No. 45498-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lance Larson,

Appellant.

Kitsap County Superior Court Cause No. 13-1-00288-2

The Honorable Judge Jennifer A. Forbes

Appellant's Opening Brief

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2. Mr. Larson's possession conviction was based on insufficient evidence.

3. The prosecution failed to prove that Mr. Larson's alleged possession was more than momentary handling or passing control of a pipe containing methamphetamine.

> **ISSUE 1:** Neither ingestion of a controlled substance nor passing, momentary control is enough to prove possession. The jury convicted Mr. Larson of possessing methamphetamine based only on evidence that he had ingested and momentarily handled someone else's drugs. Did the state present insufficient evidence for a rational jury to find Mr. Larson guilty beyond a reasonable doubt?

4. Mr. Larson was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

5. Defense counsel was ineffective for failing to timely object to the admission of Mr. Larson's statement under the *corpus delicti* rule.

6. Defense counsel was ineffective for waiting to make his *corpus delicti* objection until after Mr. Larson had testified and corroborated his extrajudicial statement.

7. Defense counsel was ineffective for failing to propose an instruction necessary to the defense.

8. Defense counsel unreasonably failed to propose an instruction telling jurors that momentary handling or passing control is insufficient to establish possession.

> **ISSUE 2:** Counsel provides ineffective assistance by rendering deficient performance that prejudices his/her client. Defense counsel delayed moving to suppress Mr. Larson's incriminating statement under the *corpus delicti* rule until after his client had provided the necessary corroborating testimony.

Was Mr. Larson denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

ISSUE 3: Defense counsel provides ineffective assistance by failing to propose instructions necessary to the defense. Mr. Larson's attorney failed to propose an instruction telling jurors that momentary handling and passing control are insufficient to prove possession of a controlled substance. Was Mr. Larson denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

9. Mr. Larson's bail jumping conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.

10. Mr. Larson's bail jumping conviction violated his state constitutional right to notice of the charges against him, under Wash. Const. art. I, §§ 3 and 22.

11. The Information was deficient because it failed to allege the essential elements of bail jumping.

12. The Information did not allege that Mr. Larson failed to appear "as required" by the order releasing him or admitting him to bail.

ISSUE 4: A charging document must apprise the accused of all of the essential elements of an offense. The Information charging Mr. Larson with bail jumping omitted an essential element of the crime. Did the charging document violate Mr. Larson's right to notice under the Sixth and Fourteenth Amendments and art. I, §§ 3 and 22?

13. Mr. Larson's bail jumping conviction infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of each crime.

14. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.

15. The court's elements instruction relieved the state of its burden to prove that Mr. Larson failed to appear "as required."

16. The trial court erred by giving Instructions No. 13.

ISSUE 5: A court violates due process by failing to instruct the jury on every element of a charged offense. Here, the "to convict" instruction for bail jumping omitted an element of the charge. Did the trial court violate Mr. Larson's Fourteenth Amendment right to have the jury instructed on each element of the bail jumping offense?

17. The trial court erred by imposing attorney fees.

18. The trial court's imposition of attorney's fees infringed Mr. Larson's Sixth and Fourteenth Amendment right to counsel.

19. The court erred by finding that Mr. Larson has the present or future ability to pay his legal financial obligations.

20. The trial court erred by adopting Finding of Fact No. 4.1(Judgment and Sentence).

ISSUE 6: A trial court may only impose attorney fees after finding that the offender has the present or likely future ability to pay. Here, the court imposed $1135 in attorney fees but failed to conduct any inquiry into whether Mr. Larson could afford to pay the amount. Did the trial court violate Mr. Larson's Sixth and Fourteenth Amendment right to counsel?

21. The trial court erred by imposing a jury demand fee in excess of that authorized by statute.

22. The trial court erred by imposing costs and fees that were not authorized by statute.

ISSUE 7: By statute, a court may order payment of a $250 jury demand fee upon conviction following trial. Here, the court ordered Mr. Larson to pay a jury demand fee exceeding $1400. Did the court exceed its authority in ordering Mr. Larson to pay a jury demand fee greater than $250?

ISSUE 8: A court exceeds its authority by ordering payment of legal financial obligations beyond what is permitted by statute. The court ordered Mr. Larson to pay a $500 contribution to the Kitsap County Sheriff's office and a $100 contribution to an "expert witness fund," neither of which are

authorized by statute. Did the sentencing court exceed its authority?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On January 7, 2013, the police executed a search warrant targeting one of Lance Larson's roommates. RP 212, 225. During the search, the police found a methamphetamine pipe in a box of papers, some of which had Mr. Larson's name on them. The documents dated from 2008 to 2010. Ex 1; RP 172, 180, 187-88. Mr. Larson denied ownership of the pipe. He also told officers that he had last used meth at a party on New Year's Eve. RP 185, 216.

The state charged Mr. Larson with possession of methamphetamine. CP 1-2. At his omnibus hearing, the court told Mr. Larson that his next hearing would be on May 18th. RP 302. The court later corrected the date to May 14th. RP 304.

In the early afternoon of May 14th, Mr. Larson called his attorney's office and found out that he had missed his hearing at 10:30 that morning. RP 337. Mr. Larson called the clerk's office, and a clerk told him to call the prosecutor's office. RP 338. The prosecutor's office told Mr. Larson to go to court on May 16th to quash his warrant. He did so. RP 338, 346-47.

The state charged Mr. Larson with bail jumping. The Information alleged that:

> On or about May 14, 2013, in the County of Kitsap, State of Washington, the above-named Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender for service of sentence in which a Class B or Class C felony has been filed, to wit: Kitsap County Superior Court Cause No. 13-1-0028802; contrary to Revised Code of Washington 9A.76.170.
> CP 2.

Both charges proceeded to a jury trial. At trial, Mr. Larson admitted that he had smoked meth at a party on December 31st. RP 310. He explained that a pipe was passed around at the party, and that he took two hits. RP 310, 351. He also admitted that he had received a positive urinalysis (UA) result for meth on January 2nd. RP 311-12. He said, however, that the pipe found in the house was not his and he had never seen it before. RP 316.

At the close of evidence, defense counsel moved to preclude the state from proceeding on the theory that Mr. Larson possessed meth on December 31st. RP 275. Counsel argued that the *corpus delicti* rule prohibited conviction based on Mr. Larson's statement alone. RP 375. The court noted that the *corpus delicti* rule only applies to extrajudicial statements, and that Mr. Larson had already corroborated his statement while on the witness stand. RP 400.

Defense counsel proposed an instruction defining possession. Defendant's Proposed Instructions, Supp. CP. The court instructed the jury using this instruction, which included the following language:

> … Proximity alone without proof of dominion and control is insufficient to establish constructive possession.… Once a substance is ingested by an individual, the individual no longer exercises dominion and control over the ingested substance; however, that ingestion may be circumstantial evidence of prior possession.
> Court's Instructions, Supp CP.

Defense counsel did not request an instruction explaining that passing control or momentary handling is insufficient to prove possession. Defendant's Proposed Instructions, Supp CP; Defendant's Supplemental Proposed Instructions, Supp CP. At the state's request, the court submitted a special verdict to the jury, asking jurors to specify which instance of possession formed the basis for any guilty verdict on Count I. Special Verdict Form, Supp CP; RP 434.

The to-convict instruction for bail jumping listed the elements as follows:

> (1) That on or about May 14, 2013, the defendant failed to appear before a court;
> (2) That the defendant was charged with a class B or class C felony;
> (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
> (4) That the acts occurred in the State of Washington.
> Court's Instructions, Supp CP.

The jury convicted Mr. Larson of both charges. RP 490. By means of the special verdict form, jurors acquitted Mr. Larson of possessing the pipe and residual meth found in his home. RP 490. Instead, jurors found him guilty of possessing drugs at the party on December 31st. RP 490.

Over objection, the court ordered Mr. Larson to pay a "jury demand fee" of $1439.74. Other fees imposed included $1135 in attorney's fees, a $100 contribution to the Kitsap County Expert Witness Fund, and a $500 contribution to the Kitsap County Sheriff's office. CP 12; RP 514. Neither party made any argument or presented any evidence regarding Mr. Larson's financial situation. RP 501-29. The court entered a boilerplate finding that Mr. Larson had the present or future ability to pay legal financial obligations (LFOs). CP 12 (finding 4.1).

This timely appeal follows. CP 18-30.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. LARSON OF POSSESSION OF A CONTROLLED SUBSTANCE.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact

could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied,* 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. No rational jury could have found beyond a reasonable doubt that Mr. Larson possessed a controlled substance on December 31st.

Neither ingestion nor the presence of contraband in a person's body is sufficient to prove that s/he possessed the contraband. *State v. A.T. P.-R*, 132 Wn. App. 181, 185, 130 P.3d 877 (2006). Momentary handling or passing control of contraband is likewise insufficient to establish possession. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

By special verdict, the jury convicted Mr. Larson of possessing methamphetamine on December 31. RP 490. The only evidence of possession on that date was Mr. Larson's statement that he had smoked meth at a party, combined with his positive UA three days later. RP 310-12, 351. That evidence was insufficient for a rational jury to find beyond a reasonable doubt that he had possessed a controlled substance. *A.T. P.-R*, 132 Wn. App. at 185; *George*, 146 Wn. App. at 920.

First, Mr. Larson's admission to ingesting meth is not enough to establish possession. *A.T. P.-R*, 132 Wn. App. at 185. Likewise, the

positive UA proves only that meth was absorbed into Mr. Larson's system, not that he possessed it. *Id.*

Second, even if the fact-finder relied on Mr. Larson's statement and his UA result as circumstantial evidence that he had physically held the meth pipe while at the party, that still would have been insufficient to convict. *George*, 146 Wn. App. at 920. At most, the evidence demonstrated that Mr. Larson had momentary, passing control of a controlled substance, which is not enough to prove possession. *Id.*

No rational jury could have found beyond a reasonable doubt that Mr. Larson possessed a controlled substance on December 31st. *Chouinard*, 169 Wn. App. at 899. Mr. Larson's possession conviction must be reversed. *Id.*

II. MR. LARSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend VI; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Id.*

B. Defense counsel provided ineffective assistance by failing to seek suppression of Mr. Larson's statement under the *corpus delicti* rule at the beginning of trial.

The *corpus delicti* rule precludes conviction based solely on the accused's confession. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). If the state fails to provide corroborating evidence for each element of the charge, the conviction must be reversed for insufficient evidence. *Id.* at 254. The *corpus delicti* rule requires suppression of an inculpatory statement to the police if it is not corroborated by independent evidence. *State v. Whalen*, 131 Wn. App. 58, 62, 126 P.3d 55 (2005).

The *corpus* rule only applies to extrajudicial statements. *State v. C.M.C.*, 110 Wn. App. 285, 288, 40 P.3d 690 (2002). Evidence introduced by the defense at trial can provide the necessary corroboration for *corpus delicti*. *State v. Pietrzak*, 110 Wn. App. 670, 680, 41 P.3d 1240 (2002).

Mr. Larson's defense attorney moved to preclude the state from proceeding based on the theory that he had possessed meth on December 31st. RP 375. Counsel noted that, under the *corpus* rule, the state had failed to provide evidence corroborating Mr. Larson's admission to using drugs on that date. RP 375.

But defense counsel did not make his *corpus* motion until after Mr. Larson had testified and the defense had rested. RP 375. Mr. Larson's attorney had already elicited the very corroboration the state needed to admit his extrajudicial statement and proceed on the theory that he had possessed drugs on New Year's Eve. RP 310-12. Failure to raise the issue earlier in the course of the trial was deficient performance. *Kyllo*, 166 Wn.2d at 862.

Mr. Larson was prejudiced by his attorney's deficient performance. The state would have been unable to provide evidence corroborating drug possession on December 31st. There is a substantial probability that defense counsel's error affected the outcome of the trial.[1] *Kyllo*, 166 Wn.2d at 862.

Defense counsel provided ineffective assistance by failing to move for suppression of Mr. Larson's statement based on the rule of *corpus*

[1] The conviction was based on the December 31st possession.

delicti at the beginning of trial. *Id.* Mr. Larson's possession conviction must be reversed. *Id.*

C. Defense counsel provided ineffective assistance by failing to propose an instruction informing the jury that momentary handling is insufficient to establish possession.

To be minimally competent, an attorney must research the relevant law. *Kyllo*, 166 Wn.2d at 862. Absent a legitimate tactical justification, counsel's failure to propose a jury instruction necessary to the defense is ineffective assistance of counsel.[2] *State v. Powell*, 150 Wn. App. 139, 155, 206 P.3d 703 (2009). The accused is prejudiced by counsel's failure to propose a necessary jury instruction when the jury is provided with no way to recognize and weigh the legal significance of the evidence. *Id.* at 156-57. In such a situation, the jury is left believing it must convict even where the evidence supports acquittal. *Id.*

In order to establish possession, the state must prove that the accused had actual control over the item possessed. *George*, 146 Wn. App. at 920. Evidence of passing control or momentary handling is insufficient to prove possession. *Id.*

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[2] Jury instructions must accurately state the law and permit each side to argue its theory of the case. *Strange v. Spokane Cnty.*, 171 Wn. App. 585, 601, 287 P.3d 710 (2012), reconsideration denied (Jan. 16, 2013), *review denied,* 177 Wn.2d 1016, 304 P.3d 114 (2013).

Defense counsel provided ineffective assistance by failing to propose an instruction telling the jury that evidence that Mr. Larson had momentarily handled drugs was not sufficient to convict him of possession. *Powell*, 150 Wn. App. at 155; *George*, 146 Wn. App. at 920.

The only evidence that Mr. Larson possessed drugs on December 31st was his admission to ingesting meth on that date. RP 310-12. The uncontroverted evidence demonstrated that Mr. Larson had only passing control of drugs that belonged to someone else. RP 310-12. At most, the evidence showed that Mr. Larson momentarily handled the drugs, which is insufficient to prove possession. *George*, 146 Wn. App. at 920.

Defense counsel provided ineffective assistance by failing to propose an instruction informing the jury that momentary handling was not enough to convict Mr. Larson of possession. *Powell*, 150 Wn. App. at 155; *George*, 146 Wn. App. at 920. Defense counsel did obtain an instruction that mere proximity is insufficient to prove possession, but left out the rule about passing control. Defendant's Proposed Instructions, Supp CP. Counsel had no valid tactical reason for failing to propose a complete instruction defining possession. *Powell*, 150 Wn. App. at 155; *George*, 146 Wn. App. at 920.

Mr. Larson was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. Without proper instruction, the jury was left

without the legal knowledge necessary to adequately consider the evidence. *Powell*, 150 Wn. App. at 156-57. The jury likely believed that the evidence of passing control on December 31st required conviction, even though the testimony actually supported acquittal. *Id.* There is a substantial probability that counsel's failure to propose the instruction affected the outcome of the trial. *Kyllo*, 166 Wn.2d at 862.

Mr. Larson received ineffective assistance of counsel when his attorney failed to propose an instruction informing the jury that momentary handling is insufficient to convict for possession. *Powell*, 150 Wn. App. at 155; *George*, 146 Wn. App. at 920. Mr. Larson's possession conviction must be reversed. *Id.*

III. MR. LARSON'S BAIL JUMPING CONVICTION VIOLATED DUE PROCESS BECAUSE THE COURT'S "TO CONVICT" INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE CHARGED CRIME.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error

affecting a constitutional right may be raised for the first time on review.[3] RAP 2.5(a)(3).

Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.

B. The court's "to convict" instruction did not include all the elements of bail jumping.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith,* 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This is so even if the missing element is

[3] The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); *see State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

supplied by other instructions. *Id; Lorenz,* 152 Wn.2d 22 at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Instruction No. 13 relieved the state of its burden to prove each element of bail jumping beyond a reasonable doubt.

In order to convict a person for bail jumping, the state must prove that s/he: (1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with knowledge of a required subsequent personal appearance; and (3) failed to appear as required. *State v. Williams*, 162 Wn.2d 177, 184, 170 P.3d 30 (2007); RCW 9A.76.170(1).

The court's to-convict instruction did not require jurors to find that Mr. Larson failed to appear "as required." Court's Instructions, Supp CP. The instruction was not available as a "yardstick," and thus did not make the state's burden manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is trivial, formal, or merely academic, if it is not prejudicial to the accused person's substantial rights, and if it in no way

affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

The error here is presumed prejudicial, and the state cannot establish harmless error under the stringent test for constitutional error. *Watt,* 160 Wn.2d at 635. Accordingly, Mr. Larson's bail jumping conviction must be reversed and the case remanded for a new trial. *Id.*

IV. MR. LARSON'S BAIL JUMPING CONVICTION WAS ENTERED IN VIOLATION OF HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ART. I, §§ 3 AND 22.

A. Standard of Review.

Constitutional questions are reviewed *de novo*. *Zillyette*, 178 Wn.2d at 161. A challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. *Id.* Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.* The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed and reversal is required. *Id.*

B. The Second Amended Information was deficient because it did not allege that Mr. Larson failed to appear "as required."

The Sixth Amendment to the Federal Constitution guarantees an accused person the right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI.[4] A similar right is secured by the Washington State Constitution. Art. I, § 22.

Under these provisions, all essential elements must be included in the charging document. *Zillyette*, 178 Wn.2d at 158. An essential element is "one whose specification is necessary to establish the very illegality of the behavior." *State v. Johnson*, 119 Wn.2d 143, 829 P.2d 1078 (1992) (citing *United States v. Cina,* 699 F.2d 853, 859 (7th Cir.), *cert. denied,* 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)). Essential elements include both statutory and non-statutory facts that the state must prove beyond a reasonable doubt. *Zillyette*, 178 Wn.2d at 158.

In order to convict a person for bail jumping, the state must prove that s/he failed to appear in court "as required." *Williams*, 162 Wn.2d at 184; RCW 9A.76.170(1).

Here, the state charged Mr. Larson with bail jumping using the following language:

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[4] This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

> ...Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state...did fail to appear... CP 2.

The Information was deficient because it omitted the essential element that he had failed to appear "as required." *Zillyette*, 178 Wn.2d at 158; *Williams*, 162 Wn.2d at 184. Failure to appear "as required" is an essential element of bail jumping because its clarification is "necessary to establish the very illegality of the behavior." *Johnson*, 119 Wn.2d at 147. Absent the "as required" language, bail jumping would criminalize failure to appear in court on any day, whether or not there was a hearing scheduled.

The missing element cannot be read into any fair construction of the document charging Mr. Larson. *Zillyette*, 178 Wn.2d at 161. The charging language did not allege when Mr. Larson was required to appear. CP 2. Instead, it specified only the date (but not the time) that Mr. Larson had allegedly failed to appear. CP 2.

The charging document was insufficient. It violated Mr. Larson's right to notice because it omitted an essential element of bail jumping. *Zillyette*, 178 Wn.2d at 158. Mr. Larson's bail jumping conviction must be reversed. *Id.* at 162.

V. THE COURT ERRED BY ORDERING MR. LARSON TO PAY LEGAL FINANCIAL OBLIGATIONS BEYOND WHAT IS PERMITTED BY THE CONSTITUTION AND BY STATUTE.

A. Standard of Review.

Reviewing courts assess constitutional issues and questions of law *de novo*. *Zillyette,* 172 Wn.2d at 161; *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013).

B. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011).[5] A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the

first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[6]

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 29916-3-III, 2014 WL 1225910 (Wash. Ct. App. Mar. 25, 2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted,* 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenged to LFOs. *Id.* The cases do not govern Mr. Larson's claim that the court lacked constitutional and statutory authority.

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[5] *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied,* 177 Wn.2d 1021, 304 P.3d 115 (2013).

[6] *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

C. The court violated Mr. Larson's right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller,* the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

> 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) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn.

App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.[7] *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt

[7] In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

from any obligation to repay". *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the accused has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment"); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller,* we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to

reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

D. The record does not support the sentencing court's finding that Mr. Larson has the ability or likely future ability to pay his legal financial obligations.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

In this case, the sentencing court entered such a finding without any support in the record. CP 12; RP 501-29. Indeed, the record suggests that Mr. Larson lacks the ability to pay the amount ordered. The lower court found Mr. Larson indigent at the end of the proceedings. CP 31-32. His incarceration and felony conviction will also negatively impact his

prospects for employment. Accordingly, Finding No. 4.1 of the Judgment and Sentence must be vacated. *Id.*

The lower court ordered Mr. Larson to pay $1135 in fees for his court-appointed attorney without conducting any inquiry into his present or future ability to pay. CP 12; RP 501-29. This violated his right to counsel. Under *Fuller,* the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Larson to pay $1135 in attorney fees must be vacated. *Id*

E. The court exceeded its authority by ordering Mr. Larson to pay a $1439.74 jury demand fee.

The legislature has authorized courts to impose a jury demand fee of $250 in cases involving a twelve-person jury. RCW 36.18.016(3)(b).

The court exceeded its authority by ordering Mr. Larson to pay a $1439.74 jury demand fee.[8] CP 12. The fee is limited to $250 by statute. RCW 36.18.016(3)(b). The fee must be vacated and the case remanded for correction of the judgment and sentence. RCW 36.18.016(3)(b).

[8] Mr. Larson objected to the jury demand fee at trial. RP 514.

F. The court exceeded its authority by ordering Mr. Larson to pay $100 into an "expert witness fund" and $500 to the Kitsap County sheriff's office.

The court may order an offender to pay "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). The court may not order an offender to pay LFOs that are not authorized by statute. *Hathaway*, 161 Wn. App. at 651-653. Nor may the court order payment of "expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." RCW 10.01.160.

The court exceeded its authority by ordering Mr. Larson to pay $100 into an expert witness fund and $500 to the Kitsap County Sheriff's office. CP 12. First, no statute authorizes imposition of costs for expert witnesses or the sheriff's office, in general. Second, the costs of operating the crime lab and the sheriff's department were not "specially incurred by the state in prosecuting" Mr. Larson. RCW 10.01.160(2).

For these reasons, the assessments for the expert witness fund and sheriff's office must be vacated, and Mr. Larson's case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

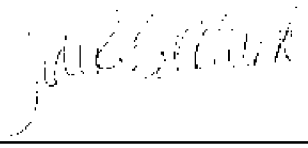
CONCLUSION

There was insufficient evidence to convict Mr. Larson of possession of a controlled substance. Defense counsel provided ineffective assistance by failing to make a *corpus* motion at the beginning of trial and by failing to propose a necessary jury instruction. The to-convict instruction for bail jumping violated due process because it left out an element of the offense. Mr. Larson was denied his constitutional right to notice because the charging document omitted an essential element of bail jumping. Mr. Larson's convictions must be reversed.

In the alternative, the court ordered Mr. Larson to pay the cost of his court-appointed attorney in a manner that impermissibly chills the exercise of the right to counsel. The court also exceeded its authority by ordering Mr. Larson to pay a $1439.74 jury demand fee as well as other LFOs that were not authorized by statute. The fees must be vacated and the case remanded for correction of the judgment and sentence.

Respectfully submitted on April 3, 2014,

BACKLUND AND MISTRY



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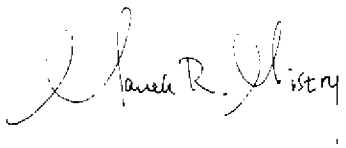

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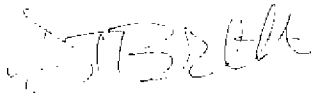

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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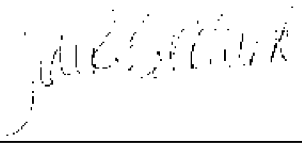
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 3, 2014.



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