No. 73325-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID THOMPSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Alan R. Hancock

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **Deputy Harvey rendered an improper opinion thus violating Mr. Thompson's right to a fair trial before an impartial jury.**

a. *Deputy Harvey's statement was an improper opinion that Robbie Spears was telling the truth.*

The State contends in its response that Deputy Harvey's statement was not an improper opinion of the truthfulness of Mr. Speers. Brief of Respondent at 13-16. The State's analysis is incorrect.

Mr. Thompson agrees that Deputy Harvey did not *explicitly* render an opinion regarding the truthfulness of Mr. Speers. Rather, the statement implicitly and "almost explicitly" opined that Mr. Speer was telling the truth when he spoke to Deputy Harvey. *See State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007) (requiring an explicit or almost explicit statement). By claiming Mr. Speer was not "making a story," Deputy Harvey was opining that Mr. Speer was telling the truth. 6/21/2014RP 291.

The State's reliance on the facts of *Kirkman* is unavailing. In the portion of *Kirkman* cited by the State, the detective was testifying about a competency protocol he gave to the witness which required questioning about whether the witness could distinguish between the truth and a lie. *Id* at 930. The Supreme Court ruled this was not opinion

evidence but an account of an interview protocol. *Id*. at 931. Here, Deputy Harvey was not accounting an interview protocol he used in questioning Mr. Speer but opining that since Mr. Speer did not hesitate in answering the deputy's questions he was not "making a story," *ergo* he was telling the truth. This was an improper opinion.

b. *The State analyzed the issue of harmless error under an incorrect standard.*

In analyzing whether the improper vouching of Mr. Speers truthfulness was a harmless error, the State claims the issue was "not of constitutional magnitude" and subsequently analyzed the issue under the non-constitutional harmless error standard. Brief of Respondent at 20. This is plainly incorrect.

Since improper opinions on guilt invade the jury's province and thus violate the defendant's constitutional right, courts apply the constitutional harmless error standard to determine if the error was harmless. *State v. Hudson*, 150 Wn.App. 646, 656, 208 P.3d 1236 (2009). Under this standard it is presumed that the constitutional error was prejudicial, and the State must prove beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Watt,* 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

The State also offhandedly notes the even if the error was analyzed under a constitutional harmless error standard, "Thompson presented no evidence." Brief of Respondent at 23. This argument ignores well established law requiring the *State* to prove the error harmless beyond a reasonable doubt; the defendant bears no burden here. *Id.*

2. **The trial court failed to make an individualized inquiry into Mr. Thompson's ability to pay before imposing legal financial obligations.**

The State counters Mr. Thompson's argument regarding the imposition of the Legal Financial Obligations (LFOs) by claiming that the failure to object at sentencing precludes review on appeal. Brief of Respondent at 23. The Supreme Court has recently held otherwise.

In *State v. Duncan*, the defendant raised the issue concerning LFOs for the first time on appeal. ___ P.3d ___ 2016 WL 1696698 (April 28, 2016). The trial court had imposed LFOs without making any inquiry into the defendant's ability to pay. *Id.* The Court of Appeals ruled that the defendant had waived the issue by failing to object at sentencing to the

imposition of the LFOs. *State v. Duncan*, 180 Wn.App. 245, 253, 327 P.3d 699 (2014).

The Supreme Court disagreed and remanded for resentencing for consideration of the defendant's ability to pay. *Id.* at *3. The Court began its analysis by pointing out that:

> Had Duncan objected at trial to the LFOs sought by the State, the trial court would have been obligated to consider his present and future ability to pay before imposing the LFOs.

Id. The Court then held:

> Consistent with our opinion in *Blazina* and other cases decided since then, we remand to the trial court for resentencing with proper consideration of Duncan's ability to pay LFO's.

Id., citing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

Thus, the Supreme Court has consistently remanded cases to the trial court for consideration of the defendant's ability to pay, where the LFO issue was raised for the first time on appeal and where the trial court failed to inquire into the defendants ability to pay. This Court should follow the Supreme Court and remand to the trial court for resentencing for the trial court to give "proper consideration" of Mr. Thompson's ability to pay. *Duncan*, at *3.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Thompson asks this Court to reverse his conviction for second degree assault with instructions to dismiss and/or, reverse his convictions and remand for a new trial in light of the impermissible opinion testimony. Further, Mr. Thompson asks this Court to remand to the trial court for an inquiry into his ability to pay if the trial court decides to impose LFOs.

DATED this 3rd day of June 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF JUNE, 2016.

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