73401-6

NO. 73401-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HOOD,

Appellant.

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

The Honorable Hollis R. Hill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Washington's pattern jury instruction on reasonable doubt is unconstitutional.

2. The trial court erroneously commented on the evidence when it instructed the jury that a "prolonged period of time" meant "more than a few weeks."

3. Christopher Robin Hood's first degree burglary and felony violation of no-contact order involved the "same criminal conduct" for sentencing purposes and should have been scored as a single offense.

4. The trial court erred in imposing an 18-month community custody term based on Hood's commission of first degree burglary given that that crime qualifies as both a violent offense (18-month term) and a crime against persons (12-month term).

5. In the unlikely event appellate costs become an issue in this appeal, this court should exercise its discretion and decline to impose them given that Hood is indigent and has not ability to pay them.

Issues Pertaining to Assignments of Error

1. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists," misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to Hood to provide a reason for why reasonable doubt exists?

2. Was the trial court's instruction that "'prolonged period of time' means more than a few weeks" an unconstitutional comment on the evidence?

3. Hood's first degree burglary and felony violation of a no-contact order involved the same victim, same time and place, and same objective intent. Did the sentencing court err when it failed to find they constituted the "same criminal conduct" for purposes of Hood's offender score?

4. First degree burglary qualifies as both a "violent offense" under RCW 9.94A.030(55)(a)(i) 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?

5. Under this court's current approach to appellate costs, any objection to such costs must be made prior to a decision on the merits and before the prevailing party is even known. Therefore, in the event this court erroneously affirms Hood's conviction, should this court exercise discretion in the decision terminating review by declining to impose appellate costs on Hood based on his indigence?

B. STATEMENT OF THE CASE

The State charged Hood with first degree burglary, stalking, and felony violation of a no-contact order. CP 14-16. All three counts contained domestic violence allegations. CP 14-15. For the burglary and no-contact order violation, the State also alleged the offenses were part of an ongoing pattern of abuse pursuant to RCW 9.94A.535(3)(h)(i). CP 14-15.

The case proceeded to a bifurcated trial. The first phase concerned Hood's guilt of the charged crimes. RP 1-499. The second phase concerned whether the first degree burglary and the felony violation of a no-contact order were part of an ongoing pattern of abuse. RP 500-46.

According to Hood's ex-wife, Linewati Djohan, Hood and Djohan finalized their divorce in November 2014. RP 230. Hood still had a copy of the keys to Djohan's condo and one day Djohan found Hood in the apartment with another woman a couple times. RP 231-32. During the second time, a neighbor called police because of yelling. RP 180-81, 233.

Djohan thereafter changed the locks to the front door of her condominium, but Hood apparently still had access to the building. RP 234.

Djohan and other witnesses described several separate incidents where it appeared someone tried to pry open Djohan's front door, glued the door shut, and spray painted the door. RP 162-64, 182-84, 237-42, 307-10, 316. Djohan obtained a no-contact order against Hood. RP 248-49. Djohan

also testified Hood showed up to her place of work following the issuance of the no-contact order. RP 245-46. She also recounted Hood following her when she got off work and pounding on the windows of her car. RP 242-44.

According to Djohan, early in the morning on November 21, 2014, Djohan saw shadows outside her condo and opened the door. RP 251. Hood was there and pushed her to the ground. RP 251. Djohan testified she screamed for help but Hood put his hand over her mouth; they proceeded to struggle on the ground. RP 252-53. Djohan stated Hood then put a gun to her head. RP 253. According to Djohan, Hood hit her two or three times with the gun and left. RP 254-55. Djohan called police. RP 255.

The trial court gave the standard reasonable doubt instruction to the jury, which read, in part, "A reasonable doubt is one for which a reason exists." CP 65; RP 425. This instruction was given again in the second phase of the trial. CP 98; RP 532.

The jury found Hood guilty of first degree burglary, stalking, and felony violation of a no-contact order. CP 56-58. The jury also determined Hood and Djohan were family or household members with respect to each verdict. CP 56-58.

During the second phase of the trial, the court instructed the jury that an ongoing pattern of abuse meant "multiple incidents of abuse over a

prolonged period of time. The term 'prolonged period of time' means more than a few weeks." CP 95-96; RP 531.

The jury determined the State proved the first degree burglary and felony violation of a no-contact order were both part of on "ongoing pattern fo psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." CP 91-92.

At sentencing, defense counsel asserted the burglary and no-contact order constituted the same criminal conduct. RP 555-56. The trial court, without analysis, stated "Those two offenses have different criminal intent," and did not further consider the defense argument. RP 555.

Based on the State's recommendation, the court imposed an exceptional sentence above the standard range for the burglary of 156 months. CP 114; RP 562. The court imposed a concurrent 60-month sentence for felony violation of a no-contact order and a suspended 364-day sentencing for stalking. CP 114, 122; RP 562. The court also imposed an 18-month community custody term for the commission of a violent offense. CP 115; RP 562.

Hood timely appeals. CP 132. Because of Hood's indigency, Hood was "entitled to counsel for review wholly at public expense." Supp. CP ___ (sub no. 59, order of indigency). Hood was also entitled to the costs of

preparing the appellate record at public expense. Supp. CP ___ (sub no. 59, order of indigency).

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

In both phases of Hood's trial, the jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 65, 98; RP 425, 532. This instruction, based on WPIC 4.01,[1] 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. Not only must jurors have 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 fill-in-the-blank arguments that Washington courts have invalidated in

[1] 11 WASH. PRACTICE: WASH. 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 exact thing.

WPIC 4.01 violates dues process and the jury-trial guarantee. U.S. CONST. amends. VI, XIV; CONST. art. I, §§ 3, 22. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

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

Jury instructions 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. See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction allowed jury to find actual imminent harm was necessary for self defense, resulting in court's determination that jury could have applied erroneous self defense standard), overruled in part 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 on 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 different between use of "should" and use of word indicating "must" regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

In light of these principles, the error in WPIC 4.01 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. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of "presume" to determine how jury may have interpreted instruction); 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 in 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 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)).

Thus, an instruction defining reasonable doubt as "a doubt based on reason" would be proper. WPIC 4.01 does not do that, however. WPIC 4.01 requires "a reason" for the doubt, which is different than 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 reasonable doubt; it requires an explainable, articulable, reasonable doubt.

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 is unconstitutional because its language requires more than just a reasonable doubt to acquit. It instead explicitly requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having 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 reasonable doubt standard elucidates similar concerns 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.

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 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 beyond-a-reasonable-doubt standard 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 just that by directing jurors they must have a reason to acquit rather than a doubt based on reason.

In prosecutorial misconduct cases, appellate courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. As discussed above, fill-in-the-blank arguments "improper impl[y] that the jury must be able to articulate its reasonable doubt" and "subtly shift[] the burden to the defense." Emery, 174 Wn.2d at 760; accord Walker, 164 Wn. App. at 731; Johnson, 158 Wn. App. at 682; Venegas, 155 Wn. App. at 523-24 & n.16; Anderson, 153 Wn. App. at 431. These arguments are improper "because they 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." Emery, 174 Wn.2d at 759.

These improper burden shifting arguments are not the mere product of prosecutorial malfeasance, however. The offensive arguments did not originate in a vacuum but sprang directly from WPIC 4.01's language. In Anderson, for instance, the prosecutor recited WPIC 4.01 before arguing, "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. at 424. In Johnson, likewise, 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. at 682.

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 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 hazard?

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. 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—which Hood does not by any means concede—that is not the correct standard for measuring the adequacy of jury instructions. Courts have arsenals of interpretative aids at their disposal whereas 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 unless and 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, compels this conclusion.

Recently, in 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 at 585. This 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 instruction "a reasonable doubt is such a doubt as the jury are able to give reason for" 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 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").

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

In Bennett, the Washington 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. Emery, 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 585. 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.

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 provided no answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case. In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued the "a doubt for which a reason exists" language 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. No. 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, Division Two 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 instruction). 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.

Thompson's 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). Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addressed the "doubt for which a reason exists" language in the instruction, so it was not at issue.

The Thompson court 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). Thompson, 13 Wn. App. at 5. Harras found no error in the following 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 Wash. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State, 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894).[2] However, this

[2] The relevant portion of the note cited by Harras is attached as the appendix to this brief.

note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[3]

So our supreme court in Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason to 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. This is a serious problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The Kalebaugh court explicitly held, moreover, that it was a manifest constitutional error to instruct the jury that reasonable doubt is "a doubt for which a reason can be given." Kalebaugh, 183 Wn.2d at 584-85.

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[3] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial 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 (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.").

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), sheds further light on this dilemma. Harsted took exception to the instruction, "The expression, 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. The court explained the meaning of reasonable doubt:

> [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, the Harsted court 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. Among them was Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." While the Harsted court noted some courts had disapproved of similar language, it was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. 66 Wash. at 165.

We now arrive at the genesis of the problem. More than 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 annihilates any 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. Our supreme court found no such distinction in Harsted and Harras.

This problem has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Harras and Harsted explicitly contradict Emery's and Kalebaugh's condemnation. The law has evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains stuck in the past, outpaced by this court's modern understanding of the reasonable doubt standard and eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable different 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. This repugnant requirement distorts the reasonable doubt standard to the detriment of the accused.

d. This structural error requires reversal

Defense counsel did not object to the instruction at issue here. See RP 417-20 (discussion regarding exceptions or objections to jury instructions). 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 for RAP 2.5(a)(3) purposes. 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.

The State might attempt to argue the invited error doctrine precludes Hood's claim. During its discussion of the jury instructions, the trial court expressed its understanding that "the defense has joined in the submission of the prosecution, so those should be ready to go." RP 415-16. Earlier in the trial, the trial court similarly stated, "I wanted to put on the record that

counsel has stipulated to the jury instructions submitted by the prosecution." RP 290. Defense counsel never indicated it had joined or stipulated to the State's instructions, however. Defense counsel did not propose any reasonable doubt instruction. Thus, there is not a sufficient record to support a claim of invited error. At most, defense counsel's acquiescence in the trial court's statement was a failure to object.

In any event, under the invited error doctrine, "a party who set up an error at trial cannot claim that very action as error on appeal and receive a windfall by doing so." State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009).

Here, even if he joined the State's instructions, defense counsel did not "set up" the articulation error in WPIC 4.01. Counsel did not mislead the trial court either. Rather, defense counsel was unaware of the nature of the challenge to WPIC 4.01 that Hood raises on appeal.

In addition, any claim of invited error will likely conflict with the State's other likely argument in response—that the Washington Supreme Court requires trial courts to give the WPIC 4.01 instruction in every criminal case. Even if Hood's attorney had not stipulated to or joined the State's instructions, the trial would have given the instruction anyway. This situation is unique because trial courts must define reasonable doubt and

currently must use a defective instruction, WPIC 4.01, to do so. In such circumstances, Hood should not be held to have invited the error.

Furthermore, if defense counsel did invite the error, he rendered ineffective assistance of counsel. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactics, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." Id.

Here, assuming defense counsel unnecessarily stipulated to the State's instructions, there was no legitimate tactic or strategy that could explain doing so. The sole consequence of joining or stipulating to the jury instructions proposed by an adverse party is making future challenges to the jury instructions more arduous for appellate counsel. There is no conceivable benefit to a criminal defendant to join in jury instructions

proposed by the prosecution. No objectively reasonable defense attorney would willingly burden his or her client's future claims against the jury instructions by agreeing to instructions proposed by the State. If defense counsel stipulated to or joined in the State's proposed jury instructions, rather than just not objecting or excepting to them, counsel's performance fell below an objective standard of reasonableness.

If the State argues Hood invited the error, the prejudice prong of the Strickland analysis is self-fulfilling. The State would be arguing that this court may not consider Hood's good faith constitutional challenge to a reasonable doubt instruction that requires jurors to articulate the reason for their doubt. Had defense counsel not stipulated to or joined in the jury instructions—assuming that is what happened—the State could not claim Hood invited any error. Nor could the State ask this court to decline to reach the merits of Hood's arguments. If this court were to apply the invited error doctrine and decline to reach the merits of this constitutional issue based on trial counsel's deficient performance, there is a reasonable probability that the outcome of this appeal and the State's prosecution would differ.

If defense counsel endorsed the jury instructions, his performance was objectively deficient. If the State makes an invited error argument and this court agrees, the resulting prejudice is Hood's inability to raise a constitutional issue on appeal. Defense counsel rendered ineffective

assistance of counsel, requiring this court to reject any invited error argument and reach the merits of Hood's challenge to WPIC 4.01.

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. The trial court's use of WPIC 4.01 was structural error and requires reversal of Hood's convictions and a new trial.

2. THE TRIAL JUDGE IMPERMISSIBLY COMMENTED ON THE EVIDENCE BY INSTRUCTING JURORS A "PROLONGED PERIOD OF TIME" MEANT MORE THAN A FEW WEEKS

Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A jury instruction constitutes a comment on the evidence if it resolves a disputed factual issue that should have been left to the jury. State v. Eaker, 113 Wn. App. 111, 118, 53 P.3d 37 (2002). Comments on the evidence are presumed prejudicial and the State bears the burden of showing no prejudice. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006); State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Here, the State alleged aggravating factors for the first degree burglary and felony violation of a no contact order charges under RCW

9.94A.535(3)(h)(i). CP 14-15. That provision provides that a current domestic violence offense "was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time . . . ." The trial court gave two jury instructions for the ongoing pattern of abuse aggravator, one each for the burglary and the no contact order violation, which stated "An 'ongoing pattern of abuse' means multiple incidents of abuse over a prolonged period of time. The term 'prolonged period of time' means more than a few weeks." CP 96-97.

Under recent Washington Supreme Court precedent, this instruction "constituted an improper comment on the evidence because it resolved a contested factual issue for the jury." State v. Brush, 183 Wn.2d 550, 559, 353 P.3d 213 (2015). "The instruction essentially stated that if the abuse occurred over a time period that was longer than a few weeks, it met the definition of a 'prolonged period of time.'" Id. The instruction wholly "relieved the State of its burden to show that the pattern of abuse occurred over a 'prolonged period of time.'" Id.

The State might argue there is no prejudice because it introduced evidence of domestic violence dating back to 1999. However, as the court explained in State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997), "Whether the State produced sufficient evidence for a rational juror to find

[the Youth Education Program] was a school is irrelevant to whether the jury instruction was correctly drafted." The erroneous instruction was still "tantamount to a directed verdict and was error." Id. The same is true here. Whether the State produced sufficient evidence for a juror to find a pattern of abuse over a prolonged period of time is not relevant to the instructional error and does not cure it. Instead, the instruction relieved the State of its burden and entirely removed this factual issue from the jury's consideration. Hood's exceptional sentence cannot be sustained under this aggravating factor. This court should vacate Hood's exceptional sentence and remand for resentencing.

3. HOOD'S CONVICTIONS FOR BURGLARY AND VIOLATION OF A NO-CONTACT ORDER ARE "THE SAME CRIMINAL CONDUCT" FOR PURPOSES OF HIS OFFENDER SCORE

When a person is sentenced for two or more current offenses, "the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct" means crimes that involve the same intent, were committed at the same time and place, and involved the same victim. Id.

This issue is reviewed for an abuse of discretion or misapplication of the law, and the defendant bears the burden to show two crimes involve the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 535-39, 295 P.3d 219 (2013).

The State contended Hood's offender score with respect to the first degree burglary was 8, which included two points for the other current felony violation of a no-contact order. Supp. CP ____ (sub no. 48, State's presentence report). Likewise, based on the other current burglary, the State contended Hood's offender score with respect to the felony violation of no-contact order was 7. Supp. CP ____ (sub no. 48, State's presentence report). However, because the burglary and felony violation of no-contact order comprised the same criminal conduct, Hood's offender score for each should have been 6 and 5, respectively.

Applying the test in RCW 9.94A.589(1)(a), Hood's burglary and violation of a no-contact order occurred at the same time and place against the same person—November 21, 2014 against Linewati Djohan. CP 6-7 (certification for determination of probable cause stating Hood "stepped into the doorway and pushed [Djohan] back into the apartment causing her to fall to the floor" and proceeded to assault Djohan with a firearm); RP 251, 253-54 (Djohan testifying she saw shadow outside front door to apartment, opened the door, Hood then pushed her, she fell down, and Hood assaulted

her). Thus, the burglary (pushing the door open and entering Djohan's condominium in order to assault her) and the felony violation of a no-contact order (pushing the door open and entering Djohan's condominium in order to assault her) occurred at the same time, same place, against the same victim, and to further the same intent to assault. These crimes constituted the same criminal conduct.

When defense counsel made the same criminal conduct argument, the trial court indicated, "Those two offenses have different criminal intent," and rejected the defense argument without further analysis. RP 555. This was error. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This includes whether the crimes were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995). "The test takes into consideration how intimately related the crimes committed are" and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

Here, both the burglary and the felony violation of a no-contact order involved the same objective—Hood intended to assault Djohan. To do so, Hood pushed open Djohan's front door, pushed her to the floor, and assaulted her. The burglary and the no-contact order violation were one and

the same: both were part of the same overall objective to enter Djohan's condo and assault her and both furthered that intent. Therefore, the first degree burglary and the violation of a no-contact order should have been treated as a single offense at sentencing. Hood's offender score for the burglary should have been 6 not 8; his offender score for the felony violation of a no-contact order should have been 5 not 7. This court should accordingly remand for resentencing.

4. RCW 9.94A.701 IS AMBIGUOUS AS TO THE COMMUNITY CUSTODY TERM APPLICABLE TO FIRST DEGREE BURGLARY

First degree burglary is statutorily defined as both a violent offense and a crime against a person. RCW 9.94A.030(55)(a)(i) ("'Violent offense'" includes "[a]ny felony defined under any law as a class A felony"); RCW 9A.52.020(2) ("Burglary in the first degree is a class A felony."); RCW 9.94A.411(2)("1st Degree Burglary" categorized among "CRIMES AGAINST PERSONS"). These two types of offense carry different mandatory community custody terms under RCW 9.94A.701(2) and (3). Because these statutes conflict and cannot be reconciled, they are ambiguous and the rule of lenity requires them to be interpreted in Hood's favor. It was error to impose 18 months of community custody rather than 12 months.

Courts review issues of statutory interpretation and statutory authority to impose community custody conditions de novo. State v.

Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). An unlawful 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 purpose of statutory interpretation is to determine and carry out 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 courts discern from the ordinary meaning of the language used in the context of the entire statute and related statutory provisions, taking the statutory scheme as a whole. Id. If a statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and courts may look to the statute's legislative history and circumstances surround its enactment to determine legislative intent. Id.

The trial court sentenced Hood to 18 months' community custody because first degree burglary is a class A felony and class A felonies are violent offenses under RCW 9.94A.030(55)(a)(i). CP 115. This community custody term is consistent with RCW 9.94A.701(2), which provides 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 violence offense."[4] (Emphasis added.)

However, RCW 9.94A.411(2) also specifies that first degree burglary is a "CRIME AGAINST PERSONS." RCW 9.94A.701(3) requires the trial 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.)

Thus, first degree burglary is statutorily defined as both a violent offense and a crime against a person. Different community custody terms apply to these two different classifications of offenses. Because the statute does not specify which community custody term applies in these circumstances, the statute is ambiguous. Accordingly, under the rule of lenity, the statute must be construed in Hood'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.").

[4] First degree burglary is not listed as a serious violent offense under RCW 9.94A.030(46).

This conclusion is compelled by looking to the statute's treatment of "violent offenses" and "crimes against persons" in other contexts. For instance, when an offender is sentenced to less than one year of incarceration, the court may only impose "up to one year of community custody" for both a violent offense and a crime against a person. RCW 9.94A.702(1). Violent offenses and crimes against a person are treated no differently in this context. 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.

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 offense and a serious violent offense, making it clear which community custody term should apply. By contrast, RCW 9.94A.701(3)(a) makes no such distinction and has no such 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 Det. of Williams, 147 Wn.2d 476, 791, 55 P.3d 597 (2002) (citations omitted); see also State v. Delgado, 148 Wn.2d 723, 728-29, 63 P.3d 792 (2003) (treating two-strike statute differently than three-strike statute based on legislature's omission of specific language). The legislature included clarifying language in RCW 9.94A.701(2) that is omitted in RCW 9.94A.701(3)(a). Therefore, it is not clear from RCW 9.94A.701(3)(a) that the legislature intended first degree burglary to be punished as a violent offense rather than as a crime against a person.

The statute is ambiguous as to whether Hood should receive an 18-month community custody because first degree burglary is a violent offense or term or a 12-month community custody term because first degree burglary is a crime against a person. The rule of lenity requires that the ambiguous statute be interpreted in Hood's favor. The 12-month community custody 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).

5. THIS COURT SHOULD EXERCISE DISCRETION NOT TO IMPOSE APPELLATE COSTS AND SO STATE IN ITS DECISION TERMINATING REVIEW

In the event the State erroneously substantially prevails in this appeal, this court should exercise discretion and decline to impose appellate costs. This court should state as much in its decision terminating review.[5]

a. The trial court informed Hood prior to appeal that appellate costs, including the cost of an appellate defender, would be provided at public expense, but this was untrue

Because he was indigent, the trial court appointed appellate counsel and provided preparation of the appellate record "at public expense." Supp. CP ____ (sub no. 59, order of indigency). Any reasonable person reading this order would believe (1) Hood was entitled to an attorney to represent him and the preparation of an appellate record at public expense and (2) "at public expense" means Hood would pay nothing due to his indigency, win or lose. Any imposition of appellate costs would convert this indigency order

[5] This court's commissioners have refused to exercise any discretion with regard to appellate costs when the issue is raised in a post-decision objection to cost bill. In so refusing, they have referenced RAP 14.2, which reads in part, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." In State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000), the court stated, albeit in dictum, RAP 14.2 "appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision." If this is so, the only mechanism available to avoid the imposition of appellate costs is assigning contingent error to the imposition of appellate costs to enable this court to direct that costs not be imposed in its decision terminating review.

into a falsehood. This alone is a sound reason for this court to exercise discretion and deny appellate costs.

b. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their cases undermines the attorney-client relationship and creates a perverse conflict of interest

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not win the day in the Court of Appeals, their clients will have to pay, at minimum, thousands of dollars in appellate costs. In this manner, appellate defenders become more than just their clients' lawyers, but also their financial planners. Indeed, appellate defenders must hedge the strength of their arguments against the vast sums of money their clients will owe and advise their clients accordingly. This undermines attorneys' fundamental role in advancing all issues of arguable merit on their clients' behalf and thereby undermines the relationship between attorney and client.

Not only do appellate defenders have to explain to clients they will face substantial appellate costs if their arguments are unsuccessful, they also have to explain that the Office of Public Defense gets most of the money. Many clients immediately see the perverse incentive this creates: the Office of Public Defense, through which all appellate defenders represent their clients, collects money only when the appellate defender is unsuccessful.

This is readily viewed as a conflict of interest and undermines the appearance of fairness of the appellate cost scheme. The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys when they lose. Franz Kafka himself would strain to imagine such a design. This court should exercise its discretion and deny costs in this case.

c. County prosecutors seek costs to punish the exercise of constitutional rights

County prosecutors have no real interest in imposing costs. They recover only a small amount of ordered appellate costs. Given the small sum, the county prosecutors' real purpose in filing cost bills is to punish those who exercise their rights to counsel and to appeal under article I, section 22 of the state constitution. This court should deny costs in this case.

d. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this court should accordingly exercise its discretion to deny appellate costs in the cases of indigent appellants

The Blazina court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. 182 Wn.2d at 836-37. LFOs accrue interest at a rate of 12 percent so that even persons "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. at 836. This, in turn, "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. 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclus.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASH. STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

While the Blazina court addressed trial court LFOs, the "problematic consequences" of trial court LFOs are every bit as problematic in the context of appellate costs. The appellate cost bill, which generally totals thousands of dollars, imposes a debt for not prevailing on appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). This debt results in the same compounding of interest and prolonged retention of court jurisdiction. Appellate costs negatively impact indigent persons' ability to move on with their lives in precisely the same ways the Blazina court identified.

Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise

that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also stated, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839.

This court receives orders of indigency "as part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. 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). If this court errs by affirming, this court should nonetheless embrace and soundly exercise its discretion by denying the award of any appellate costs in its decision terminating review in light of the serious concerns recognized in Blazina.

e. Imposing costs on indigent persons without assessing whether they have the ability to pay does not rationally serve a legitimate state interest and accordingly violates substantive due process

Both the state and federal constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV; CONST. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218-19. Deprivations of life, liberty, or property must be substantively reasonable and are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

The level of scrutiny applied to a substantive due process challenge depends on the nature of the right at issue. Johnson v. Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, courts apply rational basis scrutiny. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. Id. Although this is a deferential standard, it is not meaningless. Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (cautioning rational basis standard "is not a toothless one").

The vast majority of the money awarded in an appellate cost bill is earmarked for indigent defense funding and goes to the Office of Public Defense. Although funding the Office of Public Defense is a legitimate state interest, the imposition of costs on appellants who cannot pay them does not rationally serve this interest.[6]

As the Washington Supreme Court recently recognized, "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. Imposing appellate costs under RCW 10.73.160 and RAP 14.2 on indigent persons who cannot pay them fails to further any state interest. There is no rational basis for appellate courts to impose this debt upon indigent persons who lack the ability to pay.

Likely intending to avoid such a result, the legislature expressly granted discretion to deny a request to impose costs on indigent litigants:

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[6] It is by no means clear that the appellate cost system produces a net positive balance in the state's coffers. It is likely that enforcement efforts—if fairly quantified to include the time that trial and appellate lawyers, clerks, commissioners, and judges spend on these issues—would exceed the limited sums extracted from indigent persons.

"The court of appeals, supreme court, and superior courts may require an adult or a juvenile convicted of an offense or the parents of another person legally obligated to support a juvenile offender to pay appellate costs." RCW 10.73.160(1) (emphasis added). "The authority is permissive as the statute specifically indicates." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). No rational legislation would expressly grant discretion to courts that refuse to exercise it. Washington courts must, at minimum, require an ability-to-pay determination *before* imposing costs to comport with the due process clauses.

The state also has a substantial interest in reducing recidivism and promoting postconviction rehabilitation and reentry into society. Blazina, 182 Wn.2d at 836-37. As discussed, appellate costs immediately begin accruing interest at 12 percent, making this reentry unduly onerous, if not impossible, to achieve. See id.; RCW 10.82.090(1). This important state interest cuts directly against the discretionless imposition of appellate costs.

When applied to indigent persons who do not have the ability or likely future ability to pay, as here, the imposition of appellate costs under title 14 RAP and RCW 10.73.160 does not rationally relate to the state's interest in funding indigent defense programs. In the unlikely event the issue arises, Hood asks this court to conclude, in its decision terminating review,

that any imposition of appellate costs without a preimposition determination of his ability to pay would violate his substantive due process rights.

f. Alternatively, this court should require superior court fact-finding to determine Hood's ability to pay

In the event his court wishes to impose appellate costs, it should first require a fair preimposition fact-finding hearing to determine whether Hood can pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. If it erroneously affirms and is inclined to impose appellate costs, this court should first direct the superior court to allow Hood to litigate his ability to pay before appellate costs are imposed.

If the State is able to overcome the presumption of continued indigence and support a factual finding that Hood has the ability to pay, the superior court could then fairly exercise its discretion to impose appellate costs depending on Hood's actual and documented ability to pay.[7]

Blazina signals that the time has come for Washington courts and prosecutors to stop punishing the poor for their poverty. Hood asks that this court deny all appellate costs or at least require the trial court on remand to conduct a fair fact-finding hearing to determine his actual ability to pay appellate costs.

[7] The trial court here declined to impose any discretionary costs associated with trial. CP 113, 123; RP 562.

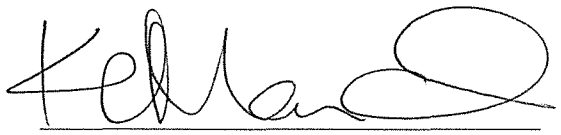
D. CONCLUSION

The defective reasonable doubt instruction given in Hood's trial requires reversal and a new trial. Alternatively, this court should remand for resentencing.

DATED this 30th day of November, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO.73401-6-I
	)	
CHRISTOPHER HOOD,	)	
	)	
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 30TH DAY OF NOVEMBER 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] CHRISTOPHER HOOD
DOC NO. 857723
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER 2015.

X Patrick Mayovsky