No. 31138-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MATTHEW DAVID LEONARD,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Ruth E. Reukauf, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Under the rules of statutory construction, the rule of lenity and In re the Personal Restraint of Andress,[1] RCW 9A.32.050(1)(b) must be interpreted to apply only to assault predicates which are separate from the act causing the death.

2. Mr. Leonard's Article I, § 12 and Fourteenth Amendment rights to equal protection and his rights to fundamental fairness were violated by the conviction for second-degree felony murder.

3. The "to-convict" instructions erroneously stated the jury had a "duty to return a verdict of guilty" if it found each element proven beyond a reasonable doubt.

4. The record does not support the findings that Mr. Leonard has the current or future ability to pay Legal Financial Obligations, including the means to pay costs of incarceration and medical care.

Issues Pertaining to Assignments of Error

1. The only way to avoid an absurd and nonsensical result and comply with the rule of lenity is to interpret the current second-degree felony murder statute so as to permit conviction based upon the predicate crime of assault only if the assault is not the conduct which results in the

[1] 147 Wn.2d 602, 56 P.3d 981 (2002).

death. Should this Court so interpret the statute and should the conviction be reversed where the predicate assault in this case was the conduct which caused the death?

2. Does the current second-degree felony murder statute violate equal protection where there is no limit to the prosecutor's discretion to charge a higher crime for the same acts and no basis whatsoever, let alone a rational basis, for treating such similarly situated defendants differently? Further, does it offend fundamental principles of fairness to allow such unfettered discretion and to permit the prosecutor to prohibit defendants who commit essentially the same crime from presenting lesser included offense options to the jury under one charge but not the other and to arbitrarily select which defendant faces far greater punishment for the exact same act?

3. In a criminal trial, does a "to-convict" instruction, which informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt, violate a defendant's right to a jury trial, when there is no such duty under the state and federal Constitutions?

4. Should the findings that Mr. Leonard has the current or future ability to pay Legal Financial Obligations including the means to pay costs

of incarceration and medical care be stricken from the Judgment and Sentence as clearly erroneous, where they are not supported in the record?

B. STATEMENT OF THE CASE

A jury found the defendant, Matthew David Leonard, guilty of second degree (felony) murder, committed while armed with a deadly weapon. CP 150, 152, 154. Jason Linder, the fatally injured person, died due to loss of blood from a single stab wound to his chest. 6/19/12 RP 596, 598, 608. The incident occurred after a progression of fights among several groups of patrons at Arty's Tavern, located in Yakima, Washington. Some of the altercations involved Mr. Leonard's sister, Elsie Gigi White. 6/13/12 RP 13–86, 92–149, 158–73; 6/15/12 RP 202–58, 263–304, 311–38; 6/19/12 RP 530–93, 635–64; 6/20/12 RP 710–59, 764–802, 805–67. The defense theory was that Mr. Leonard acted in self-defense of himself and/or his sister. 6/21/12 RP 929–71.

The state charged Mr. Leonard with second degree murder by stabbing, alleging alternatively intentional murder or felony murder based upon second degree assault. CP 4. At trial, the jury was given "to convict" instructions regarding second degree (intentional) murder, second degree (felony) murder and first degree manslaughter (as a lesser degree of second degree (intentional) murder). CP 130–32, 135. Self-defense

instructions were given as to each crime.[2] The "to convict" instructions contained *Washington Pattern Jury Instructions: Criminal* language as follows:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

Instruction No. 13 at CP 130 (WPIC 27.02); Instruction No. 14 at CP 131 (WPIC 27.04); Instruction No. 18 at CP 135 (WPIC 28.02).

At sentencing, the court imposed a mid-range sentence of 210 months, which includes the 24 month deadly weapon enhancement. 8/24/12 RP 82; CP 155. As part of the Judgment and Sentence, the court made the following pertinent findings:

> **¶ 2.7 Financial Ability**: The Court has considered the total amount owing, 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 9.94A.753 [sic].
> …
> **¶ 4.D.4. Costs of Incarceration**: In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of $50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed $100.00 per day of incarceration (the rate in 2012 is $65.00 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only

[2] Jury Instruction Nos. 19, 20 and 21, at CP 136–38.

> after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2).
>
> **¶ 4.D.5 Costs of Medical Care**: In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

CP 155 and 157 (bolding in original)**.**

This appeal followed. CP 162-63.

C. ARGUMENT

1. The conviction for second-degree felony murder must be dismissed because the post-Andress statute does not apply and could not be applied without violation of equal protection and due process guarantees.

a. RCW 9A.32.050(1)(b) is ambiguous and application of the rule of lenity and mandates of statutory construction require interpreting it in Mr. Leonard's favor to apply only to assaults which are separate from the act causing death. Under the rule of lenity, where a statute is ambiguous and thus subject to several interpretations, the Court is required to adopt the interpretation most favorable to the defendant. *See* State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Further, interpreting a statute, a reviewing court must try to construe it in order to effect its purpose, but "

'strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided.' " Statev. Leech, 114 Wn.2d 700, 708-709, 790P.2d 160 (1990), quoting State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). In addition, it is presumed that the Legislature does not intend absurd results, so courts will not construe a statute to allow such a result. In re the Personal Restraint of Andress, 147 Wn.2d 602, 610, 56 P.3d 981 (2002); *see* State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1985).

After the decision in Andress, the Legislature amended the second-degree felony murder statute to provide, in relevant part:

> A person is guilty of murder in the second degree when ... he or she commits or attempts to commit any felony, *including assault* ... and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants [.]

RCW 9A.32.050(1)(b) (emphasis added); Laws of 2003, ch.3, § 1 (statute amended in response to Andress). Although the statute does not state whether it applies to assaults which are the act which results in death or only to separate assaults, the Washington State Supreme Court has examined the "in furtherance of" language in another context and held that it means that the death has to be "sufficiently close in time and place" to the underlying felony so as "to be part of the *res gestae* of that felony." Leech, 114 Wn.2d at 706.

In Andress, the Court applied the holding of Leech and held that the language of the felony murder statute requiring that the death had to be "in the

course of and in furtherance of' the predicate felony, or in immediate flight therefrom," meant that the Legislature could not have intended to include assault as a predicate felony, because:

> the statute would provide, essentially, that a person is guilty of second degree felony murder when he or she commits or attempts to commit assault on another, causing the death of the other, and the death was sufficiently close in time and place to that assault to be part of the *res gestae* of the assault. *It is nonsensical to speak of a criminal act - - an assault, that results in death as being part of the res gestae of that same criminal act since the conduct constituting the assault and the homicide are the same.* Consequently, in the case of assault there will never be a *res gestae* issue because the assault will always be directly linked to the homicide.

Andress, 147 Wn.2d at 610 (emphasis added). It was necessary to reject this "absurd" interpretation, the Court held, because otherwise "the 'in furtherance of' language would be meaningless as to that predicate felony" as "the assault is not independent of the homicide." 147 Wn.2d at 610. Indeed, as the Supreme Court later noted, the "felony murder statute is intended to apply when the underlying felony is *distinct* from, yet related to, the homicidal act." In re Bowman, 162 Wn.2d 325,331, 172 P.3d 681 (2007).

Although the new statute specifically includes reference to assault as the predicate felony, it still suffers from the same infirmity as that which led the Andress Court to its inescapable conclusion. The statute still contains the same "in furtherance of" language which the Supreme Court found in Andress would be rendered superfluous by allowing conviction for felony

murder based upon an assault which causes death. And the statutory language is still nonsensical if applied to such situations, because it still speaks of "a criminal act - - an assault, that results in death as being part of the res gestae of that same criminal act," even though "the conduct constituting the assault and the homicide are the same." Andress, 147 Wn.2d at 610

Because the statute does not declare whether it applies to all assaults or only those which are separate from the act which causes the death but still contains the "in furtherance of' language, it is ambiguous. Applying the rule of lenity and the rules of statutory construction against absurd results and assuming the Legislature did not intend such results, the Court is required to interpret the statute to apply only to assaults which are separate from the act causing death. This is the only way to avoid rendering superfluous the "in furtherance of" language or requiring an absurd result. It is also the only way to honor the Legislature's apparent desire to include at least some assaults as predicate felonies for second-degree felony murder while following these mandates of statutory construction.

In response, the prosecution may cite to State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), *reversed on other grounds*, 172 Wn.2d 671

(2011), a Division One case in which the Court first declared, without explanation, that the statute "is not ambiguous," then stated that, if it was ambiguous, looking at the legislative history clarified that the Legislature "wants assault to be a predicate felony," which means it should be so. 153 Wn. App. at 529. This Court should decline to follow Gordon, because that case was not well-reasoned and does not withstand scrutiny.

First, Gordon ignored the very language of the statute in finding it was not ambiguous. The language used by the 2003 Legislature did not clarify *which* assaults it intended to be as predicate felonies, because it still included the "in furtherance of" language in the statute. See Laws of 2003, ch.3. Further, in amending the statute, the 2003 Legislature specifically stated that the purpose of the second-degree felony murder statute was to punish those who "commit a homicide in the course *and in furtherance of a* felony," which the Legislature said meant the death was to be "sufficiently close in time and proximity to the predicate felony." Laws of 2003, ch. 3, § 1 (emphasis added). Thus, the mere fact that the Legislature included the word "assault" in the statute does not answer the question posed as a result of the statute's ambiguity, contrary to Division One's declaration in Gordon.

Further, Division One's ruling failed to apply the rule of lenity, despite the mandate to do so under such cases as Roberts, *supra*. *See*

Gordon, 153 Wn. App. at 524-27. And it ignored the Supreme Court's holding in Bowman, *supra*, that the felony murder scheme is intended to apply "when the underlying felony is distinct from, yet related to, the homicidal act"—a distinction which is lost if the underlying felony is the assault which results in death but not if the underlying felony is an assault and a *different* act causes the death. Bowman, 147 Wn.2d at 616. Because Gordon is not well-reasoned and ignores fundamental law and principles, it should not be followed by this Court.

The only way to interpret the post-Andress RCW 9A.32.050(1)(b) to make sense of all of the language, avoid absurdity and follow the rule of lenity as required is to hold that the statute applies only when the predicate assault is an assault separate from the act which caused the death. This Court should so hold and should reverse.

b. Allowing prosecution for second-degree murder based upon an assault predicate violates Fourteenth Amendment and Article 1. §12 equal protection principles and due process mandates of fundamental fairness. Even if RCW 9A.32.050(1)(b) could be interpreted to apply to this case, application was still improper because allowing prosecution for second-degree murder based upon an assault predicate violates the constitutional mandates of equal protection and the fundamental fairness requirements of the state and federal due process clauses.

Both Article I, §12, of the Washington constitution and the Fourteenth Amendment require that similarly situated individuals receive like treatment under the law. *See* Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); Dandridge v. Williams, 397 US. 471, 518, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).[3] When conducting an equal protection analysis, the first step is to determine the appropriate standard of review. *See* State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). This is done by looking at the nature of the interests or class affected. *See* State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997), *rev. denied*, 136 Wn.2d 1002 (1998). Although physical liberty is an important liberty interest, the Supreme Court has held that it implicates only the "rational relationship" test. *See* State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996), *cert. denied sub nom* Manussier v. Washington, 520 U.S. 1201 (1997). Under that test, the courts ask 1) whether the classification applies to all members of the class, 2) whether there was some rational basis for distinguishing between those within and those outside the class, and 3) whether the challenged classification bears a "rational relationship" to the legitimate state objective which must be the

[3] Washington courts have thus far construed the Washington clause as "substantially identical" to the federal clause, and use the same analysis. *See* State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

basis for the classification. *See* In re Bratz, 101 Wn. App. 662, 669, 5 P.3d 755 (2000).

While identical treatment is not required in all circumstances, it is still required that any distinction "have some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). Further, even a seemingly valid law will violate equal protection if it is administered in a manner which unjustly discriminates between similarly situated people. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990).

Here, Mr. Leonard is in a class of defendants who commit second degree assault which results in death. Under the statutes, the prosecution was given the astounding choice of charging such persons with either second degree felony murder or the much lesser crime of manslaughter, as the Supreme Court had noted in Andress and Bowman. Yet there is absolutely no distinction between the people who would be subject to the far disparate punishments and higher crimes, save for the prosecutor's unfettered discretion. The complete lack of any standards for treating similarly situated defendants who commit exactly the same acts so differently cannot possibly serve any legitimate state objective, so that the

"rational relationship" test was not met and concepts of fundamental fairness were violated.

In response, the prosecution may again attempt to rely on Gordon, in which Division One held that there was no equal protection violation. Any such reliance would be misplaced. In Gordon, Division One relied on its own decision in State v. Armstrong, 143 Wn. App. 333, 178 P.3d 1048 (2008), *rev. denied*, 164 Wn.2d 1035 (2008), holding that it was sufficient that the Legislature had declared that it intended to "[p]unish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony." Gordon, 153 Wn. App. at 546.

But Armstrong itself specifically recognized that equal protection is violated when a statutory scheme proscribes crimes that do not require proof of different elements. Armstrong, 143 Wn. App. at 338. Put simply, the Armstrong Court noted, "[w]hen the crimes have different elements, the prosecutor's discretion is not arbitrary, but is constrained by which elements can be proved under the circumstances." Id.

Further, in Gordon, Division One completely ignored the Supreme Court's holdings in a related, instructive area of the law. Applying equal protection principles and the need to limit the prosecution's discretion, the Supreme Court has held that, "where a special statute punishes the same

conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute." State v. Shriner, 101 Wn.2d 576, 579, 681 P.2d 237 (1984), *quoting* State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979); *see* State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982). Both the courts of appeals and the Supreme Court have indicated that equal protection principles underlie this rule, because those principles are offended when the prosecutor is allowed to make a choice of which comparable crime to charge when one is far more serious. *See* State v. Pyles, 9 Wn. App. 246, 511 P.2d 1374, *rev. denied*, 82 Wn.2d 1013 (l973); *see also*, State v. Collins, 55 Wn.2d 469, 348 P.2d 214 (1960). This line of cases illustrates the equal protection problems with application of the second-degree felony murder statute to Mr. Leonard in this case.

Further, the Supreme Court has stated that, under equal protection principles, the prosecution should not be permitted the discretion to chose "different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations." Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956).

For example, if a defendant commits an intentional assault and unintentionally but recklessly inflicts substantial bodily harm which results

in death, the prosecution can charge either second degree murder or manslaughter, with the resulting differences in punishment and consequence. Similarly, with assault as the predicate felony for second degree felony murder, "a negligent third degree assault resulting in death can be second degree murder," although RCW 9A.32.070 provides that a person who with criminal negligence causes the death of another is guilty only of second degree manslaughter." Andress, 147 Wn.2d at 615; *see* RCW 9A.32.070(1).

The unfairness which can result from such discretion is evident and the harshness of punishing an unintentional homicide this way has been recognized by the Supreme Court itself. *See* Andress, 147 Wn.2d at 612. By giving the prosecution this expansive discretion to charge a higher or lesser crime for the same conduct; RCW 9A.32.050 as currently written violates the prohibitions against equal protection.

In addition, it is time for Washington to reconsider its ill-conceived notion of refusing to follow the vast majority of jurisdictions which have adopted a "merger" rule for felony murder with an underlying assault in order to prevent such drastic unfairness as currently exists in Washington. Under the merger rule, if a person is assaulted and then dies, the assault merges into the resulting homicide and cannot be the predicate felony for

felony murder, "because it is not a felony independent of the homicide." Andress, 147 Wn.2d at 606.

Washington recognizes, as part of the "merger doctrine," the concept that one crime may be so incidental to another that it does not amount to the independent crime. *See* State v. Saunders, 120 Wn. App. 800, 816-17, 86 P.3d 1194 (2004). Thus, in State v. Green, 94 Wn.2d 216, 227, 616 P.2d 628 (1980), the defendant was charged with aggravated murder with kidnapping as an element of the crime, where the crime involved taking the victim from an alley, moving her about 50 feet, and then killing her. The Court held that the prosecution failed to prove the kidnapping element because, although the child had been moved, that movement was "an integral part of and not independent of the underlying homicide." Green, 94 Wn.2d at 227.

Applying those principles here, this Court should hold that the predicate assault merged with the death, and felony murder does not apply. One purpose of the felony murder rule is to ensure that a co-participant in a predicate felony may be punished for a resulting homicide he did not commit through, effectively, "vicarious liability." State v. Carter, 154 Wn.2d 71, 78-79, 109 P.3d 823 (2005). The proof of felony murder is therefore two-fold, and requires proof both that a person "committed or

attempted to commit a predicate felony *and* that he or she, or a co-participant, committed homicide in the course of commission of the felony." 154 Wn.2d at 80 (emphasis in original). Thus, when assault is the predicate felony, to prove second degree murder the prosecution has to prove that the person committed or attempted to commit an assault *and* that she or a co-participant committed homicide in the course of commission of the assault. But logically, these two areas of proof must merge because an assault is "an integral part of and not independent of" the resulting homicide. Again as noted by the Andress Court,

> It is nonsensical to speak of a criminal act - - an assault - - that results in death as being part of the res gestae of the same criminal act since the conduct constituting the assault and the homicide are all the same. Consequently, in the case of assault there will never be a res gestae·issue because the assault will always be directly linked to the homicide .... In short, unlike the cases where arson is the predicate felony, the assault is not independent of the homicide.

Andress, 147 Wn.2d at 610-611.

Thus, the Supreme Court has declared that a predicate assault effectively merges and is not independent of the homicide. Although Andress did not take the further step and declare adoption of merger in Washington, it clearly indicated its willingness to do so. This Court should follow the path cleared by Andress and should adopt the merger doctrine in this state to protect against the "absurd result" the Andress

Court noted would result from including assault as a predicate felony for felony murder.

c. Mr. Leonard's felony murder conviction based on the predicate crime of second degree assault should be reversed. The only way to interpret the post-Andress version of RCW 9A.32.050(1)(b) to avoid an absurd result and honor basic principles of statutory construction such as the rule of lenity, as well as fundamental constitutional principles of fairness and due process, is to limit its application to felony murders where the underlying assault is not the act which causes the death. This Court should so hold and should reverse and dismiss Mr. Leonard's felony murder conviction.

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

As part of the "to-convict" instructions used in this case, the trial court instructed the jury as follows, using standard language from the pattern instructions:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

Instruction No. 13 at CP 130 (WPIC 27.02); Instruction No. 14 at CP 131 (WPIC 27.04); Instruction No. 18 at CP 135 (WPIC 28.02). Mr. Leonard contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Mr. Leonard's right to a properly instructed jury.[4]

a. Standard of review. Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de novo*. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) , *overruled in part on other grounds*, 174 Wn.2d 707, ___ P.3d ___ (June 7, 2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The elements instruction given in this case affirmatively misled the jury to conclude it was without power to nullify, therefore, it was improper. *E.g.*, State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008) (explaining that jury instructions are improper if they mislead the jury). Moreover, because this error occurred in the elements instruction, which is the "yardstick" by which the Jury measures a defendant's guilt or innocence, the error

[4] Division One of the Court of Appeals rejected the arguments raised here in its decision in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028

directly prejudiced Mr. Leonard's right to a fair trial and, thus, constituted a manifest constitutional error.

b. The United States Constitution. The right to jury trial in a criminal case was one of the few guarantees of individual rights enumerated in the United States Constitution of 1789. It was the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, § 2, ¶ 3; U. S. Const. amend. 6; U.S. Const. amend. 7. Thomas Jefferson wrote of the importance of this right in a letter to Thomas Paine in 1789: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." The Papers of Thomas Jefferson, Vol. 15, p. 269 (Princeton Univ. Press, 1958).

In criminal trials, the right to jury trial is fundamental to the American scheme of justice. It is thus further guaranteed by the due process clauses of the Fifth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

Trial by jury was not only a valued right of persons accused of crime, but was also an allocation of political power to the citizenry.

(1998), *abrogated on other grounds by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). Counsel respectfully contends Meggyesy was incorrectly decided.

> [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. at 156.[5]

c. Washington Constitution. The Washington Constitution provides greater protection to its citizens in some areas than does the United States Constitution. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Under the Gunwall analysis, it is clear that the right to jury trial is such an area. Pasco v. Mace, *supra*; Sofie v. Fiberboard Corp., 112 Wn.2d 636, 656,771 P.2d 711, 780 P.2d 260 (1989).

i. The textual language of the state constitution.

The drafters of our state constitution not only granted the right to a jury trial, Const. art. 1, § 22,[6] they expressly declared it "shall remain inviolate." Const. art. 1, § 21.[7]

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[5] In Sofie v. Fibreboard Corp., the majority saw this allocation of political power to the citizens as a limit on the power of the legislature. 112 Wn.2d 636, 650-53,771 P.2d 711, 780 P.2d 260 (1989). Two of the dissenting members of the court acknowledged the allocation of power, but interpreted it rather as a limit on the power of the judiciary. Sofie, 112 Wn.2d at 676 (Callow, C.J., joined by Dolliver, J., dissenting).

[6] **Rights of Accused Persons.** In criminal prosecutions, the accused shall have the right … to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed … .

[7] "The right of trial by jury shall remain inviolate … ."

> The term "inviolate" connotes deserving of the highest protection . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie, 112 Wn.2d at 656. Article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Pasco v. Mace, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (1910). The right to trial by jury "should be continued unimpaired and inviolate." Strasburg, 60 Wash. at 115.

The difference in language suggests the drafters meant something different from the federal Bill of Rights. See Hon. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) (Utter).

The framers added other constitutional protections to this right. A court is not permitted to convey to the jury its own impression of the evidence. Const. art. 4, § 16.[8] Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987). The right to jury trial also is protected by the due process clause of article I, section 3.

[8] "Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law."

While the Court in State v. Meggyesy[9] may have been correct when it found there is no specific constitutional language that addresses this precise issue, the language that *is* there indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

ii. State constitutional and common law history.

State constitutional history favors an independent application of Article I, Sections 21 and 22. In 1889 (when the constitution was adopted), the Sixth Amendment did not apply to the states. Furthermore, Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001), *citing* Utter, 7 U. Puget Sound Law Review at 497. This difference supports an independent reading of the Washington Constitution.

State common law history also favors an independent application. Article I, Section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." Sofie, 112 Wn.2d at 645; Pasco v. Mace, 98 Wn.2d at 96; *see also* State v. Hobble, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved

[9] 90 Wn. App. 693, 701, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

guilt beyond a reasonable doubt. Leonard v. Territory, 2 Wash.Terr. 381, 7 Pac. 872 (Wash.Terr.1885). In Leonard, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. The court instructed the jurors that they "should" convict and "may find [the defendant] guilty" if the prosecution proved its case, but that they "must" acquit in the absence of such proof.[10] Leonard, at 398-399. Thus the common law practice *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was sufficient.[11] Id.

The Court of Appeals in Meggyesy attempted to distinguish Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. But the Meggyesy court missed the point—at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the jury to make a finding of guilt. The current

[10] The trial court's instructions were found erroneous on other grounds.

[11] Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). *See, e.g.,* Miller v. Territory, 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr.1888); White v. Territory, 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr.1888); Leonard, *supra.*

practice does not comport with the scope of the right to jury trial existing at that time, and should now be re-examined.

iii. Preexisting state law.

In criminal cases, an accused person's guilt has always been the sole province of the jury. State v.Kitchen, 46 Wn. App. 232, 238, 730 P.2d 103 (1986); *see also* State v. Holmes, 68 Wash. 7, 122 P. 345 (1912); State v. Christiansen, 161 Wash. 530, 297 P. 151 (1931). This rule applies even where the jury ignores applicable law. *See, e.g.*, Hartigan v. Washington Territory, 1 Wash.Terr. 447, 449 (1874) ("[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.")[12]

iv. Differences in federal and state constitutions' structures.

State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, "Presenting a State Constitutional Argument: Comment on

[12] This is likewise true in the federal system. *See, e.g.*, United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

Theory and Technique," 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. Gunwall indicates that this factor will always support an independent interpretation of the state constitution because the difference in structure is a constant. Id., 106 Wn.2d at 62, 66; *see also* State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

v. Matters of particular state interest or local concern.

The manner of conducting criminal trials in state court is of particular local concern, and does not require adherence to a national standard. *See, e.g.,* State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934 (2003); State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Gunwall factor number six thus also requires an independent application of the state constitutional provision in this case.

vi. An independent analysis is warranted.

All six Gunwall factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the federal constitution,

and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

d. Jury's power to acquit. A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict of guilty improper even where no issues of fact are in dispute); Holmes, 68 Wash. at 12-13. If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the right to jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); *see* Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (omission of element in jury instruction subject to harmless error analysis).

The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amend. 5; Const. art. I, § 9.[13] A jury verdict of not guilty is thus non-reviewable.

Also well-established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671).

[13] "No person shall be … twice put in jeopardy for the same offense."

Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. *See generally* Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence… .If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

History shows jurors are endowed with the power to nullify. The power of a jury to acquit even in the face of overwhelming evidence of

guilt, (i.e. jury nullification) long has been recognized and accepted as an integral and essential aspect of the criminal justice system. E.g., Bushell's Case, 6 Howell's State Trials 999 (1670); *see also* United States v. Polouizzi, 687 F.Supp.2d 133, 184–98 (E.D.N.Y. 2010)[14] (providing a thorough historical survey of this right). As one commentator has observed: "The only real issue concerning jury nullification is whether or not the jury should be honestly instructed as to its authority. The value of nullification to the legal system no longer appears to be a matter of dispute." Schelin & Van Dyke, Jury Nullification: The Contours of a Controversy, 43 L. & Contemp.Probs. 51, 113 n.55 (1980).

Despite this recognized power, nullification instructions—once historically common—are no longer given. Wrongly relying on Sparf v. United States, 156 U.S. 51, 102, 15 S.Ct. 273, 39 L.Ed. 343 (1895), judges often refuse to inform juries of their full powers. Yet, Sparf—supposedly the bedrock case against jury nullification—adopted no such holding. As one commentator explains:

> [Sparf] did not preclude judges from rendering nullification instructions or allowing nullification arguments in proper circumstances, it did not require judges to mislead jurors about their power to judge the law, and it did not sanction a judicial denial of the jury's nullification power, either by instruction or interference. Sparf only held that it was not reversible error to

[14] Reversed on others ground in an unpublished case.

> instruct the jury that it would be wrong to disregard the court's instruction as to the law. In fact, the trial judge in Sparf informed the jury that it had the 'physical power' to render a verdict contrary to his instructions.

Andrew J. Parmenter, Nullifying the Jury, The Judicial Oligarchy Declares War on Jury Nullification, 46 Washburn L.J. 379, 388 (2007) (footnotes omitted).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. Hartigan, *supra.* A judge cannot direct a verdict for the state because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982). *See also* State v. Salazar, 59 Wn. App. 202, 211, 796 P .2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

This is not to say there is a right to instruct a jury that it may disregard the law in reaching its verdict. *See, e.g.*, United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other

grounds). However, if the court may not tell the jury it may disregard the law, it is at least equally wrong for the court to direct the jury that it has a duty to return a verdict of guilty if it finds certain facts to be proved.

e. Scope of jury's role re: fact and law. Although a jury may not strictly determine what the law is, it does have a role in applying the law of the case that goes beyond mere fact-finding. In Gaudin, the Court rejected limiting the jury's role to merely finding facts. Gaudin, 515 U.S. at 514-15. Historically the jury's role has never been so limited: "[O]ur decision in no way undermine[s] the historical and constitutionally guaranteed right of a criminal defendant to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." Gaudin, 515 U.S. at 514.

Prof. Wigmore described the roles of the law and the jury in our system:

> Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide. ... We want justice, and we think we are going to get it through 'the law' and when we do not, we blame the law. Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. ... That is what a jury trial does. It

> supplies that flexibility of legal rules which is essential to justice and popular contentment. ... The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.

John H. Wigmore, "A Program for the Trial of a Jury", 12 Am. Jud. Soc. 166 (1929).

Furthermore, if such a "duty" to convict existed, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty to reverse the conviction or enter a judgment of acquittal notwithstanding the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Green, *supra*; State v. Carlson, 65 Wn. App. 153, 828 P.2d 30, *rev. denied*, 119 Wn.2d 1022 (1992).

Thus, a legal "threshold" exists before a jury may convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. The "duty" to return a verdict of not guilty, therefore, is genuine and enforceable by law. A jury must return a verdict of not guilty if there is a reasonable doubt; however, it may return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

f. Current example of correct legal standard in instructions. The duty to acquit and permission to convict is well-reflected in the instruction in Leonard:

> If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you **may** find him guilty of such a degree of the crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you **must** acquit.

Leonard, 2 Wash.Terr. at 399 (emphasis added). This was the law as given to the jury in murder trials in 1885, just four years before the adoption of the Washington Constitution. This allocation of the power of the jury "shall remain inviolate."

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict. *See* WPIC 160.00, the concluding instruction for a special verdict, in which the burden of proof is precisely the same:

> … In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. … If you unanimously have a reasonable doubt as to this question, you must answer "no".

The due process requirements to return a special verdict—that the jury must find each element of the special verdict proven beyond a reasonable doubt—are exactly the same as for the elements of the general

verdict. This language in no way instructs the jury on "jury nullification." But it at no time imposes a "duty to return a verdict of guilty."

In contrast, the "to convict" instruction at issue here does not reflect this legal asymmetry. It is not a correct statement of the law. As such, it provides a level of coercion, not supported by law, for the jury to return a guilty verdict. Such coercion is prohibited by the right to a jury trial. Leonard, *supra*; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

g. Contrary case law is based on a poor analysis; this Court should decide the issue differently.[15] In State v. Meggyesy, the appellant challenged the WPIC's "duty to return a verdict of guilty" language. The court held the federal and state constitutions did not "preclude" this language, and so affirmed. Meggyesy, 90 Wn. App. at 696.

In its analysis, Division One of the Court of Appeals characterized the alternative language proposed by the appellants—"you **may** return a verdict of guilty"—as "an instruction notifying the jury of its power to acquit against the evidence." 90 Wn. App. at 699. The court spent much of its opinion concluding there was no legal authority requiring it to instruct a jury it had the power to acquit against the evidence.

[15] A decision is incorrect if the authority on which it relies does not support it. State v. Nunez, 174 Wn.2d 707, 713, 285 P.3d 21 (2012).

Division Two has followed the Meggyesy holding. State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), *rev. denied*, 137 Wn.2d 1024 (1999); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005). Without much further analysis, Division Two echoed Division One's concerns that instructing with the language 'may" was tantamount to instructing on jury nullification.

Appellant respectfully submits the Meggyesy analysis addressed a different issue. "Duty" is the challenged language herein. By focusing on the proposed remedy, the Meggyesy court side-stepped the underlying issue raised by its appellants: the instructions violated their right to trial by jury because the "duty to return a verdict of guilty" language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

However, portions of the Meggyesy decision are relevant. The court acknowledged the Supreme Court has never considered this issue. 90 Wn. App. at 698. It recognized that the jury has the power to acquit against the evidence: "This is an inherent feature of the use of general verdict. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700 (foot notes omitted). The court also relied in part upon federal cases in which the approved "to-convict"

instructions did *not* instruct the jury it had a "duty to return a verdict of guilty" if it found every element proven. *See,* Meggyesy, 90 Wn. App. at 698 fn. 5.[16, 17] These concepts support Mr. Leonard's position and do not contradict the arguments set forth herein.

The Meggyesy court incorrectly stated the issue. The question is not whether the court is required to tell the jury it can acquit despite finding each element has been proven beyond a reasonable doubt. The question is whether **the law** ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury it does. And an instruction that says it has such a duty impermissibly directs a verdict. Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Unlike the appellant in Meggyesy,[18] Mr. Leonard does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively

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[16] E.g., United States v. Powell, 955 F.2d 1206, 1209 (9th Cir.1991) ("In order for the Powells to be convicted, the government must have proved, beyond a reasonable doubt, that the Powells had failed to file their returns.").

[17] Indeed, the federal courts do not instruct the jury it "has a duty to return a verdict of guilty" if it finds each element proven beyond a reasonable doubt. *See* Ninth Circuit Model Criminal Jury Instructions:

> In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: …

[18] And the appellant in Bonisisio.

misled. This question was not addressed in either Meggyesy or Bonisisio; thus the holding of Meggyesy should not govern here. The Brown court erroneously found that there was "no meaningful difference" between the two arguments. Brown, 130 Wn. App. at 771. Meggyesy and its progeny should be reconsidered, and the issue should be analyzed on its merits.

h. The court's instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instructions given in Mr. Leonard's case did not contain a correct statement of the law. The court instructed the jurors that it was their "duty" to accept the law as instructed, and that it was their "duty" to convict the defendant if the elements were proved beyond a reasonable doubt. Instruction No. 13 at CP 130; Instruction No. 14 at CP 131; Instruction No. 18 at CP 135.

A duty is "[a]n act or a course of action that is required of one by… law." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). Sparf, *supra*, does not provide any reasonable basis for instructing the jury that it has a "duty" to return a guilty verdict when all of the elements of the alleged crime have been proven. Although a survey of the states' and federal circuits' corresponding jury instruction language revealed that 24 (almost 40 percent) of the state courts and

federal circuits use the command "must" or its equivalent ("shall" or "duty") to point juries to verdicts of guilty[19], such instructions affirmatively mislead the jury to conclude they are without power to nullify. As such, these instructions are disingenuous by omission and, therefore, have no place in any justice system.

As this Court's very recent decision in State v. Smith, __ Wn. App. __, __ P.3d __ (April 9, 2013)[20] suggests, a more accurate and complete elements instruction would substitute the word "should" for "duty." For as this Court has recognized, the term "duty" is equivalent to the obligatory or mandatory terms "ought", "shall" or "must", while the term "should" strongly encourages a particular course of action but is still the "weaker companion" to the obligatory "ought". Appendix A at 8–10 (citations omitted). By substituting "should" for "duty", a trial court would be able to strongly suggest that the jury convict if it has found all the elements proved beyond a reasonable doubt. Indeed, as this Court recognizes, the language might even be considered to be nearly mandatory. Appendix A

[19] *See* B. Michael Dorn, "Must Find the Defendant Guilty" Jury Instructions Violate the Sixth Amendment, 91 Judicature 12, 12 (2007).

[20] The PDF version of this decision is attached as Appendix A and page citations will correspond accordingly.

at 10. Yet, by using the term "should", the trial court would no longer be affirmatively misleading jurors about their power to nullify.[21]

Here, the court's use of the word "duty" in the "to-convict" instruction conveyed to the jury that it *could not* acquit if the elements had been established. This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence, Leonard, *supra*, and failed to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864. By instructing the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict.

The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The trial court's error violated Mr. Leonard's state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial. Hartigan, *supra;* Leonard, *supra.*

[21] For example, a constitutionally proper instruction would read as follows:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then you should return a verdict of guilty.

3. The findings that Mr. Leonard has the current or future ability to pay Legal Financial Obligations including the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence.

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.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation."[22] A court-ordered legal financial obligation may include the costs of incarceration (prison and/or county jail) and medical care incurred in a county jail. RCW 9.94A.760; RCW 10.01.160; RCW 70.48.130; s*ee also* RCW 9.94A.030(30). 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

[22] It appears that imposition of legal financial obligations is also contemplated by the Juvenile Justice Act. *See* RCW 13.40.192.

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." RCW 10.01.160(3).

b. There is insufficient evidence to support the trial court's findings that Mr. Leonard has the present or future ability to pay legal financial obligations, including the means to pay costs of incarceration and medical care. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding 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." 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

Here, the court made express and formal findings that Mr. Leonard has the present ability or likely future ability to pay legal financial obligations ("LFOs"), including the means to pay for the costs of incarceration and the means to pay for any costs of medical care incurred

by Yakima County on his behalf. CP 155 at ¶ 2.7[23], 157 at ¶¶ 4.D.4 and 4.D.5. But, whether a finding is expressed or implied, it 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.

[23] The Judgment and Sentence at ¶ 2.7 incorrectly cites to RCW 9.94A.753, which concerns restitution. The correct authority is RCW 9.94A.760.

The record here does not show that the trial court took into account Mr. Leonard's financial resources and the nature of the burden of imposing LFOs including the costs of incarceration and medical care on him. There was no discussion of it at sentencing. 8/24/12 RP 53–88. The record instead supports the opposite conclusion: the trial court found Mr. Leonard indigent[24] for purposes of pursuing this appeal. The record contains no evidence to support the trial court's findings in ¶ 2.7 that Mr. Leonard has the present or future ability to pay LFOs, including the means to pay costs of incarceration (¶ 4.D.4)[25] and the means to pay costs of medical care (¶ 4.D.5). The findings are therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported findings. Bertrand is clear: where there is no evidence to support the trial court's findings regarding ability and means to pay, the findings must be stricken. As to medical costs, the State may argue that the issue is somehow "moot" because it appears no medical costs were imposed in this case. However, Mr. Leonard does not challenge the *imposition* of medical costs. Rather, the trial court made a specific finding that he has the means to pay costs of

[24] SCOMIS sub no. 72, filed 10/24/12, Order of Indigency.

medical care, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Similarly, Mr. Leonard is not at this time challenging the *imposition* of costs of incarceration at Yakima County Jail or in a prison, or the specified monetary assessment at ¶ 4.D.3 of the Judgment and Sentence.[26] As with medical costs, the trial court's findings that he has the means and ability to pay costs of incarceration and total legal financial obligations are unsupported by the record and must be stricken. Id.

This remedy 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 appears to be no controlling contrary authority holding that it is it 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

[25] The sentencing court imposed a total term of confinement of 210 months. The costs of incarceration at $50/day would roughly total $319,375 (18,250/year x's 17.5 years).
[26] CP 157.

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.

The reversal of the trial court's judgment and sentence findings at ¶ 2.7, ¶¶ 4.D.4 and 4.D.5 simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Leonard until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that " '[t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*' " Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

Since the record does not support the trial court's findings that Mr. Leonard has or will have the ability to pay these LFOs when and if the State attempts to collect them, the findings are clearly erroneous and must therefore be stricken from the record. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Mr. Leonard's conviction. Alternatively it should find the to-convict instructions constituted manifest constitutional error and reverse the conviction and remand for a new trial or to strike the findings of ability and means to pay legal financial obligations including costs of medical care and incarceration.

Respectfully submitted on May 3 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 3, 2013, 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 brief of appellant and Appendix A (State v. Smith, __ Wn. App. __, __ P.3d __ (2013)):

Matthew David Leonard (#750248)
Coyote Ridge Corrections Center
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s/Susan Marie Gasch, WSBA #16485

FILED

April 9, 2013

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 29832-9-III
Respondent,	)	
	)	
v.	)	
	)	OPINION PUBLISHED
DARRELL F. SMITH,	)	IN PART
	)	
Appellant.	)	

SIDDOWAY, A.C.J. — Darrell Smith was convicted of multiple crimes arising out of his alleged 12-hour unlawful imprisonment of Eric Chadwick. He was also convicted for possession of methamphetamine found in a search following his arrest. While he makes numerous assignments of error, we find one dispositive: the atypical wording of the elements instructions given at trial could have allowed jurors to convict him even if they entertained reasonable doubt as to his guilt.

We reject Smith's single evidence sufficiency challenge (to his conviction for possession of methamphetamine), reverse his convictions on the basis of the instructional error, and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND

Darrell Smith was convicted of first degree robbery, unlawful imprisonment, second degree assault, misdemeanor harassment, and second degree theft. All arose from a scheme that Smith hatched with a drifter, Desert Sand Donini, who was then living at the same motel in Moses Lake as was Smith. Donini had become acquainted with Eric Chadwick, who was in Moses Lake to work a temporary construction job and had helped her out when she ran out of money in late February 2010. Smith and Donini realized that Chadwick, who had a good job and was then working 60 hours a week, probably had a fair amount of money.

The many twists and turns of what became Smith's and Donini's alleged 12-hour imprisonment of Chadwick need not be recounted, given the basis for our decision. It suffices to say that Smith demanded that Chadwick withdraw funds from Chadwick's bank accounts, buy assets that Smith could traffic, and—when Chadwick's credit/debit card was eventually frozen—forced him to drive Smith to locations where Smith could steal merchandise and then sell it. Eventually, Chadwick claims to have seen his opportunity to escape and did, promptly calling police.

Smith and Donini were found and arrested. Smith agreed to speak with Moses Lake police officers and his statement to police was recorded. A search warrant was obtained for his motel room, resulting in discovery of a CD (compact disc) with white residue on its surface that tested positive for methamphetamine.

Donini agreed to testify for the State at trial, where she supported Chadwick's version of his imprisonment. Smith's defense at trial was that Chadwick had been a willing participant in the 12-hour crime spree and called police only when he became concerned about being charged.

At trial, the court-prepared jury instructions differed in several respects from the Washington pattern jury instructions. The court's introduction to instructions given at the conclusion of trial omitted some of the cautions and directions included in 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02 (3d ed. 2008) (WPIC) (Conclusion of Trial—Introductory Instruction).

The elements instructions were generally based on WPIC 4.21 (Elements of the Crime) but had been modified with respect to directions given the jury depending on how it weighed the evidence. After stating the elements of a given crime, WPIC 4.21 provides:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then *it will be your duty to* return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt . . . , then *it will be your duty to* return a verdict of not guilty.

(Emphasis added.)

The court's elements instructions to the jury generally read, instead:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then *you should* return a verdict of guilty . . . .
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt . . . , then *you should* return a verdict of not guilty.

Clerk's Papers (CP) at 60 (Instruction 12, second degree assault); 62 (Instruction 14, possession of a controlled substance); 66 (Instruction 18, second degree theft); 71 (Instruction 23, unlawful imprisonment); 74 (Instruction 26, misdemeanor harassment); 52-53 (Instruction 5, robbery[1]). Smith did not object to any of these instructions.

The jury began its deliberations late in the afternoon. At around 11 a.m. the next morning, the jury asked to watch Smith's recorded statement again. The trial judge initially declined the request. After further deliberations, the jury sent out the following statement:

> We have come to a stand-still and don't believe we can get any closer to a unanimous decision without seeing the parts of the interview video between Officer Loyd and Darrell Smith that we viewed during trial.

CP at 80. The judge then allowed the video to be replayed for the jury in open court, over Smith's objection. In replaying the video, portions that had not earlier been admitted into evidence were inadvertently presented. The jury thereafter reached its verdict.

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[1] Instruction 5, dealing with robbery, was worded slightly different but still directed the jury that "if, after weighing the evidence, you have a reasonable doubt . . . , then you should return a verdict of not guilty."

Smith was convicted of first degree robbery, unlawful imprisonment, second degree assault, possession of methamphetamine, misdemeanor harassment, and second degree theft. A motion for a new trial on the burglary charge was granted but the court denied a motion for a new trial based on the inadvertent airing of video footage that had not been admitted in evidence, the court finding no prejudice.

Smith was sentenced to 17 years in prison. He appeals.

ANALYSIS

I

The trial court's introductory instruction to the jury at the conclusion of the evidence did not include 12 cautions or directions usually included; among those omitted were that the jurors accept the law "regardless of what [they] personally believe the law is," and "apply the law from [the court's] instructions to the facts that [they] decide have been proved, and in this way decide the case." WPIC 1.02, *compare with* CP at 47-49. More significantly, the elements instructions directed the jurors that "if, after weighing all the evidence, you have a reasonable doubt . . . , then *you should* return a verdict of not guilty." Smith argues that modifications to the pattern instructions created a "free for all," including leaving the jury with no constitutional guidance.

Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal. RAP 2.5(a); *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). Our general refusal to entertain issues that were not raised in the trial court

has a specific applicability to most jury instructions in criminal cases in light of CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused "'in order that the trial court may have the opportunity to correct any error.'" *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988) (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). Manifest errors affecting a constitutional right may be raised for the first time on appeal, however. *Id.* at 685.

Smith argues that the trial court's instructions relieved the State of its burden of proving all of the required elements beyond a reasonable doubt, thereby violating due process and constituting manifest constitutional error. We agree that his challenge to the elements instructions presents an issue of manifest error affecting a constitutional right. *See State v. Dow*, 162 Wn. App. 324, 330, 253 P.3d 476 (2011) (citing *State v. O'Hara*, 167 Wn.2d 91, 100-01, 217 P.3d 756 (2009)); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) (observing that the elements instruction "carries with it a special weight because the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence").

With respect to the claimed omissions from the trial court's introduction to its concluding instructions, though, we disagree. The requirements of due process usually are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be

acquitted. *Scott*, 110 Wn.2d at 690. The directions and cautions included in WPIC 1.02 can prove important on appeal if a defendant contends that jurors reached their verdict for an improper reason; in such cases, appellate courts regularly rely on a trial court's introductory instructions and the presumption that juries follow those instructions. *See, e.g., Diaz v. State*, 175 Wn.2d 457, 474, 285 P.3d 873 (2012). Smith has not demonstrated that the trial court's omissions of some of the cautions and directions included in WPIC 1.02 amounted to constitutional error, however, let alone manifest constitutional error.

We therefore review only the elements instructions. Review is de novo, in the context of the instructions as a whole. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

The specific language of the instructions is left to the discretion of the trial court. *State v. Coe*, 101 Wn.2d 772, 787, 684 P.2d 668 (1984). The instructions as a whole must, however, correctly state the law. *Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000). While pattern jury instructions are intended to be accurate, concise, unbiased statements of the law, they are not the law and are not mandatory. *In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 369, 119 P.3d 816 (2005).

"What the factfinder must determine to return a verdict of *guilty* is prescribed by the Due Process Clause." *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (emphasis added). The prosecution bears the burden of proving all

elements of the offense charged and must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish each of those elements. *Id.* at 277-78 (citing, *e.g.*, *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). The beyond-a-reasonable-doubt requirement applies in state as well as federal proceedings. *Id.* at 278.

A corollary of the due process requirement that a jury find proof beyond a reasonable doubt in order to return a verdict of guilty is that it must return a verdict of not guilty if the State does not carry its burden. Jury instructions must convey this. It is reversible error to instruct the jury in a manner relieving the State of its burden. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Smith argues that the substitution of the word "should" reduced the State's burden by connoting what is proper rather than what is required. By directing the jury that it "should" return a verdict of not guilty if the State failed to meet its burden of proof, Smith argues that the jury was left with the impression that it ought to acquit if possessed of reasonable doubt but that it was not mandatory. No Washington decisions address the substitution of "should" for "duty" in an elements instruction, but Smith cites the observation of a Massachusetts appellate court that the "use of the permissive 'should' rather than the mandatory 'must'" is a serious misstep that "goes to the heart of the [matter]: where reasonable doubt remains, acquittal is mandatory." *Commonwealth v. Caramanica*, 49 Mass. App. Ct. 376, 729 N.E.2d 656, 659 (2000). Even so, the

Massachusetts court held that "[w]ere this the only flaw . . . , reversal might not be required." *Id.*

Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004) supports Smith's position more strongly. In that case, the Ninth Circuit reviewed a district court's grant of habeas relief based, among other claimed error, on the court's instruction 10, which explained that before the jury could convict, it "'*should* require the Prosecution to prove every material allegation contained in the Information beyond a reasonable doubt.'" *Id.* at 821 n.5 (emphasis added). While the Ninth Circuit reversed the district court's grant of habeas relief, it explained that any error in instruction 10 was immediately cured by a following statement that if "'you entertain a reasonable doubt of the truth of any one of these material allegations, then it is *your duty* to give the Defendant the benefit of such doubt and acquit him,'" and by summing up with the unequivocal statement: "'There *must* be proof beyond a reasonable doubt.'" *Id.* at 822. In a footnote, the court explained why use of the term "should" may have misstated the jury's obligation, which was

> by no means clear, as common definitions of "should," "shall" and "must" include both an obligatory and an exhortatory connotation. *See, e.g., Webster's Third New International Dictionary* (unabridged 1986).

Id. at 822 n.6; *see also Caudill v. Judicial Ethics Comm.*, 986 S.W.2d 435, 438 (Ky. 1998) (concluding, in a different context, that "[s]hould, while definitely strongly encouraging a particular course of action, is permissive. Shall requires a particular course of action and accordingly, is mandatory"); *Louisiana Seafood Mgmt. Council v.*

Louisiana Wildlife & Fisheries Comm'n, 97-1367 (La. 5/19/98); 715 So. 2d 387, 394 ("The modern rule rejects [the] 'arcane' meaning [of 'should' as 'was obliged to'] and instead defines 'should' as 'the weaker companion to the obligatory "ought."'" (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 1065 (1979); *State v. Thomas*, 528 So. 2d 1274, 1275 (Fla. Dist. Ct. App. (1988))). *Louisiana Seafood* also relies on Bryan Garner's *A Dictionary of Modern Legal Usage*, the most recent edition of which includes the following entry addressing "ought" and "should":

> *Ought* should be reserved for expressions of necessity, duty, or obligation; *should*, the slightly weaker word, expresses mere appropriateness, suitability, or fittingness.

DICTIONARY OF LEGAL USAGE 644 (3d ed. 2011); *but cf. Torrence v. State*, 574 So. 2d 1188, 1189 (Fla. Dist. Ct. App. 1991) (upholding the use of "should" in instructing a jury whether to acquit).

We suspect that in this case the jury more likely than not understood the court's use of "should" in the elements instruction as mandatory. But we cannot be sure that it did. One of our panel queried the lawyers during oral argument with "you *should* eat your vegetables but you don't *have to* eat your vegetables," and "you *should* get more exercise doesn't mean you *shall* get more exercise." Even the State did not disagree.

Erroneously instructing the jury that it may acquit if in reasonable doubt is structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (denial of the right to trial by jury by giving of a defective

reasonable doubt instruction is structural error, citing *Sullivan*). Structural error is not subject to harmless error analysis; prejudice is necessarily presumed. *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009). "'[T]he difficulty of assessing the effect of the error'" is one criterion for identifying harmless error. *State v. Wise*, 176 Wn.2d 1, 14 n.7, 288 P.3d 1113 (2012) (quoting *Gonzalez-Lopez*, 548 U.S. at 149 n.4). It is illustrated here. At one point, this jury was deadlocked. We do not know why and we do not know how the deadlock was resolved. Perhaps jurors concluded from the court's instructions that while jurors with lingering doubts *should* return a verdict of not guilty, they did not have to.

"The jury instructions, read as a whole, 'must make the relevant legal standard manifestly apparent to the average juror.'" *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). The elements instructions did not do so here.

We reverse Smith's convictions and remand for a new trial.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

II

All but one of Smith's remaining assignments of error are to trial events that are unlikely to recur. He does make one sufficiency of error challenge that requires review.

He argues that possession of methamphetamine residue in only trace amounts is insufficient to support a possession conviction. He urges us to construe Washington's Uniform Controlled Substances Act, chapter 69.50 RCW, to require possession of some minimum amount of a controlled substance, beyond residue or a trace amount, to support conviction.

We review questions of statutory interpretation de novo. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Our goal in interpreting a statute is to ascertain the legislature's intent. *Id.* When a statute's meaning is plain on its face, we must give effect to that meaning as expressing the legislature's intent. *Id.* The statute's plain meaning is determined from the ordinary meaning of its language, the statute's general context related provisions, and its statutory scheme as a whole. *Id.* When a statute is unambiguous, words or clauses that the legislature has chosen not to include may not be added. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The act provides:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

RCW 69.50.4013(1). "Controlled substance" is defined to mean "a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state

laws, or federal or board rules." RCW 69.50.101(d). Nowhere does the act identify a minimum quantity required to support conviction.

The plain language of the act, then, does not support the requirement that an offender possess any minimum amount of a controlled substance. *See State v. Alexander*, 125 Wn.2d 717, 726, 888 P.2d 1169 (1995) (concluding that the legislature did not establish a minimum amount for which a defendant could be prosecuted in determining whether an "extraordinarily small amount" could be the basis of an exceptional reduced sentence). Smith nonetheless urges us to recognize a quantity requirement as a common law element of the offense, lest Washington be the only state in the union that criminalizes possession of a trace amount of a controlled substance without at the same time requiring knowledge as an element of the crime. Our Supreme Court has already held that knowledge is not an element of the crime of possession. *State v. Bradshaw*, 152 Wn.2d 528, 530-40, 98 P.3d 1190 (2004).

As Smith acknowledges, Division One of our court rejected the construction of the act that he asks us to adopt in *State v. Malone*, 72 Wn. App. 429, 438, 864 P.2d 990 (1994). And this division held in *State v. Rowell*, 138 Wn. App. 780, 785, 158 P.3d 1248 (2007) that an offender's lack of knowledge that she or he possesses a controlled substance is properly considered in connection with the affirmative defense of unwitting possession. While Smith suggests that neither *Malone* nor *Rowell* engaged in a full analysis, we are satisfied that they do. The act does not require that a minimum amount

be possessed in order to sustain a conviction. *Malone*, 72 Wn. App. at 439. As to knowledge or lack thereof,

> once the State proves the elements of unlawful possession of a controlled substance, the burden then falls on the defendant to prove the affirmative defense of unwitting possession. *Bradshaw*, 152 Wn.2d at 538; *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). The affirmative defense of unwitting possession "does not improperly shift the burden of proof." *Bradshaw*, 152 Wn.2d at 538. Instead, it is a "'judicially created affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute.'" *State v. Buford*, 93 Wn. App. 149, 151-52, 967 P.2d 548 (1998) (quoting *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 931 (1998)); *Staley*, 123 Wn.2d at 799.

Rowell, 138 Wn. App. at 785-86. Possession of an "extraordinarily small amount" is also a substantial and compelling reason for downward departure from the standard sentence range. *Alexander*, 125 Wn.2d at 727.

STATEMENT OF ADDITIONAL GROUNDS

In his pro se statement of additional grounds (SAG), Mr. Smith raises three issues, two of which relate to the airing of the video. Given our remand for a new trial, there is no need to address that event.

The third issue is his claim that the trial court erred in failing to make written findings supporting its decision to admit the statements made by Mr. Smith to Officer Loyd.

When a defendant's statement is to be offered in evidence, the court is required to set a hearing for the purpose of determining whether the statement is admissible.

CrR 3.5(a). Although a CrR 3.5 hearing is mandatory, under proper circumstances a defendant can waive a voluntariness hearing and the formal entry of written findings. *State v. Nogueira*, 32 Wn. App. 954, 957, 650 P.2d 1145 (1982).

Here, Mr. Smith and the State signed a "Stipulation for the Admission of Defendant's Statements Pursuant to CrR 3.5." SAG app. C. The stipulation provides "that all statements made by the defendant to investigating officers during the pendency of the investigation with regards to this case were made with the defendant's knowledge of his constitutional rights pursuant to Miranda[2] and with the defendant waiving his/her rights; and that the statements were freely and voluntarily given." *Id.*

The written findings required by CrR 3.5(c) are of the evidence presented and conclusions reached at a CrR 3.5 hearing. Where the hearing is waived there is no record to be made. The trial court did not err.

We reverse Smith's convictions and remand for a new trial.

Siddoway, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).