NO. 32974-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY BELT,

Appellant.

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

The Honorable Evan Sperline, Judge

BRIEF OF APPELLANT

KEVIN A. MARCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. The reasonable doubt instruction given by the trial court required jurors to have more than a reasonable doubt to acquit and shifted the burden to Larry James Belt to provide jurors with a reason for acquittal. This reasonable doubt instruction is constitutionally defective.

2a. The trial court erred in finding Belt had the current and future ability to pay legal financial obligations (LFOs).

2b. The trial court exceeded its statutory authority when it imposed discretionary LFOs without making an individualized inquiry into Belt's current and future ability to pay.

2c. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs.

Issues Pertaining to Assignments of Error

1a. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists" tell jurors that they must have more than just a reasonable doubt to acquit?

1b. Did the reasonable doubt instruction violate due process, undermine the presumption of innocence, and impermissibly shift the burden of proof by telling jurors they must be able to articulate a reason to have a reasonable doubt?

1c. Does erroneously instructing a jury regarding the meaning of reasonable doubt vitiate the jury-trial right, constituting structural error?

2a. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first considering Belt's current and future ability to pay, making the LFO order erroneous?

2b. Was Belt's trial counsel ineffective for failing to object to the imposition of discretionary LFOs?

B. STATEMENT OF THE CASE

The State charged Belt with two counts of first degree assault against Jeannette Johnson and Greg Thompson, and included special deadly weapon allegations on each count. CP 22-24.

The assault charges related to an altercation at an Ephrata tavern, Wendy's Steakhouse, owned by Jeannette Johnson. 1RP[1] 31-32. According to Johnson, Belt came into her bar and asked to use her cell phone three times to call his ex-wife, becoming visibly irritated after the third call. 1RP 38-40. After the third call, Johnson stated Belt "turned around and he looked at me and he reached inside of his jean jacket and he pulled out this huge knife." 1RP 41. Johnson testified Belt put the tip of the knife to his throat

[1] This brief will refer to the verbatim reports of proceedings as follows: 1RP—December 10, 11, and 12, 2014; 2RP—December 16, 2014.

until "a little drop of blood was coming out," and said, "I'm going to go cut [his wife's] fucking throat, and then I'm going to cut your fucking throat." 1RP 42.

Johnson reached for her phone, and according to her testimony, Belt stated he would cut the "fucking throat" of anyone she called down to the bar. 1RP 45. Johnson called her husband, who was at their nearby home. 1RP 46. Then she called 911, and Belt "just went nuts." 1RP 46. According to Johnson, she and Belt ran back and forth around the bar for three to four minutes while she was on the phone with 911. 1RP 47-49.

Johnson stated that when Belt took his jacket off, his shoulder got caught in the jacket. 1RP 49. Johnson took this opportunity to run to the bar and restaurant next door. 1RP 50. Two young men overheard Johnson's call and went to Johnson's tavern. 1RP 173, 232-33, 242.

Johnson's husband, Greg Thompson, also testified. He said he responded to Johnson's call and first came into contact with Belt at Wendy's Steakhouse. 1RP 97, 131. According to Thompson, Belt immediately said, "I'm going to fuck you up," and "came straight at" Thompson. 1RP 100. A fight ensued. 1RP 100-05. When Thompson fell, Belt got on top of him and, according to Thompson, said, "I'm going to cut your fucking throat." 1RP 106. Thompson stated Belt started to cut his throat, but Thompson grabbed the knife with his fingers and Belt pulled it away, cutting

Thompson's fingers. 1RP 106. Belt also "tried to stab [Thompson] in the stomach area." 1RP 107-08.

Thompson stated two men showed up who subdued Belt and got the knife away from him. 1RP 109.

Belt testified he acted in self defense. Belt testified he never chased or threatened to harm Johnson. 1RP 300. Belt stated that when he was talking to Johnson at the bar, Thompson came in with two other men and said, "what the fuck are you doing with my old lady." 1RP 300-01, 328. Belt responded, "it's none of your fucking business." 1RP 302. Thompson replied, "you need to just shut the fuck up," pulled a knife out of his pocket, and came at Belt. 1RP 302. Belt testified Thompson cut him on the neck and punched him in the face, and they began to wrestle around. 1RP 303-04. When Thompson was on top of him, Belt looked around and saw a knife on the ground next to him, grabbed it, and stabbed Thompson in the stomach. 1RP 306-07. Then, according to Belt, the other men who had entered the bar with Thompson grabbed the knife and held him down. 1RP 307.

The trial court instructed the jury on self defense. CP 45-46; 1RP 377-79. The trial court also gave the standard reasonable doubt instruction, which stated, in part, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 39; 1RP 373.

The jury found Belt guilty of both counts of first degree assault and returned a special verdict form finding Belt was armed with a deadly weapon at the time he committed the assaults. CP 50-51; 1RP 450-52.

The trial court sentenced Belt to a total of 264 months of incarceration. CP 57; 2RP 13-14. For each assault, it imposed a standard-range sentence of 108 months and a 24-month deadly weapon enhancement. CP 56-57; 2RP 13-14. Despite finding Belt indigent and authorizing appointed counsel on appeal, the trial court imposed $750 in discretionary LFOs without inquiring into Belt's ability to pay. CP 56, 59, 76-77; 2RP 14. The trial court also imposed a victim assessment of $500, $200 in court costs, a DNA collection fee of $100, and $4656.85 in restitution. CP 59-60; 2RP 14. Belt timely appeals. CP 71-72.

C. ARGUMENT.

1. THE JURY INSTRUCTION ON REASONABLE DOUBT IS UNCONSTITUTIONAL

Belt'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 39; 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires that trial courts provide this instruction in every criminal case, at least "until a

better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

WPIC 4.01 is constitutionally defective. It instructs jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This articulation requirement undermines the presumption of innocence and is effectively identical to the fill-in-the-blank arguments Washington courts have invalidated in prosecutorial misconduct cases. Any instruction that erroneously defines reasonable doubt vitiates the jury-trial right, violates due process, and is structural error.

a A basic examination of WPIC 4.01's language demonstrates the instruction requires articulation

The difference between "reason" and "a reason" is obvious to any English speaker. Having a "reasonable doubt" is not, as a matter of plain English, the same as having "a reason" to doubt. WPIC 4.01 is gravely flawed because it requires both a reasonable doubt and a reason to doubt for a jury to acquit.

"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

reason : RATIONAL . . . possessing good sound judgment . . ." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). In the context of reasonable doubt, this definition of reasonable requires the exercise of reason, which best comports with the United States Supreme Court's definitions. E.g., 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))).

The placement of the article "a" before "reason" converts the meaning of the word "reason" into "an expression or statement offered as an explanation or a belief or assertions or as a justification." WEBSTER'S, supra, at 1891. In contrast to the United State Supreme Court's use of the term "reason" in a manner referring to doubt based on logic or rationality, WPIC 4.01's use of "a reason" signifies a doubt capable of explanation or justification. WPIC 4.01 plainly requires more than just a reasonable doubt; it requires an explainable, articulable reasonable doubt.

Only one case, State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975), has addressed WPIC 4.01's articulation requirement and its analysis on the subject was not satisfactory. Thompson argued the instruction, "'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." 13 Wn. App. at 4-5 (quoting jury instructions). The court began its discussion by recognizing "this instruction has its detractors" but noted it was "constrained to uphold it." Id. at 5. This was hardly a ringing endorsement.[2]

In its one sentence on the articulation issue, the Thompson court stated, "Furthermore, 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." Id. This is untenable. The first sentence on the meaning of reasonable doubt, read to every criminal jury, requires a reason to exist for reasonable doubt. This plainly directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court's suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference between "reason" and "a reason."

[2] Likewise, the Washington Supreme Court in Bennett grudgingly "require[d] that [WPIC 4.01] be given until a better instruction is approved." 161 Wn.2d at 318. Washington appellate courts thus seem to concur that WPIC 4.01 has ample room for improvement. This is undoubtedly true given that its language plainly reveals an articulation requirement.

And the Thompson court's explanation contradicts itself: on the one hand it asserts there is no articulation requirement; on the other hand it posits a reasonable doubt must be capable of at least some articulation given its statement that a reasonable doubt cannot be based on something vague. Thompson fails to adequately explain away WPIC 4.01's articulation requirement.

Very recently, the Washington Supreme Court addressed the issue of articulation with respect to a trial court's preliminary instruction that a reasonable doubt is "'a doubt for which a reason can be given.'" State v. Kalebaugh, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 4136540, No. 89971-1, slip op. at 3 (Jul. 9, 2015). The court held this instruction was erroneous because "the law does not require that a reason be given for a juror's doubt." Id. at 7. The court compared the instruction with WPIC 4.01: "The trial judge instructed that a 'reasonable doubt' is a doubt for which a reason can be given, rather than the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists." Id. at 6-7. But there is no appreciable difference between the acceptable "a doubt for which a reason exists" and the erroneous "a doubt for which a reason can be given." Both instructions require *a reason*. "A reason" means there must be articulation, explanation, or justification, regardless of whether it merely exists or can expressly be given.

WPIC 4.01's language unmistakably requires jurors to articulate a reason for having a reasonable doubt. No Washington court has ever explained how this is not so.

b. WPIC 4.01's articulation requirement violates due process and undermines the presumption of innocence

i. WPIC 4.01 violates due process

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). But, in order for the jury to acquit under WPIC 4.01, reasonable doubt is not enough. Instead, Washington courts instruct jurors that they must also be able to point to a reason that justifies or explains their reasonable doubt. A juror might have reasonable doubt but also have difficulty articulating or explaining the reason for that doubt. A case might present such voluminous and contradictory evidence that jurors having a legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option.

Scholarship on the articulation requirement elucidates similar concerns:

> 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 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,' and 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.

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). In these various scenarios, despite having reasonable doubt, jurors cannot vote to acquit in light of WPIC 4.01's direction that a reason must exist for having a reasonable doubt. By requiring more than a reasonable doubt to acquit, WPIC 4.01 violates the federal and state due process clauses. Winship, 297 U.S. at 364; U.S. CONST. amend. XIV; CONST. art. I, § 3.

ii. WPIC 4.01 undermines the presumption of innocence

"The presumption of innocence 'is the bedrock upon which the criminal justice system stands.'" Kalebaugh, slip op. at 6 (quoting Bennett, 161 Wn.2d at 315). It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Bennett, 161 Wn.2d at 316. Washington courts have chosen to protect the presumption of innocence by rejecting the articulation of a reasonable doubt. This court should likewise safeguard the presumption of innocence in this case.

In prosecutorial misconduct cases, Washington courts have flatly prohibited arguments that jurors must articulate a reason for having a reasonable doubt. Prosecutors' fill-in-the-blank arguments "improperly impl[y] that the jury must be able to articulate its reasonable doubt." Emery, 174 Wn.2d at 760. These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759.

The improper fill-in-the-blank arguments were not the mere product of prosecutorial malfeasance, however. The offensive arguments originated not in a vacuum but in WPIC 4.01's language itself. In State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009), the prosecutor explicitly recited WPIC 4.01 before her or his 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." The same occurred in State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), 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.

These cases make clear that WPIC 4.01 is the true culprit: but for its articulation requirement, it is unlikely prosecutors would have taken improper license to argue that jurors must fill in a blank to have reasonable doubt.

As is true of the related prosecutorial misconduct, WPIC 4.01 requires the jury to articulate a reason for its doubt, which "subtly shifts the burden to the defense." Emery, 174 Wn.2d at 760. 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 directly shifts the burden and undermines the presumption of innocence. Id. at 759. If it is error for the prosecutor to argue for articulation, a fortiori it is error for courts to instruction articulation. See State v. Kalebaugh, 179 Wn. App. 414, 427, 318 P.3d 288 (2014) (Bjorgen, J., dissenting) ("[I]f the

requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge."), aff'd, Kalebaugh, slip op. at 1, 9.

Nor is it any answer to claim that Kalebaugh, Emery, Bennett, or other cases have approved of WPIC 4.01's language. Those cases did not address a direct challenge to WPIC 4.01. Courts "do not rely on cases that fail to specifically raise or decide an issue." In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994). If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it shifts the burden and undermines the presumption of innocence, it makes no sense at all to allow the exact same undermining to occur through a pattern jury instruction on which that assertion is based.

Moreover, in Kalebaugh, the Washington Supreme Court concluded that the trial court's erroneous 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 quire comfortably' with the final instructions given here . . . ." Slip op. at 7. 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, in essence, to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require articulation of reasonable doubt. Jurors likewise are undoubtedly interpreting WPIC

4.01 as requiring them to state a reason for their reasonable doubt. No court should sustain a reasonable doubt instruction that can "live quite comfortably" with an unconstitutional articulation requirement.

By requiring more than just a reasonable doubt to acquit, WPIC 4.01 violates due process and impermissibly undercuts the presumption of innocence. WPIC 4.01 is therefore unconstitutional.

c. WPIC 4.01's articulation requirement is structural error that requires reversal

WPIC 4.01 eases the State's burden of proof and undermines the presumption of innocence. Such an instruction violates the right to a jury trial under the Sixth Amendment and article I, sections 21 and 22. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 125 L. Ed. 2d 182 (1993). 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 Belt's jury regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82. The use of WPIC 4.01 at Belt's trial therefore requires reversal.

2. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY IN FAILING TO CONSIDER BELT'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS

RCW 9.94A.760 permits trial courts to order LFOs as part of a criminal sentence. However, RCW 10.01.160(3) prohibits imposing LFOs

unless "the defendant is or will be able to pay them." To determine whether to impose LFOs, courts "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).

The trial court imposed mandatory LFOs, including a $500 crime victim assessment, $100 DNA collection fee, $200 criminal filing fee, and restitution totaling $4656.85. CP 59-60; 2RP 14; State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013); State v. Kuster, 175 Wn. App. 420, 424-25, 306 P.3d 1022 (2013). The court also imposed $750 in discretionary court-appointed attorney fees. CP 59-60; 2RP 14. The trial court failed to make an individualized inquiry into Belt's present and future ability to pay before it imposed these discretionary LFOs. In so doing, the court exceeded its statutory authority and these discretionary LFOs should be vacated.

The Washington Supreme Court recently recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This "means that courts retain jurisdiction over the 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" and "these reentry difficulties increase the chances of recidivism." Id. at 837.

In light of these concerns, the Blazina court held that RCW 10.01.160(3) requires trial courts to first consider an individual's current and future ability to pay before imposing discretionary LFOs. Id. at 387-89. This requirement "means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. at 838. Instead, the "record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id.

The Blazina court did not stop there. It further directed courts to look to GR 34 for guidance. Id. GR 34 specifies several ways in which a person may be found indigent, including if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then "courts should *seriously question* that person's ability to pay LFOs." Id. at 839. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. at 834.

At sentencing, the trial court failed to make an individualized inquiry into Belt's current or future ability to pay $750 in discretionary LFOs. 2RP 14. The court imposed an extensive amount of restitution, $4656.85, but did not consider the burden of this additional debt. CP 59-60; 2RP 14.

Belt qualified as indigent, reporting zero savings, real estate, or other assets. CP 74. He reported no income from any source. CP 74. The trial court determined Belt was indigent and ordered that Belt "is entitled to counsel for review wholly at public expense." CP 76. Yet the trial court did not consider Belt's indigency when it imposed discretionary LFOs, as RCW 10.01.160(3) requires.

The trial court instead entered a boilerplate finding that it "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." CP 56. Blazina holds this is insufficient to justify discretionary LFOs. 182 Wn.2d at 838. Belt accordingly asks this court to vacate the LFO order and remand for resentencing. Id. at 839.

The State might ask this court to decline review of the erroneous LFO order. The Blazina court held that the Court of Appeals "properly exercised its discretion to decline review" under RAP 2.5(a). 182 Wn.2d at 834. Nevertheless, the Blazina court concluded that "[n]ational and local

cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." Id. Asking this court to decline review is to ask this court to ignore the serious harms caused by LFOs. This court should instead confront the issue head on by vacating Belt's discretionary LFOs and remanding for resentencing.

If Belt's LFO claim was waived, it was a result of constitutionally ineffective assistance of trial counsel. Every accused person enjoys the right ton effect assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. CT. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). The right to effective assistance of counsel is violates when (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. This court gives ineffective assistance claims de novo review. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Counsel's failure to object to the imposition of discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not requesting the trial court to comply with the requirements of RCW 10.01.160(3). E.g., State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has duty to know relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel simply failed to object. This neglect constituted deficient performance.

Counsel's failure to object to discretionary LFOs was prejudicial. As discussed, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. At any remission hearing to set aside LFOs, Belt will bear the burden of proving manifest hardship, and he will have to do so without the assistance of counsel. RCW 10.01.160(4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Belt incurs no possible benefit from LFOs. Given Belt's indigency and restitution debt, there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered Belt's current and

future ability to pay. Belt's constitutional right to effective assistance of counsel was violated. This court should also vacate the discretionary LFOs and remand for resentencing on this alternative basis.

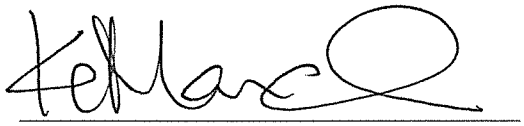
D. CONCLUSION

Belt's jury was instructed with a constitutionally deficient definition of reasonable doubt, requiring reversal and a new trial. Alternatively, Belt asks this court to vacate the LFO order and remand for resentencing.

DATED this 15th day of July, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. NELSON
JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI

State v. Larry Belt

No. 32974-7-III

Certificate 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 15th day of July, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Grant County Prosecutor
kburns@grantcountywa.gov
gdano@grantcountywa.gov

Larry Belt
DOC No. 633512
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

Signed in Seattle, Washington this 15th day of July, 2015.

X Patrick Mayovsky