

No. 45302-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Charlene Pratt,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-00695-0

The Honorable Judge James Stonier

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 4

ARGUMENT..... 6

I. Ms. Pratt’s conviction violated her Fourteenth Amendment right to due process because the court’s “to convict” instruction relieved the state of its burden to prove the essential elements of the crime as charged. ... 6

A. Standard of Review..... 6

B. The “to convict” instruction allowed conviction without proof of intent. 7

C. The “to convict” instruction allowed conviction even if Ms. Pratt’s use of force was justified. 10

II. The court miscalculated Ms. Pratt’s offender score. ... 12

A. Standard of Review..... 12

B. Ms. Pratt’s 2004 class C felony convictions “washed out” under RCW 9.94A.525(2)(c). 12

III. The court should not have ordered Ms. Pratt to pay the cost of her court-appointed attorney..... 14

A. Standard of Review..... 14

B. The court lacked the authority to order Ms. Pratt to pay the cost of court-appointed counsel..... 14

C. The court violated Ms. Pratt’s right to counsel by ordering her to pay the cost of his court-appointed attorney without first inquiring into whether she had the present or future ability to pay 16

D. The record does not support the sentencing court’s finding that Ms. Pratt has the ability or likely future ability to pay her legal financial obligations. 19

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)... 16,
17, 18, 19

WASHINGTON STATE CASES

Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 244 P.3d 924 (2010).... 6

In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)..... 12

Neder v. United States, 527 U.S. 1, 1119 S.Ct. 1827, 144 L.Ed.2d 35
(1999)..... 7

State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995)..... 7

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)..... 12

State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011)..... 19

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997)..... 16, 18

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 7

State v. Bunch, 168 Wn. App. 631, 279 P.3d 432 (2012)..... 14

State v. Calvin, 67627-0-I, 2013 WL 6332944, --- P.3d ---, n. 2 (Wash. Ct.
App. May 28, 2013)..... 14, 19

State v. Crook, 146 Wn. App. 24, 189 P.3d 811 (2008) 17

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992)..... 16

State v. Hall, 104 Wn. App. 56, 14 P.3d 884 (2000)..... 9, 10

<i>State v. Hathaway</i> , 161 Wn. App. 634, 251 P.3d 253 (2011) <i>review denied</i> , 172 Wn.2d 1021, 268 P.3d 224 (2011)	14, 15
<i>State v. Hayes</i> , 43207-2-II, 2013 WL 6008686 (Wash. Ct. App. Nov. 13, 2013)	12
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	13
<i>State v. Jones</i> , No. 41902-5-II, 2013 WL 2407119, --- P.3d --- (June 4, 2013)	14
<i>State v. Kirwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	6
<i>State v. Kyлло</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	6
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	7, 8, 9
<i>State v. Lynch</i> , 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013)	14
<i>State v. McCreven</i> , 170 Wn. App. 444, 284 P.3d 793 (2012) <i>review denied</i> , 176 Wn.2d 1015, 297 P.3d 708 (2013)	10, 12
<i>State v. Moreno</i> , 173 Wn. App. 479, 294 P.3d 812 (2013) <i>review denied</i> , 177 Wn.2d 1021, 304 P.3d 115 (2013).....	14
<i>State v. Russell</i> , 171 Wn.2d 118, 249 P.3d 604 (2011).....	6, 8, 11
<i>State v. Sanchez</i> , 122 Wn. App. 579, 94 P.3d 384 (2004)	8
<i>State v. Sibert</i> , 168 Wn.2d 306, 230 P.3d 142 (2010).....	9
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	7, 8, 10
<i>State v. Smits</i> , 152 Wn. App. 514, 216 P.3d 1097 (2009).....	16
<i>State v. Stein</i> , 144 Wn.2d 236, 27 P.3d 184 (2001)	6
<i>State v. Tewee</i> , --- Wn. App. ---, 309 P.3d 791 (Sept. 24, 2013).....	12
<i>State v. Williams</i> , 159 Wn. App. 298, 244 P.3d 1018 (2011)	8
<i>State v. Williams-Walker</i> , 167 Wn.2d 889, 225 P.3d 913 (2010).....	7
<i>State v. Woods</i> , 138 Wn. App. 191, 156 P.3d 309 (2007)	10, 11, 12

State v. Zillyette, 178 Wn.2d 153, 307 P.3d 712 (2013) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 2, 3, 16, 18

U.S. Const. Amend. XIV 1, 2, 3, 6, 7, 16

WASHINGTON STATUTES

RCW 10.01.160 15, 16, 17

RCW 7.68.035 14

RCW 9.94A.030..... 14

RCW 9.94A.500..... 12

RCW 9.94A.525..... 12, 13

RCW 9.94A.550..... 15

RCW 9.94A.750..... 15

RCW 9.94A.7709..... 14

RCW 9A.16.020..... 10, 11

RCW 9A.16.110..... 10

RCW 9A.36.031..... 7, 8

OTHER AUTHORITIES

Minn.Stat. § 611.17..... 18

RAP 1.2..... 8, 11

RAP 2.5..... 6, 8, 11

RPC 1.5..... 17

State v. Dudley, 766 N.W.2d 606 (Iowa 2009)..... 18

State v. Morgan, 173 Vt. 533, 789 A.2d 928 (2001) 18

State v. Tennin, 674 N.W.2d 403 (Minn. 2004)..... 18

ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Pratt's conviction infringed her Fourteenth Amendment right to due process.
2. The court's instructions relieved the state of its burden to prove the essential elements of third-degree assault.
3. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
4. The "to convict" instruction relieved the state of its burden to prove that Ms. Pratt intentionally assaulted Megan Kautz.
5. The court's instructions relieved the state of its burden to prove the absence of self-defense.
6. The trial court erred by giving Instruction No. 6.
7. The trial court erred by giving Instruction No. 7.

ISSUE 1: A trial court's "to convict" instruction must include a complete statement of the law. Here, the court's elements instruction allowed conviction absent proof that Ms. Pratt intentionally assaulted Megan Kautz. Did the trial court's instructions relieve the prosecution of its burden to prove the essential elements of third-degree assault in violation of Ms. Pratt's Fourteenth Amendment right to due process?

ISSUE 2: Due process requires the court to instruct the jury on all essential elements of an offense. Where the testimony includes some evidence of self-defense, the absence of self-defense becomes an element that the state must prove beyond a reasonable doubt. Did the trial court's failure to instruct the jury on self-defense violate Ms. Pratt's Fourteenth Amendment right to due process?

8. The sentencing court erred by including washed-out offenses in Ms. Pratt's offender score.
9. The sentencing court's findings of fact do not support the offender score and standard range set forth in the judgment and sentence.

10. The trial court erred by sentencing Ms. Pratt with an offender score of six.
11. The trial court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).

ISSUE 3: Prior class C felony convictions do not contribute to an offender score if the defendant subsequently spent five consecutive years in the community without reoffending. Here, the court found that Ms. Pratt had been convicted of three class C felonies in September of 2004, and that she committed her next offense in December of 2011. Did the trial court err by including Ms. Pratt's washed-out 2004 class C felonies in her offender score?

12. The trial court erred by imposing attorney fees.
13. The trial court lacked statutory authority to impose attorney fees.
14. The trial court's imposition of attorney's fees infringed Ms. Pratt's Sixth and Fourteenth Amendment right to counsel.
15. The court erred by finding that Ms. Pratt has the present or future ability to pay her legal financial obligations.
16. The trial court erred by adopting Finding of Fact No. 2.5 (Judgment and Sentence).

ISSUE 4: A court's statutory authority to impose costs and fees is limited to "expenses specially incurred by the state in prosecuting the defendant" and does not extend to "expenses inherent in providing a constitutionally guaranteed jury trial." The court ordered Ms. Pratt to pay \$825 in fees for her court-appointed attorney. Did the court exceed its statutory authority?

ISSUE 4: A court may not order an accused person to pay the costs of court-appointed counsel without first determining that s/he has the present or future ability to pay. The court ordered Ms. Pratt to pay the cost of her public defender without first inquiring into her ability to pay. Did the court impermissibly

chill Ms. Pratt's Sixth and Fourteenth Amendment right to counsel?

ISSUE 5: A court may not enter a finding that a person has the present or future ability to pay legal financial obligations absent support in the record. The court entered a boilerplate finding that Ms. Pratt had the ability to pay even though it found her indigent and did not conduct any inquiry into her financial situation. Does the court's finding lack adequate support in the record?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Charlene Pratt was homeless in May of 2013. RP 121. In her travels around Kelso, she came upon a vodka bottle. RP 121-123. Ms. Pratt had been clean for two years, but the vodka proved too tempting and she drank some. RP 123-125. She later found herself at a man's home, where they shared a significant amount of alcohol. RP 126-127. Ms. Pratt blacked out. RP 127-131.

It was raining very hard, and Ms. Pratt was running down a street with only one shoe on. RP 124, 127, 129. She pounded on the door of American Medical Response to get in out of the rain. RP 21-22. Paul Andrete, an emergency medical technician, drove up and saw her pounding on the door to gain entry. RP 21-22. Ms. Pratt was angry and disheveled and combative. RP 21-23. She had her clothing up over her shoulders, exposing her chest, and she was making no sense. RP 23-24. Police came and brought Ms. Pratt to the hospital for evaluation for involuntary treatment. Officer Berglund described her as wet, intoxicated, incoherent, threatening, and very angry. RP 31-35.

Ms. Pratt did not want to go to the hospital, and did not want to be evaluated. She made this clear to all. RP 35-37, 51, 82.

The officer, as well as security guard Sanders, nurse Hotaling, a nurse intern, and social worker Kautz all brought her to a secure room in the hospital. RP 35-38, 47, 62, 84. Ms. Pratt did not cooperate, but the nurse was able to get her vital signs. RP 36-37, 48, 63, 82.

Next, the group decided they needed to get Ms. Pratt's clothes off. RP 38-39, 64, 84. She was cooperative at times, but also uncooperative. RP 82. The officer and guard eventually put Ms. Pratt into four-point restraints and a hospital gown. RP 38-40, 86, 107-108. During the process of removing the clothing, Ms. Pratt punched Kautz. RP 52, 67, 85.

The state charged Ms. Pratt with assault in the third degree of a health care provider. CP 1. The case proceeded to trial. The court instructed the jury regarding the elements of assault three, but did not include any mention of an intent element. CP 16-17. The court did instruct the jury on the defense of voluntary intoxication. CP 21.

The jury convicted Ms. Pratt as charged. CP 26-38. Ms. Pratt timely appealed. CP 39.

ARGUMENT

I. MS. PRATT’S CONVICTION VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S “TO CONVICT” INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME AS CHARGED.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a constitutional right may be addressed for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

The adequacy of jury instructions is reviewed *de novo*. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Killo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Instructions create a manifest error affecting a constitutional right if they can be construed to relieve the state of its burden to prove every element of an offense. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). When an element is omitted from the “to convict” instruction, the

error is not harmless unless the element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 349, 58 P.3d 889 (2002)¹ (citing *Neder v. United States*, 527 U.S. 1, 18, 1119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

B. The “to convict” instruction allowed conviction without proof of intent.

A trial court’s failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

The jury has the right to regard the “to convict” instruction as a complete statement of the law. *State v. Smith*, 131 Wn.2d 258, 262, 930 P.2d 917 (1997). An instruction that relieves the prosecution of its burden to prove every element of a crime requires automatic reversal. *Id.*

A person is guilty of third-degree assault if he or she assaults a health care provider who was performing health care duties. RCW 9A.36.031(1)(i). To obtain a conviction, the prosecution must prove that

¹ *Brown* was a plurality opinion, but its holding has been restated by the court as summarized above in subsequent cases. See e.g. *State v. Williams-Walker*, 167 Wn.2d 889, 911, 225 P.3d 913 (2010).

the accused person acted with intent; it is not enough that the person acted knowingly, recklessly, or with criminal negligence. *State v. Williams*, 159 Wn. App. 298, 307, 244 P.3d 1018 (2011).

Intent is thus an essential element of assault charged under RCW 9A.36.031(1)(i). *See State v. Sanchez*, 122 Wn. App. 579, 590, 94 P.3d 384 (2004). This is not true of all third-degree assaults; two offenses require only proof of criminal negligence. RCW 9A.36.031(1)(d) and (f).

In this case, the court’s “to convict” instruction (and its instruction defining third-degree assault) omitted any mention of intent. CP 16-17. This created a manifest error affecting Ms. Pratt’s right to due process. *Smith*, 174 Wn. App. at 365. Accordingly, the issue can be addressed for the first time on review.² RAP 2.5(a)(3).

The jury was unable to use the “to convict” instruction as a “yardstick” against which to measure guilt or innocence. *Lorenz*, 152 Wn.2d at 31. The “total omission” of this essential element from the “to convict” instruction relieved the prosecution of its burden, and requires

² The court should review the error even if it does not qualify under RAP 2.5(a)(3). *Russell*, 171 Wn.2d at 122. The Rules of Appellate procedure require courts to decide cases on their merits “except in compelling circumstances where justice demands...” RAP 1.2(a). A decision on the merits here would promote justice; there is no compelling basis to refuse review on the merits. RAP 1.2(a).

automatic reversal. *State v. Sibert*, 168 Wn.2d 306, 312, 230 P.3d 142 (2010).

The error was particularly harmful in this case, because Ms. Pratt's voluntary intoxication defense rested on her challenge to the prosecution's proof of intent. Accordingly, Ms. Pratt's conviction must be reversed, and the case remanded for a new trial. *Id.* Upon retrial, the "to convict" instruction must inform the jury of the prosecution's burden to prove intent beyond a reasonable doubt. *Id.*

Division III has addressed a similar issue. *State v. Hall*, 104 Wn. App. 56, 63, 14 P.3d 884 (2000). In *Hall*, the defendant presented a diminished capacity defense to a charge of third-degree assault. *Hall*, 104 Wn. App. at 58-60. The court found the instructions sufficient despite the omission of intent from the "to convict" instruction. The court reached this result by viewing the instructions in their entirety. *Id.*, at 63.

The *Hall* court erred.

A "to convict" instruction must contain a complete statement of the law. *Lorenz*, 152 Wn.2d at 31. This allows the jury to use it as a yardstick. *Id.* Other instructions cannot provide an element missing from the "to convict" instruction. *Sibert*, 168 Wn.2d at 311-312.

Division II should not follow *Hall*. Instead, the Court should reverse Ms. Pratt's conviction and remand the case for a new trial. *Smith*, 131 Wn.2d at 262-263.

C. The "to convict" instruction allowed conviction even if Ms. Pratt's use of force was justified.

RCW 9A.16.020 provides that "The use, attempt, or offer to use force upon or toward the person of another is not unlawful... [w]henever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary..." RCW 9A.16.020.³

Where self-defense is raised at trial, the absence of self-defense becomes another element of the offense that the state must prove beyond a reasonable doubt. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793, 802 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013); *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007). The court must instruct on self-defense when there is "some evidence" that the accused

³ In addition, RCW 9A.16.110(1) provides "No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault..."

person's use of force was lawful. *McCreven*, 170 Wn. App. at 462; *Woods*, 138 Wn. App. at 199.

In this case, the record contains ample evidence that Ms. Pratt defended herself in an effort to prevent an offense against her person. Kautz and others had already used force against her, removing her clothes (in front of a small audience) and depriving her of her liberty. RP 28-138. These circumstances justified MS. Pratt's attempt to fight back. *Woods*, 138 Wn. App. at 199.

The presence of "some evidence" of self defense required the court to instruct jurors on the state's burden to prove the absence of self-defense. *Id*; RCW 9A.16.020. The court's failure to do so relieved the state of its burden to prove an essential element of the offense. *Woods*, 138 Wn. App. at 199. This created a manifest error affecting Ms. Pratt's right to due process, and thus can be addressed for the first time on appeal.⁴ RAP 2.5(a)(3).

Because the court failed to instruct on all essential elements, the jury's guilty verdict violated Ms. Pratt's right to due process. The

⁴ The court should review the error even if it does not qualify under RAP 2.5(a)(3). *Russell*, 171 Wn.2d at 122. The Rules of Appellate procedure require courts to decide cases on their merits "except in compelling circumstances where justice demands..." RAP 1.2(a). A decision on the merits here would promote justice; there is no compelling basis to refuse review on the merits. RAP 1.2(a).

conviction must be reversed. *McCreven*, 170 Wn. App. at 462. The case must be remanded with directions to instruct the jury on the issue of self-defense if the case is tried a second time. *Woods*, 138 Wn. App. 191.

II. THE COURT MISCALCULATED MS. PRATT'S OFFENDER SCORE.

A. Standard of Review.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, --- Wn. App. ---, 309 P.3d 791, 793 (Sept. 24, 2013). An offender cannot agree to a miscalculated offender score or a sentence in excess of that established by the legislature. *In re Goodwin*, 146 Wn.2d 861, 873-874, 50 P.3d 618 (2002). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Bahl*, 164 Wn.2d 739, 744-745, 193 P.3d 678 (2008); *State v. Hayes*, 43207-2-II, 2013 WL 6008686 (Wash. Ct. App. Nov. 13, 2013).

B. Ms. Pratt's 2004 class C felony convictions "washed out" under RCW 9.94A.525(2)(c).

At sentencing, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." RCW 9.94A.500(1). The sentencing court is required to determine an offender score. RCW 9.94A.525. The offender score is calculated based on the number of felony convictions

existing before the date of sentencing. RCW 9.94A.525(1). The burden is on the prosecution to establish criminal history by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012).

A conviction may “wash out” of the offender score. RCW 9.94A.525(2). Prior convictions for class C felonies are not included in an offender score if the offender spent five consecutive years in the community without committing an offense. RCW 9.94A.525(2)(b).

The court found that Ms. Pratt has multiple convictions for third-degree assault, with a conviction date of September 8, 2004. The court found that her next conviction stemmed from an incident in December of 2011. CP 28.

Under these findings, more than five years passed between Ms. Pratt’s 2004 convictions and her 2011 offense. Because the time between her 2004 convictions and the 2011 offense exceeded five years, the third-degree assault charges from 2004 should not have been included in her offender score. RCW 9.94A.525(2).

The court erroneously sentenced Ms. Pratt with an offender score of six. CP 29. Her sentence must be vacated, and the case remanded for a new sentencing hearing. RCW 9.94A.525(2)(b).

III. THE COURT SHOULD NOT HAVE ORDERED MS. PRATT TO PAY THE COST OF HER COURT-APPOINTED ATTORNEY.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Jones*, No. 41902-5-II, 2013 WL 2407119, --- P.3d --- (June 4, 2013); *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). Illegally imposed costs and fees can be challenged for the first time on review. *State v. Calvin*, 67627-0-I, 2013 WL 6332944, --- P.3d ---, n. 2 (Wash. Ct. App. May 28, 2013).

B. The court lacked the authority to order Ms. Pratt to pay the cost of court-appointed counsel.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).⁵ No statute specifically authorizes a sentencing court to impose attorney fees upon conviction.⁶

⁵ See also *State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

⁶ RCW 9.94A.030(30) defines "legal financial obligation," which "may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction." Although it mentions attorneys' fees, this definitional statute does not purport to authorize a court to impose attorneys' fees upon conviction. Cf. RCW 9.94A.7709 (allowing the prevailing party in an enforcement action to recover attorneys' fees). By contrast, other sums mentioned in the provision are specifically

The court may order an offender to pay “expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2).

The court may not order an offender to pay “expenses inherent in providing a constitutionally guaranteed jury trial.” RCW 10.01.160(2).⁷

The trial court exceeded its authority by requiring Ms. Pratt to pay \$825 for court appointed attorney fees. CP 30. As noted, no statute specifically authorizes the imposition of costs for counsel. The costs were not “expenses specially incurred by the state in prosecuting” Ms. Pratt. RCW 10.01.160(2). Furthermore, the cost of counsel inhered in the expense required to provide a constitutionally guaranteed jury trial. RCW 10.01.160(2).

For these reasons, the attorney fee assessment must be vacated, and the case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

authorized by other statutes. *See, e.g.*, RCW 9.94A.750 (restitution); RCW 9.94A.550 (fines).

⁷ Nor may the court order payment of “expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.” RCW 10.01.160. Here, the record does not indicate whether or not defense counsel belonged to a public defense agency funded in a manner unrelated to specific violations of law.

- C. The court violated Ms. Pratt's right to counsel by ordering her to pay the cost of his court-appointed attorney without first inquiring into whether she had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

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

RCW 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn.

App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.⁸ *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute’s provision that “a court may not order a convicted person to pay these expenses unless he ‘is or will be able to pay them.’” *Id.* The court noted that, under the Oregon scheme, “no requirement to repay may be imposed if it appears *at the time of sentencing* that ‘there is no likelihood that a defendant's indigency will end.’” *Id.* (emphasis added). Accordingly, the court found that “the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or

⁸ In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed for an indigent defendant.

for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the offender has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so.⁹

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns

⁹ *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Temin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

Fuller on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

D. The record does not support the sentencing court's finding that Ms. Pratt has the ability or likely future ability to pay her legal financial obligations.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). This is an error that may be raised at any time, including for the first time on appeal. *Calvin*, 67627-0-I, 2013 WL 6332944, --- P.3d ---, n. 2.

In this case, the sentencing court entered such a finding without any support in the record. CP 29. Indeed, the record suggests that Ms. Pratt lacks the ability to pay the amount ordered. The court found Ms. Pratt indigent at the end of the proceedings. CP 40. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Bertrand*, 165 Wn. App. at 404.

The lower court ordered Ms. Pratt to pay \$825 in fees for her court-appointed attorney without conducting any inquiry into her present or future ability to pay. RP 206-218. The court violated Ms. Pratt's right to counsel. Under *Fuller*, it lacked authority to order payment for the cost of court-appointed counsel without first determining whether she had the

ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Ms. Pratt to pay \$825 in attorney fees must be vacated. *Id.*

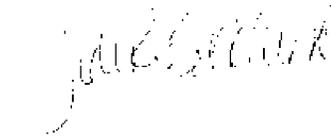
CONCLUSION

Ms. Pratt's conviction must be reversed. The court's instructions relieved the state of its obligation to prove two essential elements of third-degree assault.

In the alternative, Ms. Pratt's sentence must be vacated. The court erroneously included offenses that had "washed out" in her offender score. Furthermore, the court exceeded its authority and violated Ms. Pratt's right to counsel by ordering her to pay the cost of court-appointed counsel.

Respectfully submitted on February 12, 2014,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Charlene Pratt, DOC #874735
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

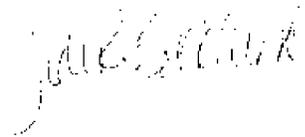
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
baur@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 12, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

February 12, 2014 - 1:40 PM

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