No. 30378-1-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

PATRICK GALE WILSON,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Bruce Spanner, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. Mr. Wilson's constitutional right to a jury trial was violated by the court's instructions, which affirmatively misled the jury about its power to acquit.

Mr. Wilson incorporates as if set forth fully herein his argument in Brief of Appellant 6–24.

2. The implied finding that Mr. Wilson has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.

The State's arguments do not apply to the issue raised by Mr. Wilson.

First, because Mr. Wilson is appealing a factual finding made by the trial court in its final Judgment and Sentence, his appeal is a matter of right under RAP 2.2(1) and does not implicate RAP 2.5(a). *Cf.* Brief of Respondent ("BOR") 12–14.

Secondly, the trial court made the implied finding that Mr. Wilson has the means to pay the assessed legal financial obligations of $15, 548.50 commencing immediately and at the rate of "up to $50.00 per month", but there is no evidence in the record to support the finding. V RP 750–54; CP 325–26, 335. Contrary to the underlying premise of the

State's position, Mr. Wilson is not challenging the *imposition* of these costs. He is disputing the entry of a factual finding— made without supporting evidence—that he has the present or future ability to pay these costs. Mr. Wilson is most certainly an aggrieved party, and the lack of evidence is not "purely academic" or moot because this court can "provide effective relief" by striking the findings as clearly erroneous. State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011); *see* Yacobellis v. Bellingham, 55 Wn. App. 706, 709, 780 P.2d 272 (1989), *rev. denied*, 114 Wn.2d 1002 (1990). *Cf.* BOR 14–18.

Finally, the State concedes Mr. Wilson is indigent at this time. BOR 9. The State has not cited to any portion of the record that might show that the trial court took into account Mr. Wilson's financial resources and the nature of the burden of imposing LFOs on him. In fact, the record contains no evidence to support the trial court's implied finding in ¶ 2.5 that Mr. Wilson has the present or future ability to pay LFOs. The record instead supports the opposite conclusion. Mr. Wilson agreed his attorney's representation to the court that he lacked any funds or means to pay for either an attorney or other costs on appeal was correct, and when asked by the court whether he had any assets that could be sold in order to finance an appeal, Mr. Wilson said he "had nothing". V RP 753. Thus,

the court was fully aware when signing paperwork for processing the Notice of Appeal that Mr. Wilson was indigent. It is his present and future ability to pay that the court must consider. The record is silent as to any evidence of such consideration. The implied finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

While the State points to the boilerplate language at ¶2.5 (CP 40)[1] as "evidence" of actual consideration, the Court in Bertrand rejected such a notion:

> The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, *the record* before us on appeal *contains no evidence to support the trial court's finding number 2.5* that Bertrand has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding number 2.5 was clearly erroneous.

Bertrand, 165 Wn. App. 393, 267 P.3d at 517 (footnote omitted, emphasis added).

"The meaningful time to examine [Mr. Wilson's] ability to pay is when the government seeks to collect the obligation."[2] If and when the Department of Corrections or the county clerk decides to enforce collection of costs will be the meaningful time to examine Mr. Wilson's

[1] BOR 9.

ability to pay. Until then, the finding of ability to pay any LFOs must be stricken from the judgment and sentence.

3. The sentencing condition prohibiting possessing or viewing "any pornographic materials, including those found on the internet" is unconstitutionally vague.

Appellant accepts the State's concession on this issue. BOR 18.

4. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are not crime-related.

Mr. Wilson challenges certain conditions of community custody related to alcohol on the bases they are not crime-related or otherwise exceed the authority of the court to impose them. Brief of Appellant 31–35. In his briefing, Mr. Wilson acknowledges there is statutory authority to order prohibition of alcohol consumption regardless of whether alcohol was involved in the offense. Brief of Appellant 32, 35. As the State appears to agree the challenged conditions must be stricken—leaving only the prohibition of alcohol consumption in place—appellant accepts the State's concession on this issue. BOR 18–19.

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[2] Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

B. CONCLUSION

For the reasons stated here and in the initial brief of appellant, the conviction should be reversed and remanded for a new trial. Alternatively, the matter should be remanded for resentencing to strike the findings as to ability to pay legal financial obligations and conditions regarding pornography and related to alcohol possession.

Respectfully submitted on December 1, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 1, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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