73519-5

NO. 73519-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON THOMAS,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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

2. The trial court erred in imposing an 18-month community custody term based on appellant's commission of second degree assault when that crime qualifies as both a violent offense (18-month term) and a crime against a person (12-month term).

Issues Pertaining to Assignments of Error

1. Does the jury instruction defining reasonable doubt as "one for which a reason exists" misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to the accused to provide a reason for why reasonable doubt exists?

2. Second degree assault qualifies as both a "violent offense" under RCW 9.94A.030(55)(a)(viii) and a "crime against persons" under RCW 9.94A.411(2). The community custody statute, RCW 9.94A.701, does not specify which community custody term to impose when an offense qualifies as both violent and against persons. Is RCW 9.94A.701 therefore ambiguous and must the lesser community custody term be imposed under the rule of lenity?

B. STATEMENT OF THE CASE

On March 26, 2015, the State charged Jason Thomas by amended information with one count of second degree assault. CP 11-12. The State alleged that on November 19, 2014, Thomas intentionally assaulted Kavit Sanghvi with a deadly weapon and recklessly inflicted substantial bodily harm, contrary to RCW 9A.36.021(1)(a) and (c). CP 11.

The case proceeded to a jury trial on March 26, 2015. 1RP.[1] The jury found Thomas guilty of second degree assault. CP 24. The jury also returned special verdicts finding Thomas was armed with a deadly weapon during commission of the crime and Sanghvi's injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm, pursuant to RCW 9.94A.535(3)(y). CP 11, 26-27.

The standard range sentence with the 12-month deadly weapon enhancement[2] was 34 to 41 months. CP 55. The trial court sentenced Thomas to an exceptional sentence of 53 months based on Sanghvi's injuries. 5RP 21; CP 55-57. The court also imposed 18 months of community custody because second degree assault is a violent offense under RCW 9.94A.030. CP 58. Thomas timely appealed. CP 64.

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[1] This brief refers to the verbatim reports of proceedings as follows: 1RP – March 26, 2015; 2RP – March 30, 2015; 3RP – March 31, 2015; 4RP – April 1, 2015; 5RP – May 22, 2015.

[2] RCW 9.94A.533(4)(b).

C. ARGUMENT

1. THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL.

At Thomas's trial, the court gave the standard reasonable doubt instruction, WPIC 4.01,[3] which reads, in part: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 34; 4RP 111. The Washington Supreme Court requires trial courts to give 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). This instruction 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

[3] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

the fill-in-the-blank arguments that Washington courts have invalidated in 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 Thomas's case is structural error requiring reversal.

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'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar.[4]

[4] 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 conclusion that jury could have applied the erroneous standard), overruled on other grounds by 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 grammatical structure of unanimity instruction to determine reasonable juror would read clause to mean jury must unanimously agree

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, e.g., Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of "common" to ascertain the jury's likely understanding of the word used in jury instruction); Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of the word "presume" to determine how jury may have interpreted the instruction).

"Reasonable" means "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). For a doubt to be reasonable under these definitions, it must be rational, logically derived, and

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upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (2013) (discussing difference between use of "should" rather than use of a word indicating "must" regarding when acquittal is appropriate).

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)).

Thus, an instruction defining reasonable doubt as "a doubt based on reason" would be proper. But WPIC 4.01 does not do that. Instead, 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, supra, 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. 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. It also 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 explains this problem:

> 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.

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 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, shifting the burden and undermining the presumption of innocence.

The standard of 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." Bennett, 161 Wn.2d at 316. The doubt "for which a reason exists" language in WPIC 4.01 does that in directing jurors the must 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). Such arguments "misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759. Simply put, "a jury need do nothing to find a defendant not guilty." Id.

But the improper fill-in-the-blank arguments did not originate in a vacuum—they sprang directly from WPIC 4.01's language. In State v. Anderson, for example, the prosecutor recited WPIC 4.01 before 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." 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). The same occurred in State v. 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." 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 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 for their 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 for it, 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)). An ambiguous instruction that permits erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). 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 Washington 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." 183 Wn.2d 578, 585, 355 P.3d 253 (2015). That conclusion is sound:

> Who shall determine whether 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); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing the instruction "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 Bennett, the supreme court directed trial courts to give WPIC 4.01 at least "until a better instruction is approved." 161 Wn.2d at 318. In Emery, the court contrasted the "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. 174 Wn.2d at 759. In Kalebaugh, the court similarly 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.'" 183 Wn.2d at 584. The Kalebaugh court concluded 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 quite comfortably' with the final instructions given here." Id. at 585.

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 are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their doubt. The plain language of WPIC 4.01 requires this articulation. 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.

None of the appellants in Kalebaugh, Emery, or Bennett argued the language requiring "a reason" in WPIC 4.01 misstates the reasonable doubt standard. "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); accord In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). 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. As such, their approval of WPIC 4.01's language does not control.

c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given.

Forty years ago, the Court of Appeals addressed an argument that "'[t]he 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." Id. 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, 13 Wn. App. at 5, court began its discussion by recognizing the "instruction has its detractors," but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated the standard instruction "has been accepted as a correct statement of the law for so many years" that argument to the contrary was without merit. 54 Wn.2d at 291. Nabors cites Tanzymore as its support. 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.

Thompson, 13 Wn. App. at 5, further observed, "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Harras found no error in the following instructional language: "It should be a doubt for which a good reason exists." 25 Wash. at 421. Harras, 25 Wash. at 421, 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).[5] However, this note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[6]

So Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason be given for the doubt. And then Thompson upheld the doubt "for which a reason exists" instruction by equating it with the instruction in Harras. 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, 183 Wn.2d at 585. The Kalebaugh

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

[6] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99 (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." (Emphasis added.)); 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." (Emphasis added.)); State v. Morey, 36 P. 573, 577 (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." (Emphasis added.)).

court explicitly held it was manifest constitution error to instruct the jury that reasonable doubt is "a doubt for which a reason can be given." Id. at 584-85.

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), further illuminates this dilemma. Harsted 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." Id. at 162. The supreme court explained "reasonable doubt" means:

> [I]f 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 defining a reasonable doubt as a doubt for which a reason can be given. Id. at 164. As stated in 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, 78 N.W. 590, 591-92 (Wis. 1899). Harsted noted some courts disapproved of the same kind of language, but was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. 66 Wash. at 165.

Here we confront the genesis of the problem. Over 100 years ago, the Washington 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. This is apparent because the supreme court in Emery and Kalebaugh, 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 acceptable 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. 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. RP 336-38. However, 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. Id. at 279-80. 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; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt.

Instructing jurors with WPIC 4.01 is structural error and requires reversal of Thomas's conviction.

2. RCW 9.94A.701 IS AMBIGUOUS AS TO THE COMMUNITY CUSTODY TERM APPLICABLE TO SECOND DEGREE ASSAULT.

Second degree assault is statutorily defined as both a violent offense and a crime against a person. These two types of offenses carry different mandatory community custody terms under RCW 9.94A.701(2) and (3). Because these statutes irreconcilably conflict, they are ambiguous, and the rule of lenity requires them to be interpreted in Thomas's favor. The trial court therefore erred in imposing 18 months of community custody rather than 12 months.

Statutory interpretation is an issue of law reviewed de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). A trial court's authority to impose a community custody condition is also an issue of law reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The court's primary duty in construing a statute is to determine the legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the

context of the entire statute, related statutory provisions, and the statutory scheme as a whole. Id. If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and courts may look to the statute's legislative history and circumstances surrounding its enactment to determine legislative intent. Id.

The trial court sentenced Thomas to 18 months of community because second degree assault is defined as a "violent offense" under RCW 9.94A.030(55)(a)(viii). CP 58. This community custody term is consistent with RCW 9.94A.701(2), which specifies a "court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense." (Emphasis added.)

However, RCW 9.94A.411(2) also specifies that second degree assault is a "crime against persons." RCW 9.94A.701(3) requires a court to "sentence an offender to community custody for one year when the court sentences the person to the custody of the department for: (a) Any crime against persons under RCW 9.94A.411(2)." (Emphasis added.)

Therefore, second degree assault is statutorily defined as both a violent offense and a crime against a person. But different community custody terms apply to these two types of offenses. Because the statute does

not specify which community custody term applies in these circumstances, it is ambiguous. Under the rule of lenity, ambiguous criminal statutes must be construed in the accused's favor. State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005); see also United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ("[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.").

The State may argue the legislature intended for those who commit violent offenses to receive a longer term of community custody than those who commit crimes against persons. Any such argument should be rejected because it is not clear from the statute. For instance, when an offender is sentenced to less than one year incarceration, the court may impose "up to one year of community custody" for both a violent offense and a crime against a person. RCW 9.94A.702(1). The two offenses are treated no differently. But where the sentence is longer than one year, as here, the statute does not provide a clear community custody term for an offense qualifying as both violent and against a person.

Further, RCW 9.94A.701(1)(b) requires courts to impose three years of community custody for a "serious violent offense." RCW 9.94A.701(2) requires courts to impose 18 months of community custody "for a violent

offense that is not considered a serious violent offense." (Emphasis added.) This provision expressly distinguishes between a violent and a serious violent offense, making it clear which community custody term should apply.[7] By contrast, RCW 9.94A.701(3)(a) includes no such distinguishing or clarifying language: the trial court must sentence an offender to one year of community custody for "[a]ny crime against persons under RCW 9.94A.411(2)." The legislature did not say "any crime against persons that is not considered a violent offense," as it did in RCW 9.94A.701(2).

"Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (citations omitted). The legislature included clarifying language in RCW 9.94A.701(2) that it omitted in RCW 9.94A.701(3)(a). Therefore, it is not clear from the statute that the legislature intended second degree assault to be punished as a violent offense rather than a crime against a person. See State v. Delgado, 148 Wn.2d 723, 728-729, 63 P.3d 792 (2003) (treating two-strike statute differently than three-strike statute based on legislature's omission of specific language).

[7] Second degree assault is not listed as a serious violent offense under RCW 9.94A.030(46).

The statute remains ambiguous as to whether Thomas should receive 18 months of community custody because second degree assault is a violent offense or 12 months of community custody because it is a crime against a person. The rule of lenity dictates the ambiguous statute be interpreted in Thomas's favor, and so the 12-month term applies. This Court should vacate the community custody term and remand for resentencing. See State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Thomas to be indigent and entitled to appointment of appellate counsel "wholly at public expense." Supp. CP__ (Sub. No. 66, Order of Indigency). If Thomas does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for appellate costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order

appropriate to the individual defendant's circumstances." Id. Accordingly, Thomas's ability to pay must be determined before discretionary costs are imposed. However, the trial court made no such finding. Instead, the trial court waived all non-mandatory fees, including court costs and recoupment for a court-appointed attorney. CP 56.

Without a basis to determine that Thomas has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

This Court should reverse Thomas's conviction and remand for a new trial because the reasonable doubt instruction unconstitutionally shifted the burden of proof. This Court should also reverse Thomas's community custody term and remand for resentencing.

DATED this 15th day of December, 2015.

Respectfully submitted,

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

STATE OF WASHINGTON	)	
Appellant,	)	
v.	)	COA NO. 73519-5-I
JASON THOMAS,	)	
Respondent.	)	

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 15TH DAY OF DECEMBER, 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] JASON THOMAS
DOC NO. 987353
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF DECEMBER, 2015.

X Patrick Mayovsky