NO. 32974-7-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

LARRY JAMES BELT,

Appellant.

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

The Honorable Evan Sperline, Judge

BRIEF OF RESPONDENT

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2. The trial court erred in finding Mr. Belt had the current or future ability to pay legal financial obligations, and defense counsel was ineffective for not objecting to the court's failure.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is an alleged error in the definition of reasonable doubt manifest when the trial court follows clear and binding Supreme Court precedent?

2. Was the error manifest and harmful?

3. Is it error when the trial court follows binding Supreme Court precedent?

4. Is the alleged error in the definition of reasonable doubt error when the jury instruction as a whole and the phrase complained of properly informs the jury of the burdens of production?

5. Is the alleged error in the reasonable doubt instruction structural?

6. Did defense counsel adequately express on the record that the defendant had the ability to pay legal financial obligations (LFO's)?

7. Should the court review an unpreserved LFO objection?

8. Was counsel ineffective when the defendant cannot demonstrate any prejudice from counsel's supposed prejudicial omission?

III. STATEMENT OF THE CASE

The appellant's statement of the case suffices for the most part. The State only adds that the jury was explicitly instructed that the State bore the burden of proof beyond a reasonable doubt, that the defendant has no burden of proving that a reasonable doubt exists and that the defendant is presumed innocent unless that presumption is overcome beyond a reasonable doubt. CP 39. During sentencing defense counsel noted that Mr. Belt was able bodied. Sentencing RP 6.

IV. ARGUMENT

A. Reasonable Doubt Jury Instruction.

1. The alleged error was not objected to and is not manifest.

In order to be entitled to appellate review of an issue the appellant must either preserve the issue by objecting in the trial court, or meet one

of the exceptions in RAP 2.5. The only possible exception relevant here is the one for "Manifest error affecting a constitutional right." Both the terms manifest and constitutional have meaning. The "constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982)). "The exception actually is a narrow one, affording review only of certain constitutional questions." *Id.*

Mr. Belt alleges a constitutional error, however, he does not allege a manifest one, therefore he is not entitled to review on this issue. *State v. Kalebaugh*, 183 Wn.2d 578, __ P.3d__ (2015) contains a summary of previous cases examining RAP 2.5.

> In *O'Hara* we held that under RAP 2.5(a)(3), manifestness requires a showing of actual prejudice. To demonstrate actual prejudice, there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case. Next, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

Id. (internal citations omitted)

To determine manifestness the appellate court must place itself in the shoes of the trial court to ascertain whether it could have corrected the error. The jury instruction is WPIC 4.01. This WPIC is generally accepted by the legal community. Comment to WPIC 4.01. The Washington Supreme Court mandated its use in *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007) and noted it had been in use for over half a century. *Id.*, citing *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959). Thus the trial court was bound by precedent to use the WPIC, and could not have reasonably corrected the error. *See Kalebaugh*, 183 Wn.2d at 584-85. "The jury instruction given was a misstatement of the law that the trial court should have known, and the mistake is manifest from the record. Thus, Kalebaugh's claim is a manifest constitutional error and can be raised for the first time on appeal." Contrary to *Kalebaugh*, the alleged error here is not manifest because the jury instruction complies with clear, binding precedent, the trial court could not correct it and the appellate court should decline to review it.

2. The error, if any, was harmless.

While the Supreme Court has insisted that harmless error is a different analysis than the practical and identifiable consequences analysis, the actual difference is elusive and has not been well defined. The practical and identifiable consequences at trial element is often similar

to a harmless error analysis. Because of this the State will discuss the two issues together.

Assuming, arguendo, that Mr. Belt is correct and the challenged instruction did place a burden of production to raise an issue on the defendant, this is a burden he asked for and accepted. Defendant's argument simply does not apply when the defense is an affirmative defense where the defendant bears the burden of production. By raising self-defense Mr. Belt did provide a reason to the jury. The jury was properly instructed that the State had the burden of disproving self-defense beyond a reasonable doubt. CP 46. Having based his defense on a reason he asserted, there are no practical, identifiable effects at trial in telling the jury that they should identify a reason for their doubt, as Mr. Belt based his whole defense on providing a reason, and any error was harmless beyond a reasonable doubt. Assuming there is error, it is harmless beyond a reasonable doubt and had no effect on the trial.

3. Kalebaugh and Bennett control this appeal, and there was no error.

Both the trial court and the court of appeals are obligated to follow Supreme Court precedent. That was done so in this case. In *Kalebaugh* the trial judge gave an improper definition in his opening remarks, but correctly gave the WPIC 4.01 instruction through the rest of the trial. The

Supreme Court ruled that the WPIC 4.01 language cured any problems with the improper language.

Mr. Belt argues that WPIC 4.01 creates a requirement to articulate a reason. Brief of Appellant at 7. But this was exactly what the Supreme Court rejected in *Kalebaugh*. The incorrect language the trial judge used was "'reasonable doubt' is a doubt for which a reason can be given" *Id.* at 584. Instead the Court reaffirmed the language 'reasonable doubt' is "a doubt for which a reason exists." *Id.* Something can exist without being readily articulable. The second definition cured the error of the first definition. The Supreme Court has already distinguished between the two concepts. By holding that the WPIC language cured the improper language, the Supreme Court necessarily held that the WPIC language was proper. The Court of Appeals is bound by that holding.

4. The jury instructions as a whole properly informed the jury.

Jury instructions are evaluated in the context of the instructions as a whole. *State v. Sublett*, 176 Wn.2d 58, 78, 292 P.3d 715 (2012). Jurors are presumed to follow instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). The same WPIC 4.01 explicitly informs the jury that the defendant bears no burden to prove that a reasonable doubt exists. Even if the sentence complained of, in isolation, is incorrect, the WPIC is

read as a whole, and properly informs the jury that the defendant had no burden to prove his innocence.

5. The error, if any, was not structural.

Reasonable doubt instructions, like most jury instructions, are subject to harmless error analysis. "An erroneous jury instruction ... is generally subject to a constitutional harmless error analysis. We may hold the error harmless if we are satisfied beyond a reasonable doubt that the jury verdict would have been the same absent the error. Misleading instructions do not require reversal unless the complaining party can show prejudice. " *State v. Lundy*, 162 Wn. App. 865, 871-72, 256 P.3d 466 (2011) (holding slight variations to WPIC 4.01, while error, were harmless). Because the jury was properly instructed, and because Mr. Belt took it upon himself to provide a reason for any doubt, even if the instruction was error, it was harmless. *Kalebaugh* also applies a harmless error analysis to this issue, and holds the correct language overcame the trial judge's misstatement. The alleged error was not structural and is subject to constitutional harmless error analysis.

B. Legal Financial Obligations.

1. The trial court adequately considered LFO's.

The defense attorney noted that Mr. Belt was able bodied during sentencing. While perhaps abbreviated, and not the clearest record, this

does show defense counsel considered legal financial obligations and concluded there was no basis to challenge them. Thus the court and counsel complied with their obligations under RCW 10.01.160. But, even if they hadn't, the court should not review this issue.

2. The court should not review this issue.

For the first time on appeal Mr. Belt asks the court to consider the trial judge's failure to consider his future ability to pay Legal Financial Obligations (LFO's) as a matter of discretionary review. The court should decline. The purpose of RAP 2.5 "Is to give the trial court a chance to correct the error and give the opposing party a chance to respond." *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012). The State Supreme Court held that an appellate court does not abuse its discretion when it declines to review this issue. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). In reviewing *Blazina* the Supreme Court essentially held that the case involved an issue of public interest that should be decided by an appellate court. RAP 13.4(b)(4). *Blazina* has resolved that significant question of public interest, and the message has been sent to the trial courts to take the issue more seriously. Deciding this case and remanding adds nothing to *Blazina*, and does not make a statement regarding a significant question of public interest. In order to support the argument that the court should accept review Mr. Belt simply repeats the public

policy statements already made in *Blazina*, he does not point out anything about this case would add to the public interest.

Mr. Belt's discretionary LFO's total $750.00. In order to accomplish what the defendant suggests Mr. Belt would have to be transported to Grant County to appear before the trial court, appointed a new public defender, take court and prosecutor time, and possibly file a new appeal, which would require another appellate counsel at public defense to review the case and either file an *Anders'* brief (*see Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)) or come up with some other issue, which would require more appellate court time and attention. These costs simply are not worth it when Mr. Belt makes no showing he is entitled to actual relief, and may petition at any time for relief from the LFO's. RCW 10.01.160(4). This is exactly the type of issue RAP 2.5 was designed for. The court should not review this issue.

3. Assuming he did not consider LFO's, defense counsel was not ineffective for not asking the court to consider the defendant's ability to pay.

A court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel' s performance was deficient and (2) the performance

prejudiced the defendant' s case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Counsel' s performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cent. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel' s performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel' s performance. *Id.*

Defendant fails his *Strickland* burden because he fails to show that the court would reduce his LFO's if asked. His discretionary LFO's were only $750.00. The burden LFO's impose is a factor for the court to consider. RCW 10.01.160. Mr. Belt would have to pay less than $3.00 a month during his incarceration to pay off his discretionary LFO's before he was released. During the commission of the crime he engaged in a strenuous fight. There is no indication in the record of a physical or mental condition that would indicate he would be unable to pay LFO's in the future. Defense counsel indicated he was able bodied. Defense counsel is not required to raise every conceivable issue that has no factual merit to be effective. Even if defense counsel breached the applicable

standard, the appellant has not shown any sort of probability that the outcome would have been any different had he raised the issue. The defendant fails his burden under *Strickland.*

V. CONCLUSION

The trial court properly followed WPIC 4.01, as mandated by the State Supreme Court. There was no error, and the error alleged is not manifest. The trial court had no reason to consider LFO's expressly when defense counsel stated that his client was able bodied, and defense counsel was not ineffective for not raising this meritless issue. The trial court should be affirmed in all respects.

Dated this 6th day of October 2015.

Respectfully submitted,

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Attorneys for Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32974-7-III
	)	
vs.	)	
	)	
LARRY BELT,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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Dated: October 8, 2015.

Kaye Burns