

65377-6

65377-6

No. 65377-6-I

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

STATE OF WASHINGTON, Respondent,

v.

RICHARD Z. BOWEN, Appellant.

**BRIEF OF RESPONDENT
AND MOTION TO STRIKE**

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

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A. ASSIGNMENTS OF ERROR

None.

**B. ISSUES PERTAINING TO APPELLANT'S
ASSIGNMENTS OF ERROR**

1. Whether the jury instruction that stated that recklessness is established if the person acts intentionally created a mandatory presumption requiring the jury to find that the defendant had recklessly inflicted substantial bodily injury because he had intentionally assaulted the victim where the instructions clearly required the jury to find separate mental states, intent regarding the assault and recklessness regarding the infliction of substantial bodily harm, and whether any error regarding the instruction was harmless where the evidence was overwhelming that the defendant intended to inflict substantial bodily harm.
2. Whether the case should be remanded for correction of the judgment and sentence where the community custody imposed is contrary to statute and the court mistakenly believed that second degree assault is a serious violent offense.
3. Whether the defendant may raise the issue of the court's failure to consider his ability to pay where the defendant never raised the issue at sentencing nor provided any information that he would not be able to pay the legal financial obligations and where the challenged costs are set forth by statute.
4. Whether there was substantial evidence to support the trial court's finding that the defendant had the ability or likely future ability to pay where the defendant has at least 10 years to pay the \$2050 in legal financial obligations and the record reflects that the defendant had recently been released on \$100,000 bail, did not object to the imposition of costs, and did not present any information regarding his inability to pay, although he was indigent at sentencing.

5. Whether the court erred in imposing the domestic violence fee, criminal filing fee and jury demand fee where the court's domestic violence finding does not implicate Blakely v. Washington and the amounts are set by statute.

C. FACTS

1. Procedural Facts.

On February 12, 2010, Appellant Richard Bowen was charged with Assault in the Second Degree, in violation of RCW 9A.36.021(1)(a), and Unlawful Imprisonment, in violation of RCW 9A.40.040, for his actions on or about February 5th, 2010. CP 62-63. A jury found him guilty as charged on April 22, 2010. CP 27.

At sentencing, the State recommended 43 months on the assault, the top of the standard range of 33-43 months, given Bowen's criminal history, and 29 months on the unlawful imprisonment, the top of the standard range of 22-29 months. CP 17; RP 244-46. Prior to addressing sentencing Bowen's counsel indicated that he wished to address the issue of bail, that bail had been set at \$100,000 and had been posted after he was convicted, and then subsequently modified to a \$100,000 performance bond. RP 244-45. With respect to sentencing, Bowen's counsel requested the court impose the low end of the range, 33 months on the assault and 22 months on the unlawful imprisonment. He also requested the court to set an appeal bond for \$100,000. RP 247. The judge imposed the top of the

standard range, noting that he felt this was an egregious case and was surprised the State had not sought an exceptional sentence. CP 19; RP 247-48. The court imposed a community custody range of 24-48 months, believing that second degree assault qualified as a serious violent offense. RP 248. The court also imposed “other standard terms and conditions of sentencing.” Id.; CP 17-18. Defense counsel never objected to the legal financial obligations imposed and never addressed the court regarding Bowen’s ability to pay them.

2. Substantive Facts

On February 5, 2010 as Ryan and Lindsey Brennan were preparing to go to bed, they heard a scream coming from outside their house, in Whatcom County. RP 16-18, 32. Initially they didn’t think too much of it, but then they heard more screaming, this time from their backyard where there was a camper in which Mrs. Brennan’s brother, Jason, had been staying. RP 18, 32-33, 36. Through their sliding glass door, they could see that the door to the camper was wide open. RP 18, 42. Suddenly a young woman popped up on their back porch, crying and distraught, saying, “Let me in, let me in!” and that her boyfriend had gone crazy. RP 19, 33. After Mr. Brennan opened the door and let the woman in, he locked the door, and the woman said, “He’s going to kill me.” RP19. When Mr. Brennan

responded, “What?” she repeated it, and then pulled her pajama bottoms down to reveal three welts on each leg, welts so significant that Mr. Brennan stated that he would never forget them. RP 19, 21-22, 39, 45. The woman, Alison Black, had a dried bloody lip, bruised and swollen fingers and bruises on her arms and back as well. She was disheveled, with muddy pants. RP 34. Mr. Brennan immediately told his wife to call the Sheriff, and he grabbed some shells for his shotgun. When asked who her boyfriend was, Alison said her boyfriend Richard had gone crazy. RP 34, 127.

A man then jumped on the back porch, banged on the door trying to get into the house and repeatedly saying to Alison “we need to talk. Let me in. Come out here. We need to talk.” RP 19, 34, 38, 127. The man was only wearing his underwear and had a number of tattoos on him. RP 20.

At this point Mr. Brennan had his hand on his shotgun, and he shouted and swore at the guy to get away from his door and to get off his property. RP 20, 38, 127. The man looked up at Mr. Brennan and ran to the camper after Mr. Brennan told him the police were coming and showed him the shotgun. RP 20, 28, 127. About three seconds later he got into Jason’s van parked near the trailer and drove off. RP 20. Alison was still crying and scared, but she relaxed a little when she realized the man,

Richard Bowen, was no longer on the property. RP 20, 24, 141. Mr. Brennan checked the camper to make sure no one else was inside. RP 21. Jason, Mrs. Brennan's brother was elsewhere that night. RP 30, 41.

The Brennans had never met or spoken with Alison or Bowen before, but they had seen Alison walking to the trailer a couple times before and Mrs. Brennan had seen Bowen walking to the trailer a few times. RP 21-22, 35. Mrs. Brennan recognized the tattoos on Bowen's neck. RP 43. Later, Mrs. Brennan called her brother and told him he could no longer stay in the trailer because she believed there was heroin use going on in the trailer. RP 41, 47.

When the Sheriffs arrived, Alison was sobbing on the couch, distraught. She told the deputy, "Richard beat me." RP 173. The deputy noticed she had red marks on her face and asked her if she was injured. RP 173. In response, Alison pulled down her pajama bottoms to show him the welts on her legs, which surprised the deputy because she wasn't wearing any underwear. This indicated to the deputy that Alison was in shock or extremely distressed. RP 173. Alison complained of pain to her neck, face, hands, arms, backs, legs and said she was having difficulty breathing because of the pain in her ribs. RP 173. Alison did not appear to be under the influence of drugs or alcohol. RP 179. When the EMTs arrived,

Alison begged them to take her to the hospital because she feared that Bowen would kill her if she stayed. RP 40. The EMTs recommended she be transported to the hospital. RP 128, 176.

Much earlier that day, Alison had contacted Bowen, with whom she'd been in a relationship with for about 2-3 months, so she could talk to him. They had had a fight around the first day of February and she had gone to her mother's house because he had gotten aggressive with her and she didn't want to be near him. RP 85-86, 90. Prior to that she had been staying with Bowen in the trailer and they had been using heroin together. RP 86. They had been supporting themselves by shoplifting, Bowen would pick out the store and stay in the car while she went into the stores to shoplift. RP 89.

While at her mother's she decided to get clean and went into a detox center in Everett. RP 87-88, 162. She didn't tell Bowen about going into detox and didn't have contact with him while she was there for three days. RP 90. After she returned to her mother's house she felt she should explain to Bowen why she left so she contacted him and arranged to meet him around 10 p.m. away from the house because her mother would disapprove of her seeing Bowen. RP 91-92.

After Bowen picked her up, she explained that she'd been in detox and showed him the hospital band from the detox center. RP 93. However, Bowen didn't really have much of a reaction and wasn't proud of her as Alison had hoped he'd be. RP 93. They drove to a couple different locations and talked, and then Bowen started to get aggravated about some text messages he had just received and started asking her where she had been for the three days. RP 94. He took her to her mother's, but as she reached for her things, he said, "F- that, you're not going anywhere," and drove off. RP 95. Bowen became more angry, started driving erratically and told her that one of the messages said she'd been with her ex-boyfriend. Alison denied it, but Bowen didn't believe her. RP 95-96.

Bowen drove to Whatcom Falls Park, not saying anything on the way there. RP 97. They arrived sometime between midnight and 1 a.m., and he told her to get out of the car, they were going for a walk. RP 97. He was angry and it seemed like he had some plan. Alison was scared as they walked in the dark in the park. RP 97-98. She tried to apologize in order to calm him down, but he just got angrier and grabbed a tree branch, and said, "This will do." RP 98, Supp. CP, Ex. 5.¹ Bowen told Alison to

¹ Ex. 5 is a picture of the branch when it was found inside the trailer.

walk in front of him and said that every time he had a bad thought in his head, he was going to hurt her physically, and showed her the stick. RP 98. As she walked ahead of him, he would whack her with the branch without warning. When she screamed, he told her to shut the F- up. RP 99. They continued to walk in the park throughout the night, with Bowen hitting her with the branch. RP 99, 100-01. He didn't talk and he didn't want her to talk. RP 101.

At one point, she tried to apologize again and he threw her down the side of the trail into a muddy creek. RP 99. He pushed her head into the water, so that half of her head was under the water, for about five seconds. RP 100. She couldn't really breathe. RP 100.

When they came to an entrance of the park where it was well lit, Alison thought about trying to get away, but Bowen directed her to turn around back into the park. RP 101-02. On the way back he continued to hit her with the branch, but faster now, as if he was getting more paranoid. RP 102. As they walked by a pond, Bowen told her to get into the water. RP 102. She did and the water came up to her mid-thigh. RP 103. Bowen told her he was going to hold her head under water until she passed out. Id. As he got into the water, however, his cell phone rang. RP 103. It was Bowen's drug dealer, and after the call, Bowen told her, "If you make

me miss my drugs, you're done." RP 103. Alison thinks the call saved her life. RP 103-04.

They got out of the water and Bowen started walking pretty fast back to the van and Alison had difficulty keeping up because her legs were in pretty bad shape. RP 104-05. As they walked over a bridge, he said, "I should just throw you over." RP 104. As they approached the van, Bowen hit her one more time and told her to get in and drive. RP 105. Bowen put the branch in the car. RP 108.

She drove over to a person named Matt's house and Bowen got his heroin. RP 106-07. Then they got something to eat and she drove back to the trailer. Bowen was calmer now. RP 107-08. On the way back, around 5 a.m., she got pulled over by Deputy Slick for no taillights. RP 51-52, 109. Bowen told her not to say a F-ing thing, about what had happened in the park. RP 109. When the deputy made contact with the car, he saw that Alison had a bloody lip, was muddy and disheveled. RP 53, 110. The deputy thought Bowen and she had been in a domestic dispute and asked her about her condition. RP 53-56. 110. Alison lied to him because she feared what would happen and told him she had fallen on rocks and fallen into a pond. RP 56, 110. When the deputy went back to his patrol car to check her information out, because she didn't have a license with her, he

again asked her what had happened, but she lied again. RP 54-57, 111. The deputy noticed she was limping and favoring her left leg. RP 55. The deputy gave her another opportunity to tell him and another female deputy that had arrived what had happened, while Bowen went to retrieve her license from the trailer which was within walking distance. RP 57, 111. Again she lied, because she cared about Bowen and didn't want to put him away. RP 57-58, 111. Later at the hospital, Alison told the deputy she hadn't told him Bowen had assaulted her because she feared Bowen. RP 62.

After the deputies left, Bowen was in a good mood because he didn't go to jail and he smoked the heroin when they got back to the trailer. RP 112. When Alison ignored him however, Bowen got angry and went and got the branch from the van which was parked within sight of the trailer. RP 113. Alison asked Bowen if she could put on a pair of sweat pants, and after changing out of her jeans and sweatshirt, she felt better. RP 114. She told Bowen she was feeling better, but Bowen started to hit her again with the branch, telling her that every time he had a bad thought, she was going to hurt physically. RP 114. Bowen said he'd give her the option of being hit on the arm or leg. She chose the arm, but since she would flinch as he went to hit her, he hit her on the leg instead. RP 115.

Bowen got his cell phone out and told her he was going to hit her every minute and timed it with his cell phone – he hit her about 12 to 14 times. RP 115-16. After that Bowen told her he was going to hit her for a full minute, which he did, about 8 to 9 times on her arms and legs, and told her he was doing it because he was having bad thoughts. RP 117-18. He didn't believe that she'd been in detox and thought she'd been cheating on him. RP 117. Despite her showing him the band on her wrist, Bowen didn't believe her. RP 117. Bowen then gave her an ultimatum, either shave her head or get hit more. RP 118. Alison chose the shaving of her head because her legs hurt so badly. RP 118. However, while she was shaving her head, he hit her on her knee with the branch. RP 119. She started crying, and he said, "Well, that was a good one." RP 119. She stopped shaving and Bowen grabbed a golf club and whacked her in the side on her ribs. RP 119-20. Bowen told her the golf club would work better and told her to put out her arm, but she flinched, so he hit her again in the side on the ribs. RP 120. When she started to make a noise, he told her to shut up. RP 120.

By this time, it was mid-afternoon and Bowen told her he wanted to take a nap. RP 121. Alison asked if she could leave and he said no, she had to lie on the bed next to the wall, so that she would be confined and

couldn't leave. RP 121-22. He told her not to leave and fell asleep. RP 122. She thought about leaving, but she was scared and knew Mrs. Brennan wasn't home. She knew if she crawled over him, he would wake up. RP 122. She also knew if she ran, he would catch her, and the Brennans lived out in the county so there weren't many people around. RP 122. She decided to wait until the Brennans were home to try to leave. RP 122.

After Bowen woke up, they went into the living area and he got angry and hit her twice in her ribs. RP 123. He started making phone calls because he was out of drugs. RP 124. She decided he wasn't going to stop hitting her, so she went for the door. RP 123-24. As she did so, he threw a knife at her, which hit her in the face although not with the blade. RP 123, 196. It was dark out, and she fell after she got out of the trailer because of the condition of her legs. Bowen grabbed her leg and she screamed. RP 124-25. She saw the Brennans at their back door, got up and ran, fell again, and got to the van, but Bowen was there. RP 125-26. Bowen said, "You just lost me a place to live, get in the car." RP 126. In fear and shock, she ran for the Brennan's back door and begged them to let her in. RP 126.

At the hospital, the deputy took photos of the injuries to Alison's legs, as well as injuries to her back, arms and face. She was given medication to help with the pain. RP 135-39, 159; Supp CP __, Ex. 19-21. The nature of her injuries, striations across both legs, were consistent with her story and were not consistent with someone just falling. RP 194-95.

After she left the hospital, Alison went back to her mother's. A couple days later she flew to Arizona where her sister lived and she stayed there until the trial because she didn't feel safe in Whatcom County. RP 129-30. For the first week in Arizona, she had to lay in bed, it was hard for her to walk and her ribs were sore. RP 132. Her sister took photos of her injuries there. RP 133-34; Supp CP __, Ex. 7-10.

D. ARGUMENT

Bowen asserts that the jury instruction defining recklessness created an impermissible mandatory presumption, relieving the State of its burden to prove all the elements of the second degree assault offense. Under State v. Holzkecht the jury instruction was an accurate and appropriate statement of the law and the instruction here clearly required the jury to find two different mental states, intent with respect to the assault element and recklessness with respect to the bodily harm element. Even if the jury instructions conflated the mental states, any error was

harmless where the evidence was overwhelming that Bowen intended to inflict substantial bodily harm.

Bowen also asserts that the community custody term the court imposed on his assault conviction was erroneous. The State concedes that it was and the matter should be remanded for the judgment and sentence to be corrected to reflect an 18 month term of community custody.

Bowen also asserts that the court erred in finding that Bowen had a present or future ability to pay certain legal financial obligations and contests the court's imposition of certain, "discretionary," costs without considering his ability to pay. However, Bowen never raised the issue below at sentencing and never provided the court with information regarding his alleged ability to pay. By failing to raise this issue below he has waived it. Moreover, the court's finding was that Bowen had the present *or future* ability to pay and Bowen will have at least ten years to pay the contested \$2050 in costs. The court did not exceed its statutory authority in imposing the legal financial obligations it did.

1. **The jury instruction did not create a mandatory presumption; the jury was required to find, and did find that Bowen intentionally assaulted the victim and thereby recklessly inflicted substantial bodily harm.**

Bowen raises for the first time on appeal the issue of whether a definitional instruction regarding the mens rea “recklessness” created a mandatory presumption. While Bowen may assert this for the first time on appeal to the extent that the mandatory presumption could relieve the State of the burden of proving all the elements of the offense, the instruction here did not create an impermissible mandatory presumption. The instructions as a whole required the jury to find two mens rea elements: intent regarding the assault element and recklessness regarding the infliction of substantial bodily harm element. The jury was not directed to find the element of substantial bodily harm if it found the assault was intentional. The instructions permitted the jury to find that Bowen’s infliction of substantial bodily harm was reckless if they found the infliction was intentional. Even if the two mental states were conflated, any error was harmless because the evidence was overwhelming that Bowen’s infliction of substantial bodily harm was intentional.

“The standard for determining whether a jury instruction creates a mandatory or permissive presumption is whether a reasonable juror might

interpret the presumption as mandatory.” State v. Deal, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). *Id.* at 699. In determining whether instructions meet constitutional requirements in the face of allegations of mandatory presumptions, the jury instructions are read as a whole to ensure that the burden of persuasion does not shift to the defendant. *Id.* at 701.

Mandatory presumptions implicate due process if they relieve the State from its obligation to prove all elements of the offense. *Id.* A mandatory presumption that relieves the State of the burden of proving an element of a crime may be raised for the first time on appeal. State v. Sibert, 168 Wn.2d 306, 316 n.6, 230 P.3d 142 (2010); *accord*, State v. Holzkecht, 157 Wn. App. 754, 762, 238 P.3d 1233 (2010). Errors related to jury instructions are reviewed de novo. State v. Atkins, 156 Wn. App. 799, 807, 236 P.3d 897 (2010).

Jury instructions that erroneously create mandatory presumptions are subject to harmless error analysis. In Deal, the Washington Supreme Court applied a traditional harmless error test: instructional errors creating mandatory presumptions are “harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error.” Deal, 128 Wn.2d at 703. However, in Atkins, a more recent Division I case, the court applied a “special test” derived

from the U.S. Supreme Court in Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991), *abrogated on other grounds*, Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).²

In order to address the special circumstance of mandatory presumptions in jury instructions, the [U.S. Supreme Court] set forth a particular harmless error test. This analysis requires that the reviewing court first identify the evidence the jury reasonably considered under the instructions given by the court on the pertinent issue in reaching its verdict. The court must then determine whether the evidence considered by the jury in accordance with the instructions is so overwhelming that there is no reasonable doubt as to the verdict rendered.

Atkins, 156 Wash. App. at 813-14 (footnotes omitted). The Atkins court then reviewed the definition of the mens rea element at issue to determine what alternative ways the jury could have found the element and reviewed the evidence supporting those ways. *Id.* at 814-15. In assessing the first prong of the test, the court attempts to determine whether the jury was free to look beyond the unlawful presumption to other evidence to support the element at issue. In assessing the second part of the test, the court weighs the probative value of the evidence considered by the jury against the

² In Yates, the U.S. Supreme Court applied the harmless error standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that an error is harmless if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained”, but in applying that test, first inquired what evidence the jury considered and weighed the probative value of that evidence against the probative value of the mandatory presumption in order to determine whether the jury actually rested its

probative value of the presumption alone. *Id.* at 815. As described by the Yates court, ultimately the question is “whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption.” *Id.* at 405.

Bowen relies upon State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009) a Division II case, in arguing that the instructions here created an impermissible mandatory presumption, that the jury would have believed that it was required to find that he had recklessly inflicted substantial bodily harm solely from his intentional assault. Bowen, however, also acknowledges that this Court in State v. Holzknicht, 157 Wn. App. 754, 238 P.3d 1233 (2010), *rev. den.*, ___ Wn.2d ___ (Feb. 2, 2011) disagreed with Division II’s analysis in Hayward,³ and agreed with Division II’s former opinion in State v. Keend, 140 Wn. App. 858, 166 P.3d 1268 (2007), *rev. den.*, 163 Wn.2d 1041 (2008). The facts of this case are nearly identical to those in Holzknicht. In that case the defendant

verdict on evidence establishing the presumed fact independent from the presumption. *Id.* at 403-405.

³ Division II continued to adhere to the analysis in Hayward in State v. McKague, ___ P.3d ___, 2011 WL174941 (2011), although the court distinguished Hayward based on the language of the mens rea instruction making it explicit as to a specific element of the

was charged with three counts of assault of a child in the second degree. Holzknrecht, 157 Wn. App. at 759. The jury was instructed regarding the elements for assault of a child in the second degree as well as the inferior degree offense of assault of a child in the third degree. The jury returned a verdict of guilty on two of the second degree assault counts and a verdict of guilty on one count of third degree assault. Id. As in our case, the jury was instructed regarding the definition of second degree assault, that the offense is committed when the person intentionally assaults another and thereby recklessly inflicts substantial bodily harm. Id. at 761. The jury was separately instructed as to the definition for “intentionally” and “recklessly”, and specifically, in part, that “recklessness is also established if a person acts intentionally or knowingly.” Id. at 761-62. The jury was further instructed as to the mens rea for negligence and knowing. Id. The court agreed with the analysis in Keend, that the to-convict instructions advised the jury that the mens rea of intentionally related to the assault and the mens rea of recklessly related to the result of substantial bodily harm, both of which were separately defined. Id. at 763. Therefore, the court concluded “there was no possibility that the jury was confused because the

crime, such that there would not be a concern regarding conflating the two mens rea elements.

instructions did not conflate the mental states and were accurate, clear, and separate, and did not create a presumption that if the defendant intentionally assaulted the victim, he also intended to inflict substantial bodily harm. *Id.* at 763, *citing* Keend 140 Wn. App. at 866-68.

The Holzknrecht court disagreed with the analysis in Hayward and its reliance on the 2008 change to WPIC 10.03.

We respectfully disagree. We see nothing in former WPIC 10.03 suggesting a departure from the statute. RCW 9A.08.010(2) provides:

When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

Clarification of the standard instruction does not amount to an indictment of earlier versions.

Holzknrecht, 157 Wash. App. at 765. The court concluded that the instructions, the same as those given in our case, were a correct statement of the law, including that the requisite mental state is proven by proof of a more serious mental state. *Id.* at 766. It further concluded that the instructions required separate inquiries, and proof thereof, intent as to the assault and recklessness as to the substantial bodily harm. *Id.* Therefore

the instructions did not create an impermissible mandatory presumption.

Id.

Bowen asserts that the last sentence in jury inst. no. 7 created an impermissible mandatory presumption. That instruction provided:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

CP 37. This definition was based on the pre-2008 version of the WPICs.

The to-convict instruction provided in relevant part:

To convict the defendant of the crime of Assault in the Second Degree, County (sic) I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 5th day of February, 2010, the defendant intentionally assaulted Alison Black and thereby recklessly inflicted substantial bodily harm; and
- (2) That this act occurred in the State of Washington.

CP 40 (Inst. 10). The jury was also provided with a separate instruction regarding the definition of intent. CP 36 (Inst. 6). Other instructions provided the definition of second degree assault and the definition of assault:

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby

recklessly inflicts substantial bodily harm

CP 34 (Inst. 4).

An assault is an intentional touching or striking or cutting or shooting of another person, without lawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. ...

CP 35 (Inst. 5).

As Holz knecht held, the sentence in jury instruction 7 accurately stated the law. Holz knecht, 157 Wn. App. at 765. The jury instructions here, taken as a whole, informed the jury there were two mental states that had to be found: intent with respect to the assault and recklessness with respect to the infliction of substantial bodily harm. The jury was correctly instructed that if they found that Bowen's infliction of substantial bodily harm was intentional then the element of reckless infliction of substantial bodily harm had been met. Moreover, during closing the prosecutor also noted there were two different mens rea elements the jury had to find.

So did he intentionally assault her? Obviously he did. He thereby recklessly inflicted substantial bodily harm. Recklessly has a definition. In this case what we know is the injuries were inflicted intentionally and it's a higher mental state than recklessness.

RP 221. Under Holz knecht jury instruction 7 did not conflate the mental elements into one and did not create an impermissible mandatory presumption.

Even if the instructions did conflate the mental elements, any error was harmless here where the evidence the jury relied upon clearly demonstrated that Bowen did not just recklessly inflict the substantial bodily injury, he did so intentionally. Here, Bowen hit Alison with a branch of a tree numerous times over the course of a night into the next day. His intent to inflict substantial bodily harm was evident from his continuous assault of her and his continuing to hit her even after her ability to walk had been affected. Her welts were visible that night – Mr. Brennan indicated he would never forget those welts. Apparently hitting Alison with a tree branch was not inflicting enough pain or damage, so he decided to use a golf club and hit her in the ribs more than once causing her to have difficulty breathing because of the pain. Bowen simply did not care how much pain or injury he inflicted, in fact he told her his intent was to hurt her physically and he had intended to hold her head under water until she passed out. The jury would have considered this evidence under the instructions given, and the evidence is overwhelming that the jury would have found that Bowen recklessly inflicted substantial bodily harm beyond a reasonable doubt without the alleged mandatory presumption.

2. The judgment and sentence should be corrected to reflect that term of the community custody on the assault conviction should be 18 months.

Bowen asserts that the trial court exceeded its authority in imposing a 24 to 48 month term of community custody on the Assault in the Second Degree conviction. The State concedes that the judgment and sentence needs to be corrected to reflect a determinate term of 18 months on the assault conviction. The State, however, asserts that the matter need not be remanded for resentencing, but merely for correction of the judgment and sentence.

Bowen contends the court erroneously imposed 24 to 48 months of community custody on the assault conviction. Assault in the Second Degree is a violent offense. RCW 9.94A.030(53). The court mistakenly believed that Assault in the Second Degree was a serious violent offense. RP 248. The community custody terms are set forth in RCW 9.94A.701(2). When Bowen was sentenced in April 2010, the statute in effect set forth a determinate term of 18 months community custody for violent offenses. RCW 9.94A.701(2). RCW 9.94A.701(2) was amended in May 2009 to provide for specific determinate terms and the amendment

was effective as of August 2009.⁴ *See*, Laws of 2009, Ch. 375, §5. The judgment and sentence should be corrected to state a determinate term of 18 months community custody for the second degree assault conviction. Bowen does not need to be, and should not be, resented in order to correct this mistake in the judgment and sentence.

3. **Bowen failed to raise any issue about his ability to pay legal financial obligations at sentencing and therefore has waived his ability to assert the trial court's failure to consider his ability to pay on appeal.**

Bowen alleges that the trial court erred in finding that he has the ability either in the present or future to pay legal financial obligations, premised largely upon the court's alleged failure to consider his inability to pay. To the extent that he relies on a statutory basis, RCW 10.01.160, for his argument, he waived the issue by failing to raise it at sentencing. There is nothing in the record to show that Bowen does *not* have the ability to pay his legal financial obligations either now or *in the future*, particularly given the length of the time Bowen has to satisfy the judgment.

⁴ The legislation also provided that the amendments were to be applied retroactively. Laws of 2009, Ch. 375 §20.

Bowen bears the burden of showing that the trial court's alleged error in finding that he has "the ability or likely future ability to pay" based on the court's failure to consider his inability to pay under RCW 10.01.160 is error that he may raise for the first time on appeal. As he failed to raise the issue below, he must either demonstrate that the court exceeded its statutory authority in assessing the amounts or demonstrate that the alleged error was a manifest one of constitutional magnitude. In general a standard range sentence cannot be appealed. RCW 9.94A.585; State v. Osman, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). Limited review is available, however, "if the sentencing court failed to comply with procedural requirements of the Sentencing Reform Act ("SRA") or constitutional requirements." Osman, 157 Wn.2d. at 481-82. In order to appeal based on the court's failure to follow a procedural requirement, the appellant must show that "the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so." State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993).

In order to assert a constitutional claim for the first time on appeal, an appellant must demonstrate that the alleged error is a manifest error of constitutional magnitude. RAP 2.5(a). "Manifest" means that a showing of actual prejudice is made. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591

(2001); *see also*, State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (error is manifest if it had “practical and identifiable consequences” in the case). If the error was manifest, the court must also determine if the error was harmless. Lynn, 67 Wn. App. at 345. The burden is on the defendant to identify the constitutional error and how it actually prejudiced his defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

Bowen relies in part on RCW 10.01.160(3) in asserting that there was insufficient evidence in the record for the court to make a finding that Bowen has the ability to pay legal financial obligations. There is no constitutional requirement that a court make a specific finding regarding a defendant’s ability to pay. *See*, State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992) (under the constitution court need not make any specific finding but need only consider defendant’s ability to pay as long as there is a mechanism for a defendant who ultimately is unable to pay to have the judgment modified). To the extent that Bowen relies upon a statutory basis to allege trial court error at sentencing, Bowen had an obligation to bring the statute, and the underlying factual basis, to the court’s attention. The court did not exceed its statutory authority, and Bowen waived any error regarding failure to consider underlying facts in deciding how much

to impose in fees and court costs by failing to bring those matters to the court's attention at the time of sentencing.

4. **There is substantial evidence in the record to support the court's finding that the defendant has the likely future ability to pay legal financial obligations and the court did not err in imposing the costs it did.**

Bowen alleges that the trial court erred in finding that he has the ability either in the present or future to pay the legal financial obligations it imposed. He further asserts that the court erred in imposing specifically the jury demand fee, the criminal filing fee, and the domestic violence fee. There is nothing in the record to show that Bowen will not have the ability to pay the fees and costs imposed, particularly given the length of the time he has to satisfy the judgment. The costs that Bowen otherwise disputes are set forth by statute and thus the court did not err in imposing them.

Bowen asserts that there was insufficient evidence in the record for the court to make a finding that he has the ability to pay the legal financial obligations imposed. A court need only consider a defendant's ability to pay and does not have to make a specific finding regarding a defendant's ability to pay. State v. Curry, 118 Wn.2d at 916. The court has jurisdiction over Bowen's judgment and sentence for collection of the legal financial obligations until the judgment is satisfied. RCW

9.94A.760(4). The judgment and sentence reflects that the court made a finding that the Bowen “has the ability or likely future ability to pay the legal financial obligations imposed.” CP 17 (section 2.5). It is difficult to imagine that Bowen, given his age, will not be able to pay the the legal financial obligations over the course of even just the next ten years. The court’s finding of Bowen’s current or future ability to pay was not error.

Bowen was represented at trial and sentencing by a public defender. As noted in Curry:

[Defendants] argue additionally that the orders of indigency entered for purposes of appeal are sufficient to show that they cannot, in fact, pay the financial obligations imposed. We disagree. The costs involved here are on a different scale that the costs involved in obtaining counsel and mounting an appeal. Moreover, in both cases, recoupment of attorney fees was waived. *It is certainly within the trial court’s purview to find that the defendants could not presently afford counsel but would be able to pay the minimal court costs at some future date.*

Curry, 118 Wn.2d at 915 n.2 (emphasis added in italics). A defendant’s indigent status at the time of sentencing does not preclude the imposition of court costs, and a defendant’s inability to pay is best addressed at the time the State attempts to enforce collection. State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008), *rev. den.*, 165 Wn.2d 1044 (2009); *see also*, State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (the time to address the defendant’s ability to pay is at the time the State seeks to

enforce collection as court's determination at sentencing is speculative). Right before sentencing the issue of Bowen's bond was raised. Apparently post conviction and shortly before sentencing the \$100,000 bail had been posted. RP 244. While the record does not demonstrate that Bowen posted the money himself, certainly this information would not indicate to the court that Bowen did not have the ability to pay \$2000 in legal financial obligations over a 10 year period. The court sufficiently considered Bowen's ability to pay, particularly given the speculative nature of such a determination at sentencing.⁵

Bowen further contests specifically the imposition of the domestic violence fee, the jury demand fee, and the criminal filing fee. Bowen contends that the trial court erred in imposing a domestic violence fee under RCW 10.99.080 because he asserts any finding regarding "domestic violence" must be found by a jury, not a judge, pursuant to Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Bowen fails to cite any authority for this proposition and fails to cite or address a case holding to the contrary. In State v. Winston, 135 Wn. App.

⁵ Bowen also references the order of indigency on appeal as evidence that the court was aware of his inability to pay. Bowen did not file the motion for the order of indigency he references until after sentencing, therefore that information was not before the trial court at the time it imposed fees and costs and is not appropriately considered by this Court on appeal.

400, 144 P.3d 363 (2006), the Court determined that a finding of “domestic violence” by the court did not violate Blakely because such a finding alone did not authorize an exceptional sentence under RCW 9.94A.535 and did not impermissibly increase potential punishment. *Id.* at 406. It further specifically found that the \$100 domestic violence fee did not violate Blakely because the fee did not exceed the statutory maximum fine that could be imposed for the offense. *Id.* at 410. Likewise here, the \$100 fee does not exceed the statutory maximum fine that could be imposed for Bowen’s convictions, even for the uncontested unlawful imprisonment conviction, i.e., \$10,000.

In challenging the criminal filing and the jury demand fees, Bowen asserts that there is nothing in the record to show that the fees were specially incurred, as he asserts is required by RCW 10.01.160(1), (2).⁶

⁶ RCW 10.01.160 provides in relevant part:

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. ... Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. ... Costs imposed constitute a judgment

The criminal filing fee, however, is set by statute. Under RCW 36.18.020 the fee, to be paid upon conviction, is \$200. RCW 36.18.020(h). As to the jury demand fee, under RCW 10.01.160(2), that statute specifically allows for the imposition of the jury fee costs under RCW 10.46.190. RCW 10.01.160(2) (“Expenses incurred for ... jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay.”). Under RCW 10.46.190, “[e]very person convicted of a crime ... shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court ..., a jury fee as provided for in civil actions for which judgment shall be rendered and collected.” RCW 10.46.190. Under RCW 36.18.016 the amount is \$250. RCW 36.18.016(b). The jury demand fee is to be paid even if the conviction is for only a misdemeanor. State v. Twitchell, 61 Wn.2d 403, 410, 378 P.2d 444 (1963).

The trial court had the authority to impose the fees it did and did not err in finding that Bowen had the likely future ability to pay the legal financial obligations it imposed. A defendant’s inability to pay is best

against a defendant and survive a dismissal of the underlying action against the defendant.

...
(3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court

addressed at the point at which the State seeks to enforce collection, and RCW 10.01.160(4) provides a means for a defendant to request remission of payment of the costs.

5. The State moves to strike references in the appellate brief to a study regarding the effect of legal financial obligations on defendants.

Bowen references a study regarding the legal financial obligations and the effect on defendants and the rate of recidivism. Appellate Brief at 19-20. The State moves to strike this reference from the appellate brief as this information was never presented to the trial court, and does not provide a basis for the trial court not to impose the statutory fees.

Argument as to the wisdom of requiring defendants to pay for the costs their unlawful conduct imposes upon the judicial system and society as a whole is one better left for the legislature.

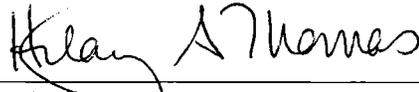
E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Bowen's conviction for Assault in the Second Degree and remand this matter for correction of the judgment and sentence with respect to the term of community custody, and not for resentencing. The

shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

State further requests that this Court affirm the legal financial obligations imposed in the judgment and sentence.

Respectfully submitted this 8th day of February, 2011.

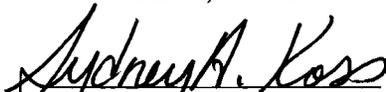


HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

NANCY P. COLLINS
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101



Legal Assistant

02/08/2011
Date