No. 31672-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DAVID P. BOLTON,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give a jury unanimity instruction.

2. The record does not support the implied finding that Mr. Bolton has the current or future ability to pay Legal Financial Obligations.

3. The trial court erred by imposing discretionary costs.

4. The trial court erred by imposing a variable term of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Bolton denied his constitutional right to a unanimous jury verdict where the State relied on two criminal acts as a basis for conviction on a single count and a *Petrich* instruction on jury unanimity was not given?

2. Should the directive to pay legal financial obligations based on a finding of current or future ability to pay be stricken from the Judgment and Sentence as clearly erroneous, where the finding is not supported in the record? Did the trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took Mr. Bolton' financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

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3. Did the sentencing court not have the statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701?

C. STATEMENT OF THE CASE

Mr. Bolton was charged and convicted by a jury of custodial assault for assaulting Gary Ford, a staff member of Coyote Ridge Correctional Center. CP 19, 36-37. In closing argument the State argued in pertinent part:

> I'd submit to you that Mr. Bolton assaulted Mr. Ford, not just once that day on July 18th, 2012, but he assaulted him twice. The first time was when Mr. Ford had him sit down in the office or rolled into the office and Mr. Bolton stood up and frightened Mr. Ford, thinking that this was going to be an assault where Mr. Bolton potentially would jump over his desk and start a fight. The second assault was when Mr. Bolton told Mr. Ford that, "Not giving you my ID," and told Mr. Ford to come get it. . . . as he tried to get it, he took a swing at Mr. Ford . . .

RP 71.

Mr. Ford's testimony was consistent with the State's closing argument as quoted above. RP 34-38. The jury was not given an instruction on jury unanimity. CP 20-35.

The sentencing court imposed discretionary costs of $1013.72 and mandatory costs of $700[1], for a total Legal Financial Obligation (LFO) of

[1] $500 Victim Assessment and $200 criminal filing fee. CP 8.

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$1713.72. CP 8. The Judgment and Sentence contained the following language:

> ¶ 2.5 Legal Financial Obligations/Restitution. The court has considered the defendant's past, 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. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A753.

CP 7.

Mr. Bolton asked the Court to consider waiving the discretionary costs. He stated he suffered from a medical condition, would be over 60 years old by his release date, and already owed over $5000 in previously imposed LFO's. RP 92. The Court did not waive the costs and made no further inquiry into Mr. Bolton' financial resources and the nature of the burden that payment of LFOs would impose on him. RP 91-92. The court ordered Mr. Bolton to pay at least $100 per month commencing immediately. CP 9.

The Court imposed the following sentence of community custody:

> (A) The defendant shall be on community custody for the longer of:
>
> (1) the period of early release. RCW 9.94A.728(1)(2); or
>
> (2) the period imposed by the court, as follows: . . .12 months . . .

CP 11, ¶4.6.

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This appeal followed. CP 2-3.

D. ARGUMENT

1. Mr. Bolton was denied his constitutional right to a unanimous jury verdict because the State relied on two criminal acts on a single count as a basis for conviction and a *Petrich* instruction on jury unanimity was not given.

"When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The State may, in its discretion, elect the act upon which it will rely for conviction. *Id.* Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. *Id.* When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement. *Id.* The failure to follow one of the above options violates the defendant's State constitutional right to a unanimous jury verdict and his United States constitutional right to a jury trial. *State v. Beasley*, 126 Wn.App. 670, 682, 109 P.3d 849 (2005), citing

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State v. Badda, 63 Wn.2d 176, 182, 385 P.2d 859 (1963); U.S. Const. amend. 6; Wash. Const. art. 1, § 22.

An alleged *Petrich* error may be raised for the first time on appeal. *State v. Watkins*, 136 Wash. App. 240, 244, 148 P.3d 1112 (2006); *State v. Holland*, 77 Wn.App. 420, 424, 891 P.2d 49, rev. denied, 127 Wn.2d 1008, 898 P.2d 308 (1995). When determining whether a unanimity instruction is required, the court must answer three inquiries: (1) what must be proved under the statute? (2) what does the evidence disclose? and (3) does the evidence disclose more than one violation? *State v. Russell*, 69 Wn.App. 237, 249, 848 P.2d 743 (1993).

Here, the State presented evidence of two different acts by Mr. Bolton that it argued constituted a custodial assault. RP 34-38, 71. The jury was not given a *Petrich* instruction on jury unanimity. CP 20-35. As in the cases cited above, there is no way to assure that all members of the jury were relying on the same act when voting to convict Mr. Bolton. Therefore, since there was no assurance that the jury verdict was unanimous, the verdict must be reversed.

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2. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.

Mr. Bolton did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Calvin,* __Wn. App. __, 302 P.3d 509, 521 fn 2 (2013), citing *State v. Ford,* 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

a. The directive to pay must be stricken. There is insufficient evidence to support the trial court's finding that Mr. Bolton has the present and future ability to pay legal financial obligations, and the directive to pay must be stricken. Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia,* 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

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RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he 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). "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." *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915-16.

Here, there is insufficient evidence to support the trial court's finding that Mr. Bolton has the present and future ability to pay legal financial obligations as stated in paragraph 2.5 of the Judgment and

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Sentence. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *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)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin,* 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Bolton' financial resources and the nature of the burden of imposing

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LFOs on him. The record contains no evidence to support the trial court's finding that he has the present or future ability to pay LFOs. In fact Mr. Bolton asked the Court to consider waiving the discretionary costs because of his financial situation. He stated he suffered from a medical condition, would be over 60 years old by his release date, and already owed over $5000 in previously imposed LFO's. RP 92. The Court did not waive the costs and made no further inquiry into Mr. Bolton' financial resources and the nature of the burden that payment of LFOs would impose on him. RP 91-92. Instead, the court ordered Mr. Bolton to pay at least $100 per month commencing immediately. CP 9. Therefore, the finding that he has the present or future ability to pay LFOs is simply not supported in the record. Since it is clearly erroneous, the directive must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

This remedy of striking the unsupported finding is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. *State v. Lohr*, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); *State v. Schelin*, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There

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appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of "fixing" it with the taking of new evidence. *Cf. State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, recon. denied, rev. denied, 116 Wn.2d 1026 (1991); *Lohr* (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

b. The imposition of discretionary costs of $1013.72 must also be stricken. Since the record does not reveal that the trial court took Mr. Bolton' financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the judgment and sentence.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin,* 63 Wn. App. at 312. The decision to

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impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. *Id.*

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. But,

> 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). It is well-established that this provision does not require the trial court to enter formal, specific findings. See *Curry*, 118 Wn.2d at 916. Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. *Bertrand*, 165 Wn. App. at 404. Where the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *Calvin,* 302 P.3d at 521-22.

Here, after supposedly considering Mr. Bolton' "present and future ability to pay legal financial obligations", the court imposed discretionary costs of $1013.72. However, the record reveals no balancing by the court

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of Mr. Bolton' financial resources and the nature of the burden that payment of LFOs would impose on him. RP 91-92.

In sum, the record reveals that the trial court did not take Mr. Bolton' particular financial resources and his ability (or not) to pay into account as required by RCW 10.01.160(3). The finding of ability to pay is unsupported by the record and clearly erroneous. Further, the court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay *and* the imposition of the discretionary costs. *Calvin,* 302 P.3d at 522; *Bertrand*, 165 Wn. App. at 405.

3. The sentencing court did not have the statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the

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legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). The statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

> (3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for . . .:
>
> (a) Any crime against persons under RCW 9.94A.411(2) . . .

RCW 9.94A.701(3)(a).

"Under [RCW 9.94A.701], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length

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of community custody at the time of sentencing." *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

Here, the trial court imposed the following sentence of community custody:

> (A) The defendant shall be on community custody for the longer of:
>
> (1) the period of early release. RCW 9.94A.728(1)(2); or
>
> (2) the period imposed by the court, as follows: . . .
>
> 12 months . . .

CP 11, ¶4.6.

The trial court did not have the statutory authority to sentence Mr. Bolton to a variable term of community custody contingent on the amount of earned release. Under RCW 9.94A.701 it could only sentence him to a finite term of 12 months. Therefore, the variable term of community custody imposed by the trial court was improper.

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E. CONCLUSION

For the reasons stated the conviction should be reversed, or in the alternative, the matter should be remanded to strike the directive to pay *and* the imposition of discretionary costs from the Judgment and Sentence, and to impose a finite term of community custody.

Respectfully submitted December 3, 2013,

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PROOF OF SERVICE

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