

No. 47163-9-II

Pierce County #13-1-03251-3

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

STATE OF WASHINGTON,

Respondent,

v.

BONNIE M. TEAFATILLER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Bryan Chuschcoff, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and violated the due process rights of appellant Bonnie Teafatiller by apply a constitutionally infirm standard in finding guilt.

2. Appellant assigns error to the following findings/conclusions in the Decision of the Court:

“Teafatiller . . . did not offer an explanation for why Jenkins would begin to drive that way” (CP 301).

“[The defense theory] is not convincing because the presence of the blood stain can be explained in other ways, each of which seems more likely to this trier of fact from all the evidence in this case” (CP 310).

“[E]ven if this blood spot is from an exit wound, more likely than the defense theory is that Ms. Wadley had already exited from the car just before the last shot was fired” (CP 311).

“The relative accounts make most sense as Wadley related them” (CP 312).

“Teafatiller’s description of events does not explain why Jenkins would suddenly drive as he did. Jenkins said it was because Teafatiller fired a gunshot that he sped up saying to her, are you going to shoot me while I’m driving? Nothing else explains why Jenkins would begin to drive dangerously” (CP 312).

“The physical evidence of the shots coupled with the actions of the actors’ support the sequence of events described by Ms. Wadley. The blood spatter evidence has been discussed above and does not supply reasonable doubt that Ms. Teafatiller was not the shooter” (CP 313).

“While it may have been physically possible for a person sitting in the driver’s side back seat to have fired the shots causing the result that occurred, the fact that two things are possible does not render them equally likely” (CP 313).

3. The trial court erred in failing to conduct the required inquiry into Ms. Teafatiller’s individual financial circumstances and likely ability to pay prior to imposing \$2000 in discretionary legal financial obligations and terms and this Court should exercise its discretion to address the

issue under State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

4. Appellant assigns error to the “boilerplate,” pre-printed finding 2.5 in the judgment and sentence, which provides:

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant’s part, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 381.

5. Counsel was prejudicially ineffective in failing to object to the imposition of discretionary legal financial obligations without proper consideration of his client’s actual ability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process mandates that the prosecution must prove every essential element of its case, beyond a reasonable doubt. The fact-finder’s duty is to decide whether that burden has been met, not to decide which version of events -the defense or the state - seems more “likely.”

Did the trial court err and apply a constitutionally infirm standard below and is reversal and remand for a new trial required to ensure that Ms. Teafatiller’s constitutional rights are honored?

2. Ms. Teafatiller, who is indigent, was ordered to pay \$2,000 in discretionary legal financial obligations without any consideration on the record of this actual financial situation, indigence, employment prospects, employment history and other relevant factors as now required under the Washington Supreme Court’s decision in Blazina.

Should this Court exercise its discretion and order remand under Blazina where the same error occurred here and the same systemic and other problems with our state’s LFO scheme are the same here as in Blazina?

Further, was counsel prejudicially ineffective in failing to

raise this issue below?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Bonnie Teafatiller was charged by second amended information in Pierce County Superior Court with attempted first-degree murder, two counts of first-degree assault, two counts of attempted first-degree robbery, conspiracy to commit first-degree robbery and second-degree promoting prostitution, all with firearm enhancements; as well as second-degree unlawful possession of a firearm. CP 191-95; RCW 9A.10.010, RCW 9A.10.040, RCW 9A.10.530, RCW 9A.10.533, RCW 9A.10.020, RCW 9A.10.040, RCW 9A.10.030(1)(a), RCW 9A.10.011(1)(a), RCW 9A.10.190, RCW 9A.10.200(1), RCW 9A.10.080(1)(a)(b).

After preliminary hearings before the Honorable Frank Cuthbertson on July 8 and 11, 2014, pretrial proceedings were held before the Honorable Bryan Chuschcoff on October 3 and 15, the Honorable Susan Serko on October 17, and Judge Chuschcoff on November 10, 17 and 20, and a bench trial held before Judge Chuschcoff on December 1-4 and 8, 2014.¹ Judge Chuschcoff acquitted Teafatiller of the promoting prostitution charge, granted the prosecutor's request to dismiss the

¹The verbatim report of proceedings will be referred to as follows:
July 8, 2014, as "1RP;"
July 11, 2014, as "2RP;"
October 3, 2014, as "3RP;"
the chronologically paginated volumes containing the proceedings of October 15, November 10, 17 and 20, December 1, 2, 3 and 4 and 8, 2014, and January 23, 2015, as "RP;"
October 17, 2014, as "4RP."

conspiracy charge as unfounded, and found Teafatiller guilty of the lesser-included offense of attempted second-degree murder, both counts of first-degree assault, both counts of attempted first-degree robbery and the unlawful possession charge, also finding that Teafatiller was armed with a firearm for all but the unlawful possession charge. CP 341-73, 391-92. Count II, a first-degree assault, and count V, an attempted first-degree robbery, were both dismissed based on double jeopardy grounds. CP 390-94.

On January 23, 2015, Judge Chuschcoff ordered a sentence below the standard range based upon the “multiple offense” policy. CP 393-97. The judge entered both bench trial findings and later written findings of fact and conclusions of law memorializing his rulings. CP 341-73. Teafatiller appealed, and this pleading follows. See CP 324-36.

2. Testimony at trial

In August of 2013, Allen Jenkins moved from Florida to Olympia, Washington, to live with his nephew, Bruce Marbley. RP 107-10. Both Jenkins and Marbley were disabled and retired military, but Marbley was in much worse shape, having suffered brain damage. RP 109-110, 158. In mid-August, Marbley’s wife and child had left him and Marbley was “bumming around,” “all over the place,” staying in motels and drinking heavily. RP 110-11.

Jenkins and Marbley were living on the military base, with Marbley and his mom staying in a tent and Jenkins sleeping in his car. RP 112, 165-67. After about 10 days of that, on August 16, they decided to go to a motel to take a shower and get cleaned up. RP 112.

Marbley described his injuries in the service, suffering from post-traumatic stress disorder and having memory loss, extreme anxiety and paranoia. RP 184-85. He freely admitted his memory “picks and chooses what it wants to remember” and that he had a “very hard time remembering things.” RP 185-86. Sometimes, Marbley said, he recovers memories when they are “jogged.” RP 186.

At the time, Marbley admitted, he was at “a really bad time” in his life, was an alcoholic and was “putting them down pretty good.” RP 186-88. Even though he had “meds” he was supposed to be on, he was not taking them because he did not like to mix them with alcohol. RP 187-88, 211-12. This was “not good,” he admitted, as being off his prescription drugs “extremely affect[ed]” his post-traumatic stress disorder and other conditions. RP 188-89.

Marbley already tended to “blackout,” he drank so much. RP 188. On that August day, he was, he admitted, “pretty messed up.” RP 187.

Marbley had bought himself and Jenkins the services of prostitutes several days before and wanted to go up to Seattle to go to a “strip club.” RP 112-13, 116, 157-58, 188. They did not know where any strip clubs were but knew they could find one in Seattle. RP 116. They had not discussed hiring prostitutes that night but Jenkins assumed it would eventually come up. RP 118.

The men were talking about their plans outside the motel when a woman came out of the room next door, apparently heard them and said, “I can take care of you right here” and “[y]ou don’t have to go all of the way to Seattle.” RP 120. That woman, later identified as Bonnie Teafatiller,

asked the men how much they wanted to spend. RP 120. Jenkins was not really paying much attention but heard his nephew say something like, “I have \$800 on me, I might as well go for that[.]” RP 120. It was a lie; Marbley only had about \$27. RP 141-42.

Jenkins smoked a cigarette while Teafatiller used her cellular telephone and a few minutes later a woman Jenkins described as a “not-too-bad-looking black chick,” later identified as Kayla Wadley, approached. RP 121-24, 356. Wadley “wasn’t all that” and did not attract him, Jenkins said, but he talked to her anyway while his nephew and Teafatiller spoke. RP 123-24. Wadley admitted she later became a prostitute but said it would have been her first time that night if it had worked out. RP 360. On cross-examination, however, Wadley admitted it would not have been her first time exchanging sex for money, but just her first time going off with someone she did not know. RP 396.

Wadley was there with Wadley’s cousin, whom Teafatiller had been dating. RP 364. Wadley and her cousin were in a car in the hotel parking lot together when Teafatiller came over and told Wadley there were some guys with money nearby. RP 364. Wadley said that her cousin was rude to Teafatiller but Wadley got out and went over to check things out. RP 364-65.

Jenkins admitted he did not really hear much of what was said while Teafatiller and Marbley were talking, but ultimately the plan was that Teafatiller was going to take the men to an apartment building somewhere to get some strippers. RP 120-21, 152.

All four of them got into Marbley’s car, with Jenkins driving,

Marbley in the front passenger seat, Teafatiller behind him and Wadley next to her on the back left side. RP 123-28. Jenkins admitted that Wadley seemed to be “with” Teafatiller at the time. RP 128.

For his part, Marbley could not remember either woman except for the general color of their skin. RP 191-92. He did not remember if he met them together or separately and did not remember any of the conversation he had with either of them. RP 192-93. And he did not recall why they got into the car, except maybe to go to a store for more alcohol or cigarettes. RP 193. When asked if they were going to a strip club or to look for strippers that night, Marbley said, “I don’t think that is where we were going that night,” but again, “I don’t remember.” RP 193-92.

They drove for about 15 minutes, during which, Jenkins said, Teafatiller and Marbley were talking, Marbley was drinking and “fidgeting” and “they” were giving Jenkins directions. RP 129-30. Marbley had no recollection of any of this or any conversations in the car. RP 197. Jenkins had no idea what Marbley or Teafatiller said, because he was not paying attention and did not really care. RP 130.

Wadley said she and Teafatiller were “talking, or whatever,” in the back seat and Teafatiller was “kind of mad” at Wadley because of what was happening between Teafatiller and Wadley’s cousin. RP 370-71. That man, the guy Wadley had been with in the car, was “playing” Teafatiller, trying to break up. RP 371. He had gotten another girl pregnant, Wadley said, and was “cutting. . .off” Teafatiller, wanting “nothing to do with her no more.” RP 371.

Wadley admitted that she was sort of tuning out what Teafatiller

was saying because it was irrelevant to her. RP 371. Instead of listening, Wadley just sort of “sat there” while Teafatiller talked. RP 372.

When they got to an apartment complex, Teafatiller got out and went somewhere for about 6 minutes, during which, Jenkins said, the others had gotten out of the car and were smoking and chatting. RP 130-31. Wadley remembered it differently and thought she and Jenkins had both stayed in the car, talking. RP 372-73. Marbley did not recall any of this and thought that, if they had stopped anywhere, they might have stopped to get some more alcohol. RP 195-96.

A moment or two after Teafatiller returned to the car, “this really ugly, fat woman came over.” RP 131-35. Both Jenkins and Marbley said, “no way.” RP 131-35. Jenkins told Teafatiller she had to “do better than this,” and she then said she had another place to take them. RP 132.

According to Jenkins, the two men, Wadley and Teafatiller got back in the car and they drove around some more. RP 133-34. At some point, Jenkins said, Teafatiller had directed him down some dead end streets and Jenkins told her that “this” was not working. RP 134-35. He told her to just direct them back to the hotel. RP 134-35.

Wadley remembered it differently, saying that they had gone to a little store right next to the hotel and Teafatiller and the two men had disagreed “a little bit.” RP 374-75. Wadley thought the price “we had already talked about” was not the price Teafatiller “had in her head.” RP 374-75. Wadley remembered talking to Jenkins outside next to the car and him telling her he did not know what was going on with her friend, “but this is over.” RP 375. According to Wadley, Jenkins said, “it is going too

far and she is asking for way too much and I'm not doing that." RP 375. Wadley could not remember the amount but thought it was "\$600 or \$500" that Teafatiller wanted. RP 376. She said they all got into the car to leave at that point. RP 376-77,

Jenkins said Teafatiller was unhappy that Marbley had promised her \$100 for helping. RP 138. Jenkins told her "you ain't done nothing" but agreed to give her "50 bucks, and that's it." RP 138. According to Jenkins, at that point, Teafatiller said, "no," pulled out a gun and demanded that Jenkins give her Marbley's billfold, which Marbley was holding. RP 136-37. Although he did not recall it at trial, Jenkins also told police later that Teafatiller said she wanted their bank cards, knew they had money and thought they "could go to the ATM one at a time." RP 155.

Again, Wadley remembered the discussion differently. RP 377. She said the conversation about going to the ATM happened before the gun was pulled out - even before they left the parking lot. RP 377. Wadley recalled Teafatiller telling Jenkins to go to the ATM so they could get some money to give her and Jenkins saying, "no, I'm not going to the ATM. I will give you \$100 and that's it." RP 378. The two of them were arguing as he drove off down the road. RP 378.

Wadley said Teafatiller pulled out the gun and pointed it at Jenkins 'to get his attention,' but neither man noted the laser sight light. RP 380-81. Wadley also said that Teafatiller had pulled the gun out just after Jenkins said he was not going to an ATM to get her "no \$600." RP 381. And Wadley claimed to have seen the gun when it was pulled out. RP

380-82.

On cross-examination, however, Wadley admitted that, when interviewed by police, she was specifically asked if she had seen the gun pulled out and had told them “[n]o.” RP 392. Indeed, she told them that she had only seen it after the first shot. RP 392.

According to Jenkins, at that point he said “wasn’t giving her shit.” RP 136-37. Instead, he accelerated the car, saying she would have to shoot him while he was driving - and then they would all die. RP 136-37, 140-41, 159. He went “about 50 miles an hour” through several stop signs before ultimately braking when he got near a busy road. RP 137, 140-42.

Jenkins did not want to give up Marbley’s wallet, afraid Teafatiller would shoot them when she found out they had lied about having money. RP 142-44.

When he hit the brakes, Jenkins said, shots rang out. RP 142-43. He was not sure how many but thought it was three. RP 143, 160-61. He did not know which hit him in the side of the head but was pretty sure it was not the first. RP 144-45.

Wadley also remembered three shots, with the first one fired out the passenger side window. RP 381, 384. A moment later, Wadley said, Teafatiller shot right into the middle console of the front part of the car. RP 382. Wadley remembered Jenkins saying he would give Teafatiller whatever she wanted but a moment later he was shot. RP 383.

At trial, Wadley specifically recalled seeing the third shot hit Jenkins. RP 390. Just after the incident, however, when she spoke to police, she told them she did not even know that he had gotten shot until

that day, when told by police. RP 392-93.

Although he initially maintained he saw who pulled the trigger, ultimately Jenkins admitted that he had not and just knew that the shot originated “from the backseat someplace.” RP 162-63. He said, however, he had seen the gun in Teafatiller’s hand before the shots, while he was driving, and a moment later, after he was shot. RP 170-71.

Jenkins could not, however, describe the gun he said he saw, except to say it was an automatic. RP 137. He did not know the color, assumed it was black, said he “really didn’t look at it” and that it was “big.” RP 137. Jenkins did not know whether the car was still moving after he was shot, did not know whether his foot was on the brake, did not see the women get out of the backseat and said, bluntly, “I know a bullet had hit me. That’s all I know.” RP 169.

For his part, Marbley did not remember much but that there was “some yelling” going on before the shooting and his uncle was “yelling back at the women” behind him. RP 195. Marbley did not know what the yelling was about. RP 195. He remembered the shooting only “[v]ery vaguely, recalling that, during the yelling, one of the women said something like, “let me see your hands.” RP 197, 198. He also thought his uncle had said at some point, “she’s got a gun.” RP 198-99.

Marbley himself, however, never saw the gun. RP 198-99. He only remembered one shot and said he had “really bad tinnitus” which probably was set off and would have made his ears ring with a loud sound. RP 200.

At trial, Marbley had the feeling that the woman behind him was

the one who had done the shooting, but he had “no definitive reason why.’ RP 202. He did not see the shot, nor did he know whether his uncle was arguing with one or both of the women. RP 207-208. And he thought when he heard the first shot it probably triggered his post-traumatic stress disorder. RP 209-210.

After he felt the shot, Jenkins heard the car doors open. RP 147-48, 164-65. Jenkins drove several blocks to a convenience store and then yelled at his nephew to get him to call police. RP 147-48, 164-65.

Marbley did not really remember much about that except running inside the store and saying his uncle had been shot. RP 204-205. The next thing he recalled was being in a jail cell, concerned about his mom, and, “[v]ery vaguely,” talking to police. RP 204-205.

Jenkins repeatedly tried to express his opinion that Wadley was not involved and an officer tried to relate that opinion as well, but a defense objection was sustained. RP 319. That same officer testified about contacting Teafatiller and ultimately taking her statement. RP 323-25, 339. First, Teafatiller said she was not involved but then she said she had been in a separate car when the shooting happened and did not commit the crime but knew who had. RP 326-30, 339.

The officer testified that Teafatiller admitted that she had agreed to “broker a deal” for prostitution for \$600 that night. RP 326-30. On cross-examination, however, the officer admitted that Teafatiller had actually said she was arranging strippers, not prostitution. RP326-35.

A cartridge casing was found between the center console and front passenger seat, near the seatbelt latch. RP 269. Two unfired cartridges

were in the rear passenger floorboard and one near the rear floor bracket of the front seat. RP 170. In the front dashboard area, near the windshield, a lead bullet core was found, and an officer said that would have come out of a firearm as it discharged. RP 274. It was extremely deformed and embedded. RP 314-15. The vehicle was released and destroyed before the defense could examine it. RP 288.

Teafatiller's statements to police were admitted. In those statements, at one point, she said she had seen Wadley get a gun from her cousin just before she got into the car with Jenkins and the others. CP 302. Wadley admitted that, just before she got into the car with Teafatiller and the others, she had walked over to her cousin's car. RP 367-68. Wadley claimed, however, that she was just telling her cousin that she was going off with "Bonnie" and he could "go ahead and go." RP 367-68.

A defense expert disputed the bullet trajectory claims of a state expert and the estimation that the trajectory was towards where it was claimed Teafatiller was sitting. RP 422-57. The defense expert also said that, based on the blood spatter evidence in the car, it was possible that the person who fired the shot which hit Jenkins was seated in the driver's side back seat and had slid over towards the middle of the back seat and fired that shot. RP 468-69.

D. ARGUMENT

1. THE TRIAL COURT APPLIED AN IMPROPER, UNCONSTITUTIONALLY LOW STANDARD IN DECIDING GUILT, IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS

Under the state and federal due process clauses, the prosecution in

a criminal case bears the extremely high burden of proving every element of the charged crime, beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029, cert. denied, 499 U.S. 948 (1991). Having a trier of fact apply the correct standard when determining if the prosecution has met this burden is so important that it is deemed the touchstone of our system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Indeed, application of the correct standard of proof beyond a reasonable doubt is the primary “instrument for reducing the risk of convictions resting on factual error” in our criminal justice system. Cage, 498 U.S. at 40; see also, State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

In this case, this Court should reverse, because the trial court failed to apply the proper burden of proof in deciding to convict.

The conduct of a bench trial places “unique demands” on judges, requiring them to act “both as arbiters of law and as finders of fact.” State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002). But the prosecution’s constitutionally mandated burden of proof beyond a reasonable doubt is not lessened when a case is tried to a bench rather than a jury. Indeed, a judge is required under CrR 6.1 to enter written findings of fact and conclusions of law addressing each separate element and the evidence used to find it had been proved. See State v. Banks, 149 Wn.2d 38, 65

P.3d 1198 (2003).

In this case, the trial court's decision was memorialized in the initial written "decision," not in oral findings made in open court. And those findings reveal that the trial court applied an improper standard in deciding whether the prosecution had met its burden of proof, beyond a reasonable doubt. It is not the factfinder's job to "solve" a case, or declare what happened, or find the truth. State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). Instead, the factfinder is tasked with only determining whether the prosecution has proved its allegations to the required standard of proof. Id.

And that standard can be difficult for even learned jurists to define with easy precision. See Cage, supra; Bennett, 161 Wn.2d at 317-18. Indeed, misstatements of the constitutional weight of the burden of proof beyond a reasonable doubt are so common in closing arguments by prosecutors in recent years that the annals of our casebooks are bursting. See, State v. Lindsay, 180 Wn.2d 243, 326 P.3d 125 (2014) (improper to compare reasonable doubt to the standard of every day decision making); State v. Emery, 174 Wn.2d 741, 751, 278 P.3d 653 (2012) (misconduct in telling jurors they had to decide the truth of what happened and "speak" that truth); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 821, review denied, 170 Wn.2d 1003 (2010) (misstatement in telling the jurors they had to come up with a reason to doubt the defendant's guilt in order to acquit); State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011) (comparing the burden to deciding

what picture is depicted on a puzzle minimizes the burden); State v. Anderson, 153 Wn. App. at 431 (improperly comparing the certainty jurors have to have to find the state has met its burden to the certainty they needed in making everyday decisions); State v. Flores, 18 Wn. App. 255, 566 P.2d 1281 (1977) review denied, 89 Wn.2d 1014 (1978) (telling jurors they must be able to assign a reason for their doubts).

A factfinder does not properly apply the burden, however, when it makes its decision based upon “determining whose version of events is **more likely** true, the government’s or the defendant’s.” See, United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994) (emphasis added). Using that analysis results in an improperly low burden being applied. See, e.g., United States v. Pine, 609 F.2d 106, 108 (3rd Cir. 1979). This is because the factfinder deciding between versions of events uses more like a “preponderance of the evidence” standard than the more stringent burden of proof beyond a reasonable doubt. Gonzalez-Balderas, 11 F.3d at 1223. Further, the “preponderance” standard requires only that there is evidence sufficient to show that something is “more probable than not” or “more likely than not” for it to be met. See State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009).

The “pick a side” analysis is a misstatement and minimization of the prosecution’s true burden of proof because it means the factfinder treats “the matter of proof as a fair fight,” with the one even slightly more persuasive side winning out. See United States v. Guest, 514 F.2d 777,

780 (1st Cir. 1975). But in fact, the matter of proof is supposed to be weighted in the defendant's favor by the burden of proof beyond a reasonable doubt - and, by extension, the presumption of innocence which the prosecution must marshal evidence to overcome. 514 F.2d at 780.

In this case, the judge's written decision included the following findings crucial to the conclusions of guilt which show the improper burden was applied:

Teafatiller . . . **did not offer an explanation** for why Jenkins would begin to drive that way (CP 301).

[The defense theory] is not convincing because the presence of the blood stain can be explained in other ways, each of which seems **more likely** to this trier of fact from all the evidence in this case (CP 310).

[E]ven if this blood spot is from an exit wound, **more likely** than the defense theory is that Ms. Wadley had already exited from the car just before the last shot was fired (CP 311).

The relative accounts **make most sense** as Wadley related them (CP 312).

Teafatiller's description of events does not explain why Jenkins would suddenly drive as he did. Jenkins said it was because Teafatiller fired a gunshot that he sped up saying to her, are you going to shoot me while I'm driving?" **Nothing else explains** why Jenkins would begin to drive dangerously (CP 312).

The physical evidence of the shots coupled with the actions of the actors' support the sequence of events described by Ms. Wadley. The blood spatter evidence has been discussed above and **does not supply reasonable doubt that Ms. Teafatiller was not the shooter** (CP 313).

While it may have been physically possible for a person sitting in the driver's side back seat to have fired the shots causing the result that occurred, the fact that two things are possible does not render them **equally likely** (CP 313).

These sections of the trial court's findings make it clear that the court did not apply the proper standard. Instead of evaluating the evidence in light of whether the prosecution had proved its case beyond a reasonable doubt, the court used a quasi- "pick a side" analysis, choosing which was "more likely" and worse, faulting Teafatiller for failing to provide evidence to disprove the prosecution's claims.

The court's improper focus is most tellingly revealed in its finding/conclusion that the defense evidence "does not supply reasonable doubt" of Teafatiller's guilt. This was not the court making a permissible finding that the evidence did not support the defense theory. See, e.g., State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). This was a trier of fact faulting a defendant for failing to "supply reasonable doubt" - and thus meet some burden of disproving the state's case.

Reversal is required. Unless the fact-finder applies the correct standard of proof beyond a reasonable doubt, the entire trial is affected, because that "misdescription of the burden of proof vitiates" all of the findings at trial. See Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2709, 124 L. Ed. 2d 182 (1993). Further, had the proper standard been applied, the trial court might well have decided not to convict. The evidence against Ms. Teafatiller was not strong, with each of the witnesses having serious problems with credibility or memory. In finding Teafatiller guilty based on the wrong constitutional standard, the trial court erred. This Court should so hold and should reverse and remand for a new trial.

2. THIS COURT SHOULD REVERSE AND REMAND FOR RESENTENCING BECAUSE THE LOWER COURT DID NOT MAKE THE REQUIRED INQUIRY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS ON THE INDIGENT APPELLANT AND THE CONCERNS RAISED BY OUR HIGHEST COURT IN BLAZINA ARE PRESENT HERE; IN THE ALTERNATIVE, COUNSEL WAS INEFFECTIVE

In the alternative, this Court should remand for resentencing with instructions for the trial court to engage in the analysis set forth by the Supreme Court recently in State v. Blazina, supra, because the trial court did not follow the requirements of RCW 10.01.160(1) and this case presents the very same policy concerns which compelled our highest court to act even absent an objection below.

Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

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.

In Blazina, our highest Court recently interpreted RCW 10.01.160(3). Blazina involved two consolidated cases, each with an indigent defendant. 344 P.3d at 683-84. In one case, the sentencing court ordered a \$500 crime victim penalty assessment, a \$200 filing fee, a \$100 DNA fee, \$1,500 for assigned counsel and restitution to be determined "by later order." 344 P.3d at 682-83. The other sentencing court ordered the

same fees except only \$400 for appointed counsel and an additional \$2,087.87 in extradition costs. Id.

Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. Id.

On review, the defendants argued that the failure to comply with the requirements of RCW 10.01.160(3) on the record was error. The prosecution first argued that the issue was not “ripe for review” until the state tried to enforce collection of the amounts imposed. 344 P.3d at 682-83 n. 1. The Supreme Court majority found instead that the issue was primarily legal, did not require further factual development and involved a final action of the sentencing court, a conclusion of “ripeness” with which the concurring justice seemed to agree. Id.²

The Court majority also found that RCW 10.01.160(3) was mandatory, noting that it requires that a trial court “**shall not**” order costs without making an “individualized inquiry” into the defendant’s individual financial situation and their current and future ability to pay, and that the trial court “**shall**” take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose” in determining the amount and method for paying the costs. 344 P.3d at 685 (emphasis in original). And the Court found that, in this context, the word “shall” is imperative. Id.

Further, the majority agreed with the defendants in both of the consolidated appeals that the individualized inquiry must be done on the

²This portion of the decision was unanimous, but one justice would have used a different method of reaching the issues on appeal. See 344 P.2d at 686.

record. 344 P.3d at 685. They then rejected the a “boilerplate” clause, preprinted on the judgment and sentence, as sufficient:

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors. . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

344 P.3d at 686.

The Blazina majority gave sentencing courts guidance on making the determination of “ability to pay,” referring them to the comments to GR 34 which set forth nonexclusive ways of determining indigency, including looking at household income, federal poverty guidelines, whether the person receives federal assistance and other relevant questions, specific to that particular defendant. Id.

The Blazina majority held that, in crafting RCW 10.01.160(3) the Legislature “intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.; see also, 344 P.3d at 686 (Fairhurst, J., concurring). Further, the majority believed that the trial judge’s failure to consider the defendants’ ability to pay in the consolidated cases on review in Blazina was “unique to these defendants’ circumstances.” Blazina, 344 P3d at 683-84. The Court therefore believed that the failure of a sentencing court to properly consider the defendant’s present and future ability to pay was an error not expected to “taint sentencing for similar crimes in the future,” unlike the errors in Ford. 344 Wn.2d at 683.

But the majority nevertheless decided to reach the issue. While stopping short of faulting lower appellate courts for declining to exercise their discretion to do so thus far, the Blazina Court held that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” 344 Wn.2d at 683. The Court chronicled national recognition of “problems associated with LFO’s imposed against indigent defendants,” including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems “caused by inequitable LFO systems.” Id. One of the proposed reforms the Court mentioned was a requirement “that courts must determine a person’s ability to pay before the court imposes LFOs.” Id.

The Court then noted the flaws in our own state’s LFO system and the system’s “problematic consequences.” 344 P.3d at 684. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. 344 P.3d at 683-85. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford \$25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because

courts retain jurisdiction until LFOs are completely paid off. 344 P.3d at 684-85. This increased involvement “inhibits reentry,” the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other “reentry difficulties increase the chances of recidivism.” Id.

Finally, the Blazina majority pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. 344 P.3d at 685-86. The court also noted that certain counties seem to have higher LFO penalties than others. Id.

The concurrence in Blazina agreed that the issue required action by the Court, but disagreed with how the majority applied RAP 2.5(a) and its exceptions. 344 P.3d at 686-87. The concurrence would have found the error non-constitutional and would not have addressed it under RAP 2.5(a)(3) but would instead have reached the issue under RAP 1.2(a), “to promote justice and facilitate the decision of cases on the merits.” Id. The concurring justice felt it was appropriate for the court to exercise its discretion to reach the unpreserved error “because of the widespread problems” with the LFO system as applied to indigents “as stated in the majority.” Id. And she also would have reached the error, because “[t]he consequences of the State’s LFO system are concerning, and addressing where courts are falling short of the statute will promote justice.” Id.

In this case, at sentencing, Ms. Teafatiller’s personal financial situation was not discussed. RP 606. The prosecutor, however, asked

almost in passing for the court “to impose standard legal financial obligations” and “whatever [it] sees fit for” appointed counsel services. RP 606-607. The court did so. CP 379.

On the judgment and sentence, the same pre-printed clause which was found insufficient in Blazina was marked in this case. CP 386. Further, the trial court ordered \$1800 in court-appointed counsel fees. CP 386. The order also required that payments will be “commencing immediately,” and that Teafatiller “shall report to the clerk’s office within 24 hours of the entry of the judgment and sentence to set up a payment plan” unless the court set a different rate. Id. Ms. Teafatiller was ordered to provide financial and other information to set up payments and to herself pay any costs of “services to collect unpaid legal financial obligations per contract or statute.” CP 386-87.

Just like the defendants in Blazina, Ms. Teafatiller is indigent. Just like those defendants, she is already subject to 12% interest, compounding now. And just as in Blazina, here, there was no consideration of whether she has any present or future likelihood of having any hope of paying, despite the requirements of RCW 10.01.160 as noted in Blazina.

Further, just as in Blazina, the only findings on Ms. Teafatiller’s “ability to pay” were the insufficient pre-printed “boilerplate” findings, entered without consideration of her individual circumstances.

Thus, Ms. Teafatiller is in the same situation as the defendants in the consolidated cases in Blazina. She will suffer the impacts of the unfair and unjust system our Supreme Court has now condemned unless this Court follows Blazina and orders resentencing. The resentencing court

should be ordered to consider Ms. Teafatiller's "individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay," on the record as set forth in Blazina, before deciding whether it should even impose legal financial obligations.

Pursuant to RAP 1.2(a), this Court is tasked with interpreting the rules and exercising its discretion in order to serve the ends of justice. Blazina was a watershed in our state. Every single justice on our highest court agreed that our state's system of imposing legal financial obligations is so racially biased, unfair, improperly enforced and debilitating to the possibility of any rehabilitation for indigents that the justices unanimously agreed to take the extremely unusual step of addressing the issue for the first time on appeal, even though they agreed it was non-constitutional error.

In so doing, the Blazina Court took a courageous step towards working to ensure that poor people convicted of crimes are not permanently marginalized as a sub-class of our society, never able to climb out from the ever-deepening hole of legal debt even if, as the Blazina Court noted, those people make full minimum payments for *years*.

For our highest state court to so rule sends a very clear message. While it was not error or an abuse of discretion for lower appellate courts to fail to take action prior to Blazina, the import of Blazina is that our highest Court intends to ensure that the injustices in our LFO system are redressed. For this Court to decline to do so after the Blazina decision would not only perpetuate the same injustices our high Court has just condemned but amount to a significant unfairness, rising to the level of a

due process violation.

In the alternative, reversal and remand for resentencing in light of Blazina is required because Ms. Teafatiller was deprived of effective assistance of appointed counsel at sentencing. Both the state and federal constitutions guarantee that a person who cannot afford counsel is appointed counsel to assist her, and that appointed counsel provides effective assistance. See Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); see State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Cary v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 483 (2006); Sixth Amend.; Art. 1, § 22. Counsel is ineffective when, despite a strong presumption of competence, his performance falls below an objective standard of reasonableness and that deficiency causes prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990), dissapproved of in part and on other grounds by, State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015).

Here, even if the Court does not choose to exercise its discretion to grant Teafatiller relief from the discretionary legal financial obligations imposed without consideration of her individual ability to pay, relief should be granted based on counsel's ineffectiveness in failing to raise the issue below.

This Court's decision declining to address the improper imposition of legal financial obligations for the first time on appeal in Blazina was issued on May 21, 2013. State v. Blazina, 174 Wn. App. 906, 301 P.3d 493 (2013), remanded, 182 Wn.2d 827 (2015). In that case, this Court

declared that it would not address a failure of the trial court to make the required findings regarding individual ability to pay when a defendant does not object to the boilerplate finding of ability to pay below. 174 Wn. App. at 911. The sentencing in this case occurred well after that time, in January of 2015. And before that sentencing, this Court again held that it would not address the issue for the first time on appeal, giving counsel notice of the need to object below. See State v. Halverson, 176 Wn. App. 972, 309 P.3d 795 (2013), review denied, 179 Wn.2d 1016 (2014). Yet counsel here sat mute and never raised Teafatiller's inability to pay. Nor did he ever note that, given that she faced more than 20 years in custody, the likelihood of her suddenly acquiring the resources to be less than indigent after being indigent for so long was slim. As a result, counsel's client has been ordered to pay huge discretionary costs at exorbitant credit rates and terms, effective from the date of sentencing, even though she is indigent. Counsel's unprofessional failure to be aware of the state of current law prejudiced his client, and reversal should be granted on that basis even if this Court does not choose to exercise its discretion under Blazina.

The Blazina decision represents a fundamental recognition by our highest court that the system under which appellant was ordered to pay LFOs is flawed and unjust. The concerns shared by all of the justices on the Supreme Court in Blazina apply equally here as to the defendants in the two separate cases consolidated in Blazina. This Court should grant Ms. Teafatiller the same relief as the defendants in Blazina and, in addition to the other remedies requested, should strike the LFO's and order reversal

and remand for resentencing with orders for the trial court to give full and fair consideration to her individual financial circumstances and present and future ability to pay before imposition of any LFOs. In the alternative, the Court should grant relief based on counsel's ineffectiveness on the issue.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial. In the alternative, reversal and remand for resentencing in light of Blazina is required.

DATED this 29th day of January, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILEING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this court's portal upload at Pierce County Prosecutor's Office, pcpatccff@co.pierce.wa.us, and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Ms. Bonnie Teafatiller, WCCW, 9601 Bujacich Rd. N.W., Gig Harbor, WA, 99362.

DATED this 29th day of January, 2016.

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