

FILED
February 9, 2016
Court of Appeals
Division I
State of Washington

NO. 73642-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ARRINGTON,

Appellant.

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

The Honorable Mary Roberts, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to investigate whether a juror was sleeping through testimony.

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

3. The trial court erred when it failed to enter written findings of fact and conclusions of law pursuant to CrR 3.5.

Issues Pertaining to Assignments of Error

1. Appellant's constitutional right to a fair jury trial required each juror to consider all the evidence before reaching a verdict. During trial, the court was alerted that a juror was having difficulty staying awake during testimony. Without first soliciting the parties' input, the court chose not to question the juror to determine whether she was sleeping. Did the trial court commit reversible error by failing to question the juror after receiving reliable information the juror may have been sleeping?

2. Second degree assault qualifies as both a "violent offense" under RCW 9.94A.030(55)(a)(viii) and a "crime against persons" under RCW 9.94A.411(2). The community custody statute, RCW 9.94A.701, does not specify which community custody term to impose when an

offense qualifies as both violent and against persons. Is RCW 9.94A.701 therefore ambiguous and must the lesser community custody term be imposed under the rule of lenity?

3. CrR 3.5 (c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant's statement. No findings or conclusions were filed in this case. Must this case be remanded for entry of the required findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural History.

The King county prosecutor charged appellant Richard Arrington with one count of second degree assault for an incident that occurred on December 20, 2014. The State further alleged that Arrington was armed with a knife during the assault. CP 1-7.

A jury found Arrington guilty of second degree assault. CP 17; 1RP¹ 343. The jury did not reach a verdict as to whether the assault was committed while Arrington was armed with a knife. CP 18; 1RP 343.

The trial court sentenced Arrington to 50 months imprisonment. CP 43-51; 2RP 12. The court also imposed 18 months of community

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – April 7, 8, and 9, 2015; 2RP – May 28, 2015.

custody because second degree assault is a violent offense under RCW 9.94A.030. CP 47; 2RP 12-13. Arrington timely appealed. CP 53-62.

2. Trial Testimony.

Jeffrey Ryan Clark and his girlfriend, Vanessa Sonnichsen, planned to drive to Utah to spend the holidays with family. 1RP 67-69, 115, 151-52. Clark bought a new GMC Denali SUV for the trip. 1RP 67-68, 115. Clark drove to Sonnichsen's apartment in Seattle and parked his car on the street about 9:30 p.m. 1RP 70, 153. Clark left the bags he had packed for the trip inside the car. 1RP 71.

Clark and Sonnichsen walked back to the car about 11 p.m. 1RP 72, 154-56. While waiting to cross the street, Clark noticed Arrington by the car with hands raised as though he was peering inside the window. 1RP 72, 84. Sonnichsen also noticed a pair of white shoes behind the car and assumed Arrington was urinating on the tire. 1RP 154-56. Clark and Sonnichsen heard a "pop" and the sound of breaking glass. 1RP 73, 116, 154, 159. The rear passenger window of the car was broken. 1RP 105. In response, Clark screamed, "hey, what the fuck are you doing?" 1RP 73, 114-16, 154, 159, 246, 261. Arrington ran away. 1RP 246-48, 261. Clark gave chase. 1RP 73, 114, 116, 154. Sonnichsen quickly lost sight of Clark and Arrington. 1RP 154-55. Sonnichsen did not call 911. 1RP 155.

Clark chased Arrington into an alley. 1RP 74-75, 250. Arrington told Clark to stop following him and noted that Clark's insurance would cover the cost of the damage to his car window. 1RP 86-87, 138, 259. Clark told Arrington he was going to go to jail. 1RP 78, 88, 94, 113. Arrington feared that Clark, who was much bigger than himself, would hurt him. 1RP 248-49, 272. Clark never communicated to Arrington that he did not intend to hurt him. 1RP 121, 129, 134.

Clark continued to move toward Arrington. 1RP 25-52. In response, Arrington turned and made two back and forth swiping movements with his hand. 1RP 75, 80, 86-87, 123, 251-52, 260-63. Clark felt something snag his finger and hand but did not know what it was at first. 1RP 75. Clark saw blood on his hand when he looked at it. 1RP 75, 83, 122.

Arrington tried to get inside a taxicab. The driver told Arrington to get out of the cab when Clark explained what had happened. 1RP 76, 90, 127-28, 252-55. Arrington ran across the street and got onto a bus. The bus driver refused to move when Clark told him what had happened. 1RP 76-77, 91, 129. Clark continued to chase Arrington for several more blocks. 1RP 77, 254-55. Clark called 911. 1RP 77, 100-01, 110-13. Clark ignored the 911 dispatcher's order to stop chasing Arrington. 1RP 136.

Clark eventually chased Arrington to the transit tunnel elevators near Benaroya Hall. 1RP 78, 81, 92-93, 256-57. Clark took pictures of Arrington with his cell phone. 1RP 93, 119, 255, 265-66. Arrington told Clark to stop and made five or six lunging motions toward him with a small knife. 1RP 93-94. Arrington got inside an elevator. 1RP 256-57. Clark kicked the elevator door several times to prevent it from closing. 1RP 95, 131-32, 257, 266. Arrington lunged at Clark and tried penetrating his shoe with the knife so the elevator doors would close. The knife did not penetrate Clark's shoe. 1RP 98, 133-34. Clark then grabbed the knife from Arrington. 1RP 99, 132-34.

Clark yelled for help. 1RP 102-03, 192-93. Security officer Michael Fry called 911. 1RP 192-93. Clark handed the Fry the knife and left to flag down the police. 1RP 102-03, 194-95. Fry kept the elevator from moving while waiting for police to arrive. 1RP 195-97.

Police saw injuries to Clark's hand when they arrived. 1RP 142-44, 164, 173, 202, 219. Clark was later treated in the emergency room for cuts to the base of his thumb and tip of his ring finger. 1RP 104, 180-81. The cut on Clark's finger was stitched and steri-strips were placed on the thumb. 1RP 107, 182, 186. Clark continued to have some numbness on his palm and tip of finger. 1RP 137. The injuries were not life threatening. 1RP 180.

Arrington was arrested inside the elevator. 1RP 203-04, 224-25, 231. He was cooperative. 1RP 217, 225, 232-33. Arrington told police he was looking into a car when Clark surprised him. 1RP 226, 245. Arrington ran because he was scared. 1RP 226. Clark cut himself on Arrington's knife when he turned around. 1RP 226. Arrington later denied having a knife. 1RP 226-27.

Arrington explained that he ran because he was scared Clark would assault him for breaking his car window. 1RP 249. Arrington told Clark he had a knife and asked him to please stop chasing him. 1RP 130-31, 250, 253, 272. Arrington swung the knife when Clark kept coming towards him. 1RP 251-52, 260-63. Arrington did not know that Clark had been cut. 1RP 252-54. Arrington denied that he was trying to hurt Clark. 1RP 251.

Arrington waived the knife at Clark inside the transit tunnel so Clark would stop coming towards him. 1RP 257, 268. Arrington tried to throw the knife out the elevator door but was unsuccessful. 1RP 257-58, 268-69. Arrington explained that he told police he did not have a knife because at the time of his arrest he no longer had possession of the knife. 1RP 259, 270.

3. Sleeping Juror.

At the start of the second day of trial, Juror 8 became ill with food poisoning. Juror 8 was excused and the trial continued with only 12 jurors. 1RP 54. Later that same day, the prosecutor alerted the trial court that a different juror appeared to sleeping. The prosecutor explained, “one of the jurors in the front row seemed to sort of during testimony be listening with her eyes closed and then I actually kind of saw her head nod.” 1RP 218. In response, the prosecutor asked to take an afternoon break. The trial court responded, “nothing wrong with taking the recess when we see people nodding off.” 1RP 218. The trial court did not question the juror to determine whether she was sleeping. Nor did the court ask either party for input. The issue of whether the juror was sleeping was not addressed again.

C. ARGUMENT

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INVESTIGATE WHETHER A JUROR WAS SLEEPING DURING TRIAL.

a. The Court Had A Duty To Voir Dire The Juror.

Both the United States and Washington constitutions guarantee the right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash. Const. art. I, §§ 3, 22. The failure to provide defendant with a fair trial violates minimal standards of due process. State v. Jackson, 75 Wn. App.

537, 543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. A constitutionally valid jury trial must be free of disqualifying jury misconduct. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), rev. denied, 118 Wn.2d 1021 (1992).

Sleeping during trial is a form of juror misconduct warranting removal. State v. Jorden, 103 Wn. App. 221, 226, 230, 11 P.3d 866 (2000), rev. denied, 143 Wn.2d 1015 (2001); People v. Valerio, 141 A.D.2d 585, 586, 529 N.Y.S.2d 350 (N.Y. App. Div. 1988). To serve, a juror must take an oath that in substance promises to “well, and truly try, the matter in issue . . . and a true verdict give, *according to the law and evidence as given them on the trial.*” RCW 4.44.260 (emphasis added). The jury in Arrington’ case was accordingly instructed to render a verdict after consideration of all of the evidence. CP 20 (Instruction 1). A sleeping juror cannot listen to all the evidence and fulfill his oath to base his verdict on all the evidence. “A juror who has not heard all the evidence in the case . . . is grossly unqualified to render a verdict.” Valerio, 141 A.D.2d at 586.

Under RCW 2.36.110, the judge has a duty “to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of . . . *inattention* . . . or by reason of

conduct or practices incompatible with proper and efficient jury service.” (emphasis added). CrR 6.5 states that “[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged.” RCW 2.36.110 and CrR 6.5 place a “continuous obligation” on the trial judge to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005).

The trial judge is afforded discretion in its investigation of jury problems. Elmore, 155 Wn.2d at 773-74. Discretion does not mean immunity from accountability. Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). “A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds[.]” State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2014). “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). At some point, the judge makes a decision outside the range of acceptable discretionary choices and thereby abuses discretion. State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d

1097 (2000). “The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law.” State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

The trial judge abused its discretion by failing to investigate the potentially sleeping juror. “[I]f there is a sufficient showing of juror inattentiveness, the appropriate remedy is to engage in a fact finding process to establish a basis for the exercise of discretion.” State v. Hampton, 201 Wis.2d 662, 672-73, 549 N.W.2d 756 (Wis. 1996). Inquiry should be conducted if there is a real basis for concluding a juror was sleeping. Commonwealth v. Braun, 74 Mass. App. Ct. 904, 905, 905 N.E.2d 124 (Mass. App. Ct. 2009). A judge’s receipt of “reliable information” that a juror is asleep “requires prompt judicial intervention to protect the rights of the defendant and the rights of the public, which for intrinsic and instrumental reasons also has a right to decisions made by alert and attentive jurors.” Commonwealth v. Dancy, 75 Mass. App. Ct. 175, 181, 912 N.E.2d 525 (Mass. App. Ct. 2009).

Because sleeping juror cases are highly fact specific, there is no case factually identical with Arrington’s case. Comparison with similar cases, however, reveals that here the court failed in its obligation to conduct proper investigation into whether the juror was sleeping.

In People v. South, the trial court committed reversible error in failing to conduct proper inquiry after defense counsel informed the court a juror was sleeping, even though the court only acknowledged the juror had closed his eyes for short periods of time. 177 A.D.2d 607, 607-08, 576 N.Y.S.2d 314 (N.Y. App. Div. 1991). Under these circumstances, the trial court should have conducted “a probing and tactful inquiry to determine whether juror number 9 was unqualified to render a verdict based upon her apparent sleeping episodes.” South, 177 A.D.2d at 608.

In Valerio, the trial court committed reversible error in failing to inquire of two jurors, where the court noted they were dozing during a readback of testimony and defense counsel suggested the court conduct an in camera inquiry of one juror whose eyes were closed and seemed asleep. Valerio, 141 A.D.2d at 586. Valerio recognized a defendant is deprived of his constitutional right to a jury trial and entitled to a new one when the court unjustifiably fails to investigate an allegedly sleeping juror and allows that juror to deliberate on the defendant’s guilt. Valerio, 141 A.D.2d at 586. “It is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified. The court may not speculate upon the juror’s qualifications but must ascertain the juror’s state of mind and must place its reasons for excusing or retaining the juror on the record.” Valerio, 141 A.D.2d at 586.

In Braun, the judge abused his discretion by failing to voir dire the juror where there was a real basis for concluding the juror was sleeping during testimony and the judge's instructions. Braun, 74 Mass. App. Ct. at 905. The juror's inattentiveness was not a momentary lapse, but an inattention that spanned all or portions of the testimony of two witnesses and the judge's instructions. Braun, 74 Mass. App. Ct. at 905. "That the judge was not certain whether the juror was sleeping and was unwilling to make such a finding should not have ended the inquiry. Uncertainty that a juror is asleep is not the equivalent of a finding that the juror is awake." Braun, 74 Mass. App. Ct. at 905.

By not conducting a voir dire, the judge in Arrington's case "prevented himself from obtaining the information necessary to a proper exercise of discretion." Braun, 74 Mass. App. Ct. at 905; see also State v. Reevey, 159 N.J. Super. 130, 133-34, 387 A.2d 381 (N.J. Super. Ct. App. Div. 1978) (defense counsel informed court juror was sleeping; trial judge should have conducted a hearing and questioned the juror as to whether she was in fact dozing or sleeping, or whether she was listening to the summations and the charge with her eyes closed), cert. denied, 79 N.J.471 (1978); cf. People v. Buel, 53 A.D.3d 930, 931, 861 N.Y.S.2d 535 (N.Y. App. Div. 2008) (upon realizing juror appeared to be sleeping, court questioned juror; juror informed court he was tired but had heard the

testimony and had not fallen asleep; based on this appropriate inquiry, court had an adequate basis for its conclusion that the juror had not missed significant portions of the trial testimony and, therefore, was not grossly unqualified to continue to serve as a juror).

Under these circumstances, it could not fairly be determined whether the juror was in fact sleeping without asking the juror herself. The judge did not dispute the veracity of the prosecutor's observation. On this record, whether the juror was sleeping is a question that can only be answered by resorting to speculation. By choosing to remain ignorant of whether the juror's sleeping or sleepiness undermined her ability to participate in the case and deliberate upon the evidence, the court abused his fact-finding discretion.

In Jorden, the appellate court was unwilling to impose a mandatory format for establishing whether a juror engaged in misconduct. Rather, the court held: the trial judge has discretion to resolve the issue "in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." Jorden, 103 Wn. App. at 229. Arrington is not asking this Court to impose a mandatory format. On the particular facts of this case, the trial court had a duty to conduct further investigation and abused its discretion in failing to conduct that inquiry.

The Jorden court held the trial judge did not err in failing to ask a juror if she had been sleeping because the judge, based on independent observation, was able to determine the juror was in fact sleeping without the need for further inquiry and there was *no dispute* that the juror was sleeping at a hearing on the matter. Jorden, 103 Wn. App. at 228. In Arrington's case, whether the juror was sleeping was uncertain.

Unlike in Jorden, Arrington's constitutional right to a fair jury trial was on the line. In determining the constitutional interest affected, there is a difference between removing a juror for sleeping and keeping that juror on to deliberate on guilt. A defendant has the right to an impartial jury composed of 12 individuals. A defendant has no right to an impartial jury of 12 particular individuals. Jorden, 103 Wn. App. at 229. By removing the offending juror in Jorden, the defendant's right to a fair and impartial jury trial was protected because the remaining jurors were qualified to serve.

In contrast, the juror in question here remained on the jury after the court refused to conduct further inquiry and was one of the jurors who convicted Arrington. As recognized by Jorden, that difference is significant in determining whether a trial court abuses its discretion. Jorden, 103 Wn. App. at 228.

In Jorden, the Court of Appeals did not fault the trial judge for not questioning the juror because (1) questioning may have been embarrassing to the juror; (2) if the judge had questioned her, the parties presumably would also have been entitled to question her, which may have put her in an adversarial position with the State; and (3) if the juror denied sleeping, the State may have proposed calling other jurors to report their observations, which could have put the juror in an adversarial position to the other juror-witnesses. Jorden, 103 Wn. App. at 228.

These concerns arguably retain validity in a case where the defendant's constitutional right to fair jury trial was not actually implicated by juror *removal*. Such concerns, however, must give way to a defendant's constitutional right to a fair trial when the issue is whether a juror accused of sleeping should be allowed to *remain* on the jury.

To the extent, if any, the Jorden court's concerns are applicable to the latter situation, its reasoning is flawed. The Jorden court's resolution of the inquiry issue was to assume *any* inquiry would taint the juror and prejudice one of the parties. A tactful and sensitive inquiry makes the realization of these concerns a remote possibility. If accepted as a per se rule, the Jorden approach shields all sorts of jury misconduct from appropriate scrutiny, given that there is always a theoretical possibility a

juror may be embarrassed by questions about an ability to follow his or her oath.

In any event, preventing embarrassment to a juror should not trump a defendant's constitutional right to a fair trial. Moreover, the possibility that the sleeping juror could have been placed into an adversarial position with one of the parties or other jurors is theoretical speculation untethered from the facts of this case or any other. Again, the solution is tactful inquiry, not dispensing with inquiry altogether.

Where inquiry into whether the juror actually fell asleep is inadequate, there is no way for the reviewing court to fairly determine whether proper grounds existed to justify discharge of that juror. On the facts of this case, this Court should hold the trial court had a duty to investigate the potential sleeping juror by asking the juror whether she had fallen asleep.

b. The Court's Failure To Conduct Appropriate Inquiry Is Reversible Error.

Juror misconduct that causes prejudice warrants a new trial. State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). The defendant bears the burden of showing that the alleged misconduct occurred. State v. Kell, 101 Wn. App. 619, 621, 5 P.3d 47 (2000), rev. denied, 142 Wn.2d 1013 (2000). Prejudice is presumed once juror misconduct is established, and the

State bears the burden of overcoming this presumption beyond a reasonable doubt. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006), rev. denied, 158 Wn.2d 1011 (2006); Kell, 101 Wn. App. at 621. If the juror was in fact sleeping, that juror's conduct prejudiced Arrington's right to a fair trial because he was convicted by a jury that included one member who had not heard all the evidence. Jorden, 103 Wn. App. at 228.

Arrington, however, is entitled to a new trial regardless of whether the record shows misconduct occurred. This case presents the question of what should happen when the trial court fails to conduct adequate inquiry into juror misconduct, thereby preventing the defendant from adequately showing the misconduct in fact occurred. Under that circumstance, courts have held the failure to conduct inquiry when needed is reversible error. Valerio, 141 A.D.2d at 586; South, 177 A.D.2d at 607-08; Dancy, 75 Mass. App. Ct. at 181; Braun, 74 Mass. App. Ct. at 905; cf. People v. McClenton, 213 A.D.2d 1, 6, 630 N.Y.S.2d 290 (N.Y. App. Div. 1995) (removal of a juror could have proved unnecessary had the court conducted appropriate inquiry into the claimed misconduct, but lack of such inquiry "means that it will never be known whether this defendant was tried by a jury which did not engage in premature deliberations, did

not commence deliberations with a predisposition toward a finding of guilt, or did not operate under a time constraint for reaching its verdict.”).

Inquiry is needed in other contexts to ensure the protection of important constitutional rights. For example, reversal of a defendant’s conviction is required if the trial court knows or reasonably should know of a potential attorney-client conflict and the trial court fails to conduct an adequate inquiry after timely objection. State v. Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008), rev. denied, 165 Wn.2d 1012 (2008); State v. McDonald, 143 Wn.2d 506, 513-14, 22 P.3d 791 (2001). Due process requires inquiry once reason to doubt competency exists. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

Protection of a defendant’s fundamental constitutional right to a fair jury trial is entitled to no less consideration. There was a sufficient basis for the trial court to reasonably know the juror was potentially sleeping. Voir dire of the juror was needed to ensure Arrington’s right to a fair trial.

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

Second degree assault is statutorily defined as both a violent offense and a crime against a person. These two types of offenses carry different mandatory community custody terms under RCW 9.94A.701(2)

and (3). Because these statutes irreconcilably conflict, they are ambiguous, and the rule of lenity requires them to be interpreted in Arrington's favor. The trial court therefore erred in imposing 18 months of community custody rather than 12 months.

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

The court's primary duty in construing a statute is to determine the legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. Id. If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and courts may look to the statute's legislative history and circumstances surrounding its enactment to determine legislative intent. Id.

The trial court sentenced Arrington to 18 months of community because second degree assault is defined as a "violent offense" under

RCW 9.94A.030(55)(a)(viii). This community custody term is consistent with RCW 9.94A.701(2), which specifies a “court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.” (Emphasis added.)

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

Therefore, second degree assault is statutorily defined as both a violent offense and a crime against a person. But different community custody terms apply to these two types of offenses. Because the statute does not specify which community custody term applies in these circumstances, it is ambiguous. Under the rule of lenity, ambiguous criminal statutes must be construed in the accused’s favor. State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005); see also United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (“[T]he canon of strict construction of criminal statutes, or rule of lenity,

ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”).

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

Further, RCW 9.94A.701(1)(b) requires courts to impose three years of community custody for a “serious violent offense.” RCW 9.94A.701(2) requires courts to impose 18 months of community custody “for a violent offense that is not considered a serious violent offense.” (Emphasis added.) This provision expressly distinguishes between a violent and a serious violent offense, making it clear which community custody term should apply.² By contrast, RCW 9.94A.701(3)(a) includes

² Second degree assault is not listed as a serious violent offense under RCW 9.94A.030(46).

no such distinguishing or clarifying language: the trial court must sentence an offender to one year of community custody for “[a]ny crime against persons under RCW 9.94A.411(2).” The legislature did not say “any crime against persons that is not considered a violent offense,” as it did in RCW 9.94A.701(2).

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

The statute remains ambiguous as to whether Arrington should receive 18 months of community custody because second degree assault is a violent offense or 12 months of community custody because it is a crime against a person. The rule of lenity dictates the ambiguous statute be interpreted in Arrington’s favor, and so the 12-month term applies. This

Court should vacate the community custody term and remand for resentencing. See State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

3. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 3.5.

Before trial, the court held a hearing under CrR 3.5 to determine admissibility of Arrington's statements to police officer Victor Pirak. 1RP 20-36. The trial court found the statements admissible. 1RP 42. The court, however, failed to enter written findings or conclusions as required by CrR 3.5. That court rule provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. Here, the court followed CrR 3.5's mandate to hold a hearing on the admissibility of the statements and rendered an oral decision, but failed to enter the required written findings and conclusions.

The oral decision is "no more than a verbal expression of [the court's] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900

(1963). Consequently, the court's decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State v. Hescok, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

"When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205 ("[T]he State's obligation is similar under both CrR 3.5 and CrR 3.6). But where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is necessary. Id.; State v. Friedlund, 182 Wn.2d 388, 393-97, 341 P.3d 280 (2015) (concluding trial court lacks authority to enter belated written findings under RAP 7.2(e)).

4. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Arrington to be unable to pay any of the expenses of appellate review and therefore appointed appellate counsel at public expense. Supp. CP ___ (sub no. 46, Order of Indigency, dated 6/24/15). If Arrington does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, II, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719 *2 (slip op. filed January 27, 2016) (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. State v. Sinclair, II, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719 *4 (slip op. filed January 27, 2016).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Arrington's ability to pay must be determined before discretionary costs are imposed. Here the trial court made no such

finding. “The Rules of Appellate Procedure establish a presumption of continued indigency throughout review[.]” State v. Sinclair, II, __ Wn. App. __, __ P.3d __, 2016 WL 393719 *7 (slip op. filed January 27, 2016).

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

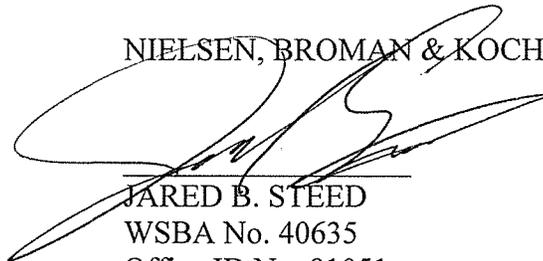
D. CONCLUSION

For the reasons discussed above, this Court should reverse Arrington’s conviction and remand for a new trial. This Court should also exercise its discretion and deny appellate costs.

DATED this 9th day of February, 2016.

Respectfully submitted,

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

STATE OF WASHINGTON/DSHS)	
)	
Respondent,)	
)	
v.)	COA NO. 73642-6-I
)	
RICHARD ARRINGTON,)	
)	
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 9TH DAY OF FEBRUARY 2016 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] RICHARD ARRINGTON
DOC NO. 816558
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF FEBRUARY 2016.

x *Patrick Mayovsky*