73295-1

 COA NO. 73295-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

LAURA REED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Raquel Montoya-Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in giving a flawed reasonable doubt instruction, in violation of due process and the right to a jury trial. CP 32.

2. The court erred in imposing discretionary legal financial obligations at sentencing.

Issues Pertaining to Assignments of Error

1. Whether the reasonable doubt instruction, in stating a "reasonable doubt is one for which a reason exists," misdescribes the burden of proof, undermines the presumption of innocence and shifts the burden to the defendant to provide a reason for why reasonable doubt exists?

2. Whether the court abused its discretion in imposing legal financial obligations because it misapprehended its authority to waive them, mistakenly believing they were mandated by law?

B. STATEMENT OF THE CASE

The State charged Laura Reed with second degree assault as a crime of domestic violence. CP 2-3. The case proceeded to trial, where the jury was given the following instruction:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The

> defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 32 (Instruction 3).

The jury found Reed guilty as charged, returning a special verdict that the assault was committed against a family member. CP 50, 52. The court imposed a standard range sentence of nine months with a work release option. CP 59. It also imposed mandatory and discretionary legal financial obligations. CP 60-61. When Reed protested, the court told her that the costs were mandatory. 3RP[1] 168-69. Reed appeals. CP 68-79.

[1] The verbatim report of proceedings is referenced as follows: 1RP - 2/17/15, 2/18/15 (suppression motion); 2RP - 2/18/15 (jury trial), 2/19/15; 3RP - 2/19/15 (continued), 2/20/15, 3/10/15, 3/18/15.

C. ARGUMENT

1. THE JURY INSTRUCTION THAT TELLS JURORS "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS" UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED.

Reed's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 32. This instruction, based on WPIC 4.01,[2] is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions.

Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments that Washington courts have invalidated in

[2] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008).

prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same thing.

For these reasons, WPIC 4.01 violates due process and the right to a jury trial. U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 22. Use of this instruction in Reed's case is structural error requiring reversal of the conviction.

a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof and undermines the presumption of innocence.

In order for jury instructions to be sufficient, they must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev. in part on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). So in examining how an average juror would interpret an instruction, appellate courts rely on the ordinary meaning of words and rules of grammar in reaching a conclusion.[3]

[3] See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, resulting in court's determination that jury could have applied the erroneous standard), overruled on other grounds, State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying upon

With these principles in mind, the flaw in WPIC 4.01 reveals itself with little difficulty. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a "not guilty" verdict. Examination of the meaning of the words "reasonable" and "a reason" shows this to be true.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition to ascertain the jury's likely understanding of a word used in jury instruction); Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (in finding jury instruction on a presumption to be infirm, looking to dictionary definition of the word "presume" to determine how jury may have interpreted the instruction).

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of

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grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785, (discussing difference between use of "should" rather than use of a word indicating "must" regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

reason : RATIONAL . . . possessing good sound judgment . . ." Webster's Third New Int'l Dictionary 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'") (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

An instruction that defines reasonable doubt as "a doubt based on reason" would be proper. But WPIC 4.01 does not do that. WPIC 4.01 requires "a reason" for the doubt, which is different from a doubt based on reason.

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01, means "an expression or statement offered as an explanation of a belief or assertion or as a justification." Webster's Third New Int'l Dictionary at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification to oneself or

to other jurors. In other words, WPIC 4.01 requires more than just a doubt based on reason; it requires a doubt that is articulable.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington's pattern instruction on reasonable doubt instruction is unconstitutional because its language requires more than just a reasonable doubt to acquit. Instead, the instruction requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have a reasonable doubt but also have difficulty articulating why their doubt is reasonable to themselves or others. Scholarship on the reasonable doubt standard explains the problem with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's

> doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.[4]

In these scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, which shifts the burden and undermines the presumption of innocence.

The standard of proof beyond a reasonable doubt enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363. The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve."

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[4] Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 Notre Dame L. Rev. 1165, 1213-14 (2003) (footnotes omitted).

State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The doubt "for which a reason exists" language in WPIC 4.01 does that in directing jurors to have a reason to acquit rather than a doubt based on reason.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Emery, 174 Wn.2d at 759. The Court of Appeals has repeatedly rejected such arguments as prosecutorial misconduct because they misstate the law on reasonable doubt.[5] Simply put, "a jury need do nothing to find a defendant not guilty." Emery, 174 Wn.2d at 759.

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[5] See, e.g., State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding improper prosecutor's PowerPoint slide that read, "'If you were to find the defendant not guilty, you have to say: 'I had a reasonable doubt[.]' What was the reason for your doubt? 'My reason was ____.'"); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010) (holding improper argument when prosecutor told jurors that they have to say, "'I doubt the defendant is guilty and my reason is I believed his testimony that . . . he didn't know that the cocaine was in there, and he didn't know what cocaine was'" and that "'[t]o be able to find reason to doubt, you have to fill in the blank, that's your job'"); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (prosecutor committed misconduct in stating "In order to find the defendant not guilty, you have to say to yourselves: 'I

But the improper fill-in-the-blank arguments were not the mere product of invented malfeasance. The offensive arguments did not originate in a vacuum. They sprang directly from WPIC 4.01's language. In Anderson, for example, the prosecutor explicitly recited WPIC 4.01 before in making the fill-in-the-blank argument: "A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). The same occurred in Johnson, where the prosecutor told jurors "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur

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doubt the defendant is guilty, and my reason is' — blank"), review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (finding improper prosecutor's statement that "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank"), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010).

through a jury instruction. The misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same pitfall?

Jury instructions "must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity, that is not the correct standard for measuring the adequacy of jury instructions. Courts have an arsenal of interpretive tools at their disposal; jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average

juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." Dana, 73 Wn.2d at 537. WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, supports this conclusion.

In State v. Kalebaugh, the Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." State v. Kalebaugh, ___Wn.2d___, ___P.3d___, 2015 WL 4136540 at *3 (slip op. filed Jul. 9, 2015). That conclusion is sound. Instructing a jury that "a reasonable doubt is such a doubt as the jury are able to give a reason for" can "only lead to confusion, and to the detriment of the defendant. A juror may say he does not believe the defendant is guilty of the crime with which he is charged. Another juror answers that you have a reasonable doubt of the defendant's guilt; give a reason for your doubt; and under the instruction given in this cause the defendant should be found guilty unless every juror is able to give an affirmative reason why he has a reasonable doubt of the defendant's guilt.

It puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case." Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893).

Further, who shall determine whether a juror is "able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached." State v. Cohen, 78 N.W. 857, 858 (Iowa 1899) (criticizing "A reasonable doubt is such a doubt as the jury are able to give a reason for.").

b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01.

In Bennett, the Supreme Court directed trial courts to give WPIC 4.01 at least "until a better instruction is approved." Bennett, 161 Wn.2d at

318. In Emery, the Court contrasted "proper description" of reasonable doubt as a "doubt for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. Emery, 174 Wn.2d at 759.

In Kalebaugh, the Court contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt for which a reason can be given.'" Kalebaugh, 2015 WL 4136540 at *3. The Court concluded that the trial court's erroneous preliminary instruction — "a doubt for which a reason can be given" — was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." Id.

The Court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors likewise are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their reasonable doubt. WPIC 4.01's language requires jurors to articulate to themselves or others a reason for having a reasonable doubt. No Washington court has ever explained how this is not so. Kalebaugh did not

provide an answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case.

The appellant did not advance the legal theory that the language requiring "a reason" in WPIC 4.01 misstates the reasonable doubt standard in Kalebaugh, Emery or Bennett. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. Those cases did not involve a direct challenge to WPIC 4.01, so their approval of WPIC 4.01's language does not control. Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

c. The pattern instruction rests on an outdated view of reasonable doubt that equated a doubt for which there is a reason with a doubt for which a reason can be given.

40 years ago, in State v. Thompson, the Court of Appeals addressed an argument that "'The doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists' (1) infringes upon the

presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instructions). Thompson brushed aside the articulation argument in one sentence, stating "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Thompson, 13 Wn. App. at 5.

That cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors" but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959)

and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959).[6] Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addresses the doubt "for which a reason exists" language in the instruction. There was no challenge to that language in either case, so it was not an issue.

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[6] The "standard" instruction at issue in Tanzymore read: "You are instructed that the law presumes a defendant to be innocent until proven guilty beyond a reasonable doubt. This presumption is not a mere matter of form, but it is a substantial part of the law of the land, and it continues throughout the entire trial and until you have found that this presumption has been overcome by the evidence beyond a reasonable doubt.

'The jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.'" Tanzymore, 54 Wn.2d at 291 n.1.

Thompson observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wn. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following instructional language: "It should be a doubt for which a good reason exists, — a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering." Harras, 25 Wn. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342).[7] Id. This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[8]

So Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason be given

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[7] For the Court's convenience, the relevant portion of the note cited by Harras (48 Am. St. Rep. at 574-75) is attached as appendix A to the brief.

[8] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 199 (La. 1891) ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for."); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,-such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 255-59, 36 P. 573 (Or. 1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

for the doubt. And then Thompson upheld the doubt "for which a reason exists" instruction by equating it with the instruction in Harras. Thompson, 13 Wn. App. at 5. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01's doubt "for which a reason exists" language means a doubt for which a reason can be given. That is a problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Emery, 174 Wn.2d at 759-60; Kalebaugh, 2015 WL 4136540 at *3.

State v. Harsted, 66 Wn. 158, 119 P. 24 (1911) further illuminates the dilemma. In Harsted, the defendant took exception to the following instruction: "The expression 'reasonable doubt' means in law just what the words imply-a doubt founded upon some good reason." Harsted, 66 Wn. at 162. The Supreme Court explained the phrase "reasonable doubt" means that, "if it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given." Id. at 162-63.

In support of its holding that there was nothing wrong with the challenged language, Harsted cited a number of out-of-state cases upholding instructions that defined a reasonable doubt as a doubt for which a reason can be given. Id. at 164. As stated by one of these decisions, "[a] doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (Wis. 1899).[9] Harsted noted some courts disapproved of the same kind of language,[10] but was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. Id. at 165.

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[9] Additional citations include the following: State v. Patton, 66 Kan. 486, 71 Pac. 840, 840-42 (Kan. 1903) (instruction defining a reasonable doubt as such a doubt "as a jury are able to give a reason for"); Hodge v. State, 97 Ala. 37, 41, 12 South. 164, 38 Am. St. Rep. 145 (Ala. 1893) ("a reasonable doubt is defined to be a doubt for which a reason could be given."); State v. Serenson, 7 S. D. 277, 64 N. W. 130, 132 (S.D. 1895) ("a reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for."); Vann, 9 S.E. at 947-48 ("But the doubt must be a reasonable doubt, not a conjured-up doubt,-such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); People v. Guidici, 100 N. Y. 503, 510, 3 N. E. 493 (N.Y. 1885) ("You must understand what a reasonable doubt is. It is not a mere guess or surmise that the man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence-a doubt for which some good reason arising from the evidence can be given."); Jefferson, 43 La. Ann. at 998-99 ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for.").

[10] Citing Siberry, 133 Ind. at 684-85; Bennett v. State, 128 S. W. 851, 854

Here we confront the genesis of the problem. Over 100 years ago, the Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation demolishes the argument that there is a real difference between a doubt "for which a reason exists" in WPIC 4.01 and being able to give a reason for why doubt exists. The Supreme Court found no such distinction in Harsted and Harras.

The mischief has continued unabated ever since. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. We know it's rotten because the Supreme Court in Emery and Kalabaugh, and numerous Court of Appeals decisions in recent years, condemn any suggestion that jurors must give a reason for why there is reasonable doubt. Old decisions like Harras and Harsted cannot be reconciled with Emery and Kalebaugh. The law has evolved. What seemed okay 100 years ago is now forbidden. But WPIC 4.01 has not evolved. It is stuck in the misbegotten past.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. Cf. People v. Jackson, 167 Mich. App.

(Ark. 1910); Blue v. State, 86 Neb. 189, 125 N. W. 136, 138 (Neb. 1910); Gragg v. State, 3 Okl. Cr. 409, 106 Pac. 350 (Okla. Crim. App. 1910).

388, 391, 421 N.W.2d 697 (Mich. Ct. App. 1988) ("An instruction defining reasonable doubt may not shift the burden of proof by requiring the jurors to have a reason to doubt the defendant's guilt. Rather, the instruction must convey to the jurors that a reasonable doubt is an honest doubt based upon reason.").

As argued, there is no appreciable difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. That requirement distorts the reasonable doubt standard to the accused's detriment.

d. This structural error requires reversal.

Defense counsel did not object to the instruction at issue here. 3RP 39. The error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's

jury trial guarantee. Sullivan, 508 U.S. at 279-80. Indeed, where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

As discussed, WPIC 4.01's language requires more than just a reasonable doubt to acquit criminal defendants; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence and shifts the burden of proof. WPIC 4.01 misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal of Reed's conviction.

2. THE COURT ABUSED ITS DISCRETION IN IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS BECAUSE IT MISTAKENLY BELIEVED THEY WERE MANDATED BY LAW.

The court ordered Reed to pay the following discretionary legal financial obligations (LFOs): (1) $100 domestic violence assessment; (2) $450 court costs; (3) $250 jury demand fee; and (4) $1800 fee for court appointed attorney. CP 60-61. The court erred in imposing these LFOs because it erroneously believed they were mandatory.

The court addressed legal financial obligations at sentencing. 3RP 168-69. The following colloquy occurred:

> The Court: There are legal financial obligations -- yes Ms. Reed?
> Ms. Reed: Your Honor, I am still obligated to pay child support whether I have a job or not. (Indiscernible - unsteady speech) this job, so please don't impose a bunch more fines if you're going to put me in jail for almost a year.
> The Court: Well what I am telling you is that *there are legal financial obligations that are mandated by law and I will be imposing those financial obligations*. I am not going to be imposing them at a very high rate per month. I am going to impose them at $100 per month. Those include the $500 victim assessment fine, the domestic violence assessment fine of $100, court cots of $450, as well as fees for the court appointed attorney which is $1800 and the mandatory felony DNA collection. That will be in place until it's completely paid off and paid in the amount of $100 per month.
> Ms. Reed: I don't have $100 per month. I pay $300 a month child support --
> The Court: I understand.
> Ms. Reed: -- and with all my bills and I have nothing left.
> The Court: I understand that. *The Court is required to impose legal financial obligations* with respect to that.
> Ms. Reed: $100 per month without a job?
> The Court: You have a job, you just told me you had a job.
> Ms. Reed: I know, but you are putting me in jail.
> The Court: Okay, I am going to move on.
> Ms. Reed: Sorry.

3RP 168-69 (emphasis added).

The court may order a defendant to pay costs pursuant to RCW 10.01.160. However, the statute also provides "[t]he 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). A trial court thus has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes legal financial obligations. State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

The $500 victim assessment fee, the $100 DNA fee, and the $200 court filing fee imposed by the court are mandatory. CP 60-61; State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). But the other fees are not mandatory. The court has the discretion not to impose a domestic violence assessment, "court costs," jury demand fee, and fees for court appointed counsel. Lundy, 176 Wn. App. at 107 (courts costs and jury demand fee are discretionary); State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) (fee for court-appointed counsel is discretionary), remanded, 182 Wn.2d 827, 344 P.3d 680 (2015); RCW 10.99.080(1) ("All superior courts . . . *may* impose a penalty of one hundred dollars, plus an additional fifteen dollars on any adult offender convicted of a crime involving domestic violence") (emphasis added); RCW 10.01.160(1) ("The court *may* require a defendant to pay costs.") (emphasis added).

The error here is that the court imposed the discretionary LFOs based on the misapprehension that they were mandatory. The exercise of sound discretion presupposes the trial court has a correct understanding of the

applicable law, including its sentencing authority. State v. McGill, 112 Wn. App. 95, 100, 102, 47 P.3d 173 (2002). "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority." McGill, 112 Wn. App. at 102. "Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." Id. at 100.

Remand is required here because the court did not have a correct understanding of the applicable law. The court erroneously believed that it had no choice but to impose the discretionary costs. 3RP 168 ("there are legal financial obligations that are mandated by law and I will be imposing those financial obligations"); 3RP 169 ("The Court is required to impose legal financial obligations"). The law, however, authorized the court to exercise its discretion on whether to impose the LFO's at issue here. The failure to exercise sentencing discretion is an abuse of discretion. See In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 332-34, 166 P.3d 677 (2007) (trial court mistakenly believed it was without discretion to impose concurrent sentences for separate serious violent offenses); State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005) (failing to exercise discretion on whether to grant exceptional sentence downward). Remand for resentencing on the LFO issue is therefore needed. The court

should be given the opportunity to exercise its discretion following an individualized inquiry into Reed's ability to pay these LFOs.

The issue is important. Problems associated with LFOs imposed against indigent defendants include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. Blazina, 182 Wn.2d at 835.

The amount owing on LFOs has a way of metastasizing. LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time. Id. at 836. "[I]ndigent offenders owe higher LFO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount that they owe." Id. at 836. A $100 per month payment schedule, which the court described as not "a very high rate," can be crippling and insurmountable to indigent offenders. 3RP 168.

Further, "[t]he inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. "The court's long-term involvement in defendants' lives inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. This active record can have serious negative consequences on

employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. ll of these reentry difficulties increase the chances of recidivism." Id. at 837 (internal citations omitted).

Moreover, significant disparities exist in the administration of LFOs in Washington. Id. Offenses resulting in trial, for example, receive disproportionately high LFO penalties. Id.

A thoughtful trial judge, in the course of making an individualized inquiry into ability to pay, can take these troubling realities into account in determining whether discretionary LFOs are warranted. The case must be remanded.

D. CONCLUSION

For the reasons set forth, Reed requests reversal of the conviction. If the conviction is affirmed, then the case should be remanded for resentencing on the discretionary legal financial obligations imposed by the trial court.

DATED this 24th day of August 2015

Respectfully Submitted,

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Attorneys for Appellant

APPENDIX A

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

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N. Y. 503; *Cohen* v. *State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Boulden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jarrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 73295-1-I
	)	
LAURA REED,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK ,MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF AUGUST, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LAURA REED
2813 VALENCIA STREET
BELLINGHAM, WA 98226

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF AUGUST, 2015.

X Patrick Mayovsky