⁵ Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

(citing test). The government certainly has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like Ms. Young 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. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.⁶

- c. This Court should reverse and remand with instructions to strike the legal financial obligations and decline to award any requested costs on appeal.

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. In *Blazina*, the Supreme

⁶ Division Two recently held that despite the equal hardships imposed by “mandatory” and “discretionary” LFOs, it could not agree with the above statutory interpretation or constitutional grounds to reverse the imposition of a \$500 victim penalty assessment and \$100 DNA fee. *State v. Mathers*, __ Wn. App. __, 2016 WL 2865576 (May 10, 2016). Division One also recently held that the “mandatory” DNA fee does not violate substantive due process (or equal protection, but on different grounds than those argued here). *State v. Lewis*, No. 72637-4-I, slip op. 4-10 (June 27, 2016); *State v. Shelton*, 72848-2-I, slip op. at 1 (June 20, 2016). For the reasons set forth above, this Court should not follow these decisions.

Court exercised discretionary review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand” it. 182 Wn.2d at 835. The Court re-emphasized this holding in *Duncan*, 2016 WL 1696698, at *2-3.

This case raises the same concern. *See also Blazina*, 182 Wn.2d at 841 (Fairhurst, J. concurring) (arguing RAP 1.2(a), “rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits,” counsels for consideration of the LFO issue for the first time on appeal).

Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs. *Accord Duncan*, 2016 WL 1696698, at *2-3. Because the record demonstrates Ms. Young’s indigence, this Court should remand with instructions to strike legal financial obligations, and strike the boilerplate finding that Ms. Young has the ability to pay. CP 20.

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

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. Young. RAP 1.2(a), (c); RAP 2.5; *Blazina*, 182 Wn.2d at 835; *id.* at 841 (Fairhurst, J. concurring).

F. CONCLUSION

Latousha Young's burglary conviction should be reversed and the charge dismissed because she was licensed, invited, or otherwise privileged to enter her mother's home. Alternatively, the burglary conviction should be reversed and remanded because the court's instruction commented on the evidence and misstated the law by telling the jury that "A person who is prohibited by court order from entering a premise cannot be licensed, invited, or otherwise privileged to so enter or remain on the premise by an occupant of the premise."

Otherwise this Court should remand with instructions to strike the financial obligations and not award any costs to the State on appeal.

DATED this 29th day of June, 2016.

Respectfully submitted,

s/ Marla L. Zink
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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74537-9-I
)	
LATOUSHA YOUNG,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JUNE, 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:

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



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