No. 32543-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JAMES E. FURR,

Defendant/Appellant.

Appellant's Brief

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2. The record does not support the finding Mr. Furr has the current or future ability to pay the legal financial obligations imposed.

3. The trial court erred by imposing discretionary costs.

B. ISSUES PERTAINING TO ASSINGMENTS OF ERROR

1. Mr. Furr's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove an essential element of the crime of second degree rape--that the alleged victim was incapable of consent due to her mental incapacity?

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

C. STATEMENT OF THE CASE

James Furr was charged and convicted of second degree rape on the sole basis that the alleged victim, Rita Evans, was incapable of consent due to mental incapacity. CP 14, 34. Prior to the incident Mr. Furr had been staying at his brother's house for approximately two months. Shortly thereafter, his brother introduced Mr. Furr to Ms. Evans who lived next door with her parents. RP 175-77. The brother and his wife had known Ms. Evans for over eight years, and interacted with her on a regular basis. She was a frequent visitor at their house, took care of their pets and even had a key to their house. RP 178. She also interacted with Mr. Furr on a number of occasions, having coffee and smoking cigarettes with him on the front porch. RP 108-09, 213-14, 244, 423-24.

The brother, who was 55 years old, and his wife thought of Ms. Evans as a daughter and part of their family. They felt Ms. Evans had the mentality of a 12-year-old and they were quite protective of her. RP 177-79, 227-28. The brother communicated these feelings to Mr. Furr. RP 179.

On the day of the incident, Mr. Furr, his brother and Ms. Evans were sitting on the couch at his brother's house watching football on television and drinking alcohol. RP 180-83. At some point, Mr. Furr and

Ms. Evans went outside on the back deck to smoke cigarettes. A short time later his brother heard a noise on the back deck, looked outside and saw Mr. Furr and Ms. Evans engaging in sexual intercourse. 185-88. The brother and his wife became very upset, yelled at Mr. Furr and ordered him out of the house. RP 189-97. Mr. Furr eventually admitted having consensual sex with Ms. Evans. RP 206-08.

Ms. Evans, who was 33 years old, testified she has lived in Cle Elum since 1994 and graduated from Cle Elum high school. RP 89-90. She said she also lived in Renton and Mountlake Terrace for a time after graduation. RP 91. She testified she worked as a courtesy clerk at Safeway from 2000 until 2003. She has also worked as a waitress and is currently a housekeeper at a local motel. RP 91, 107. She said she currently lives with her father and his girlfriend but makes her own day-to-day decisions. RP 106.

Ms. Evans testified she not only understand the mechanics of sexual intercourse (penis and vagina) but also knows what being in love means and associates sexual intercourse with love. RP 103-04. She said she was in love with the father of her child when she got pregnant in high school. She said she got pregnant because of unprotected sex. RP 102-05. When asked what "unprotected sex" means, she stated it meant using a condom.

When asked about other reasons why people use condoms, she stated, "for STDs." When asked what STD's means she said, "Sexually transmitted diseases." When asked what are some examples of sexually transmitted diseases, she responded, "Herpes, AIDS, gonorrhea." RP 105. Ms. Evans also testified "sexually assaulted" means "I didn't give my okay." RP 106.

Dr. Paul Connor, a clinical psychologist and neuropsychologist, testifying as an expert witness for the State, said Ms. Evans suffers form fetal alcohol spectrum disorder (FASD). RP 332-36. He described his interaction with her as that of a pre-teenager, said her IQ was 65, and that she was very suggestible. RP 349, 351, 359. However, Dr. Connor also testified Ms. Evans was capable of forming emotional bonds with other people and her strength in verbal expression might lead other people to overestimate her actual abilities. CP 370-74. He also stated he could not say that Ms. Evans was unable to consent to sexual intercourse. RP 384.

Mr. Furr testified at first he thought Ms. Evans was shy and child-like, but after several conversations with her he thought she was a normal adult. Mr. Furr stated he thought Ms. Evans was more intelligent than he, due to her knowledge of history, the internet and other facts. RP 426-30, 451-53.

The sentencing court ordered Mr. Furr to pay at least $100 per month toward his legal financial obligations upon his release. CP 33.

The sentencing court imposed discretionary costs of $1150 and mandatory costs of $800[1], for a total Legal Financial Obligation (LFO) of $1950. CP 51-52. The Judgment and Sentence contained the following language:

> ¶ 2.5 Legal Financial Obligations/Restitution. (RCW 9.94A760) The court has considered the total amount owing, the defendant's 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. (RCW 10.01.160).

CP 49.

The Court did not inquire further into Mr. Furr's financial resources and the nature of the burden payment of LFOs would impose other than ordering him to pay $100 per month toward his legal financial obligations beginning one month after his release. CP 52; RP 593-94.

This appeal followed. CP 45.

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[1] $500 Victim Assessment, $200 criminal filing and $100 DNA fee. CP 51-52.

D. ARGUMENT

1. Mr. Furr's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove an essential element of the crime of second degree rape--that the alleged victim was incapable of consent due to her mental incapacity.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process

violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

RCW 9A.44.050 provides in pertinent part:

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
> . . .
> (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated . . .

RCW 9A.44.010(4) provides:

> "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

The key to a proper interpretation of RCW 9A.44.010(4) is a sufficiently broad interpretation of the word "understand". Evidence showing that a victim has a superficial understanding of the act of sexual intercourse does not by itself render RCW 9A.44.010(4) inapplicable. *State v. Ortega-Martinez*, 124 Wash. 2d 702, 711, 881 P.2d 231 (1994). A finding that a person is mentally incapacitated for the purposes of RCW 9A.44.010(4) is appropriate where the jury finds the victim had a condition

that prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse. *Id.*

A meaningful understanding of the nature and consequences of sexual intercourse necessarily includes an understanding of the physical mechanics of sexual intercourse. *Id.* at 712; *See* RCW 9A.44.010(1) (broadly defining the physical acts considered to be sexual intercourse). It also includes, however, an understanding of a wide range of other particulars. For example, the nature and consequences of sexual intercourse often include the development of emotional intimacy between sexual partners; it may under some circumstances result in a disruption in one's established relationships; and, it is associated with the possibility of pregnancy with its accompanying decisions and consequences as well as the specter of disease and even death. *Id.* While the law does not require an alleged victim to understand any or all of these particulars before a defendant can be considered insulated from liability under RCW 9A.44.050(1)(b) for having had sexual intercourse with a mentally incapacitated individual, all of the above are elements of a meaningful understanding of the nature and consequences of sexual intercourse and are important for a trier-of-fact to bear in mind when it is evaluating whether a person had a condition which prevented him or her from having a

meaningful understanding of the nature or consequences of the act of sexual intercourse. *Id.*

In *State v. Summers*, the defendant was convicted of second degree rape of a 44-year-old, mentally-ill woman. The victim met the defendant on a public street. After talking to the victim and telling her to follow him, the defendant took her inside a private apartment and proceeded to have sexual intercourse with her. Although the victim knew a baby was a result of a man "put[ting] a wiener in you", she spoke in fragmented and confusing sentences, had no knowledge of sexually transmitted diseases, thought a penis was a tail, and did not know how to read. *State v. Summers,* 70 Wn. App. 424, 426-27, 853 P.2d 953 (1993), *review denied,* 122 Wn.2d 1026, 866 P.2d 40 (1993). Holding the jury had sufficient evidence from which to conclude the victim did not understand the nature or consequences of sexual intercourse, the Court of Appeals affirmed the defendant's conviction. It wrote: "The evidence showed that [the victim] had a basic understanding of the mechanical act of sexual intercourse, but this should not be equated with an understanding of its nature and consequences." *Summers,* 70 Wn. App. at 431, 853 P.2d 953.

Conversely, in the present case Ms. Evans testified she not only understand the mechanics of sexual intercourse (penis and vagina) but also

knows what being in love means and associates sexual intercourse with love. RP 103-04. She said she was in love with the father of her child when she got pregnant in high school. She said she got pregnant because of unprotected sex. RP 102-05. When asked what "unprotected sex" meant, she stated it meant using a condom. When asked what other reasons people use condoms, she stated, "For STDs." When asked what STD's means she said, "Sexually transmitted diseases." When asked what are some examples of sexually transmitted diseases, she responded, "Herpes, AIDS, gonorrhea." RP 105. Ms. Evans also testified "sexually assaulted" means "I didn't give my okay." RP 106. Clearly, by her own testimony Ms. Evans does not have a condition that prevented her from having a meaningful understanding of the nature or consequences of the act of sexual intercourse.

Moreover, this fact was later confirmed through the testimony of the State's expert, Dr. Connor, who stated he could not say that Ms. Evans was unable to consent to sexual intercourse. RP 384.

In assessing whether the State has met its burden of showing that a victim had a condition which prevented him or her from understanding the nature or consequences of sexual intercourse at the time of an incident, the jury may evaluate, in addition to that person's testimony regarding his or

her understanding, other relevant evidence such as the victim's demeanor, behavior, and clarity on the stand. *Ortega-Martinez*, 124 Wash. 2d at 714, 711, 881 P.2d 231. It may also take into consideration a victim's IQ, mental age, ability to understand fundamental, nonsexual concepts, and mental faculties generally, as well as a victim's ability to translate information acquired in one situation to a new situation. *Id.*

In *Ortega-Martinez*, the case-worker testified the 30-year-old victim had an IQ in the 40s and estimated her mental age to be between the ages of five and nine. *Id.* A police officer with experience in child abuse cases testified her mental age seemed close to that of a 4- or 5-year old. *Id.* He also testified she was unable to tell him where she had gotten off the bus. *Id.* at 715. The victim herself testified she could not read. *Id.* She exhibited to the jury the skills of a child whose answers were often nonresponsive. *Id.* When the prosecutor asked her for clarification concerning her comment that there "was something in the coffee", she stated, "There was something underneath the blanket". *Id.* When he asked if she had ever seen Ortega-Martinez before that night, she replied, "When I leave for him". *Id.* When she was asked how long she stayed in the truck, she replied "It was raining". *Id.* In response to a question "Where

did you go after you went over the railroad tracks?", she testified "I saw the green barn and red barn". *Id.*

By contrast, Ms. Evans had much higher mental capabilities than the victim in *Ortega-Martinez*. Ms. Evans' testimony was similar to that of a witness with normal mental faculties. She testified she was 33 years old, had lived in Cle Elum since 1994 and had graduated from Cle Elum high school. RP 89-90. She said she also lived in Renton and Mountlake Terrace for a time after graduation. RP 91. She testified she worked as a courtesy clerk at Safeway from 2000 until 2003. She has also worked as a waitress and is currently a housekeeper at a local motel. RP 91, 107. She said she currently lives with her father and his girlfriend but makes her own day-to-day decisions. RP 106.

Taking into consideration her testimony, her ability to understand fundamental, nonsexual concepts, and mental faculties in general, the State did not meet its burden of proving Ms. Evans lacked the capability to consent because of her mental incapacity.

Furthermore, Mr. Furr proved by a preponderance of the evidence that at the time of the offense he reasonably believed the victim was not mentally incapacitated. RCW 9A.44.030(1) provides:

> In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's

> being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

Mr. Furr testified at first he thought Ms. Evans was shy and child-like, but after several conversations with her he thought she was a normal adult. Mr. Furr stated he thought Ms. Evans was more intelligent than he, due to her knowledge of history, the internet and other facts. RP 426-30, 451-53. Dr. Connor testified Ms. Evans was capable of forming emotional bonds with other people and her strength in verbal expression might lead other people to overestimate her actual abilities. CP 370-74. Dr. Connor's testimony reaffirms that it was reasonable for Mr. Furr to believe that Ms. Evans was not mentally incapacitated. Therefore, the evidence was insufficient to sustain the conviction.

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

Ms. Furr did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).[3]

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

[2] Assignments of Error Nos. 2 & 3.

[3] Appellant is aware that this Court has issued an opinion holding that this issue may not be challenged for the first time on appeal. *See State v. Duncan*, No. 29916-3-III, 2014 WL 1225910, at *2-6 (March 25, 2014). However, this issue is now pending before the Washington Supreme Court in *State v. Blazina*, No. 89028-5, consolidated with *State v. Paige-Colter*, No. 89109-5. The cases were scheduled for oral argument February 11, 2014. Therefore, this issue is raised in order to preserve the argument, should the Washington Supreme Court overrule this Court's opinion in *Duncan*.

to his or her poverty. *Bearden v. Georgia,* 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). "In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Id.*

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

Here, there is insufficient evidence to support the trial court's finding that Mr. Furr has the present or future ability to pay legal financial obligations. Although the trial court made no express finding that Mr. Furr had the present or future ablity to pay the LFOs, the finding is implied because the court ordered Mr. Furr to pay at least $100 per month toward his legal financial obligations one month after his release. CP 52.

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.

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Furr's financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's implied finding that he has the present or future ability to pay LFOs. RP 593-94.

Therefore, the implied finding that Mr. Furr has the present or future ability to pay LFOs is simply not supported in the record. Since it is clearly erroneous, the directive must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

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

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

b. The imposition of discretionary costs of $1150 must also be stricken. Since the record does not reveal that the trial court took Mr. Furr's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the judgment and sentence. A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin,* 63 Wn. App. at 312. The decision to impose

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

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

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). It is well-established that this provision does not require the trial court to enter formal, specific findings. See *Curry*, 118 Wn.2d at 916. Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. *Bertrand*, 165 Wn. App. at 404.

Here, the court imposed discretionary costs of $1150. The record reveals no further balancing by the court of Mr. Furr's financial resources and the nature of the burden that payment of LFOs would impose on him. 10/25/13 RP 10-17.

In sum the record reveals the trial court did not take Mr. Furr's particular financial resources and his ability (or not) to pay into account as required by RCW 10.01.160(3). The implied finding of ability to pay is

unsupported by the record and clearly erroneous. Further, the court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay *and* the imposition of the discretionary costs. *Bertrand*, 165 Wn. App. at 405.

D. CONCLUSION

For the reasons stated the conviction should be reversed. The matter should also be remanded for resentencing to strike the directive to pay and the imposition of discretionary costs from the Judgment and Sentence.

Respectfully submitted January 21, 2015,

s/David N. Gasch, WSBA #18270
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on January 21, 2015, 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 the brief of appellant:

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