

No. 48523-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Benjamin Hamel,**

Appellant.

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Kitsap County Superior Court Cause No. 15-1-00987-5

The Honorable Judge William Houser

**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. The court violated Mr. Hamel’s constitutional right to confront the witnesses against him by prohibiting him from eliciting that the police officer alleged victim had previously been suspended from duty for lying. .... 6**

**II. Prosecutorial misconduct deprived Mr. Hamel of a fair trial. .... 9**

**III. The court’s “reasonable doubt” instruction infringed Mr. Hamel’s Fourteenth Amendment right to due process because it improperly focused the jury on a search for “the truth,” rather than on whether the state had met its burden of proof..... 13**

**IV. The court exceeded its authority by ordering Mr. Hamel to undergo a drug and alcohol evaluation as a condition of his sentence when there was no evidence that the alleged crime involved drugs or alcohol. .... 16**

**V. The court erred by adding a point to Mr. Hamel’s offender score for a 2003 Arizona conviction that is not legally comparable to a Washington felony..... 17**

**VI. If the state substantially prevails on appeal, the court should not order Mr. Hamel – who is indigent – to pay the costs of this appeal. .... 19**

**CONCLUSION ..... 20**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).....	7
<i>Davis v. Alaska</i> , 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).....	7
<i>Descamps v. United States</i> , 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) <i>reh'g denied</i> , 134 S.Ct. 41, 186 L.Ed.2d 955 (2013) .....	18
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).....	13, 15
<i>Vasquez v. Jones</i> , 496 F.3d 564 (6th Cir. 2007) .....	8

### WASHINGTON STATE CASES

<i>In re Call</i> , 144 Wn.2d 315, 28 P.3d 709 (2001) .....	16
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	10, 11, 12, 13
<i>State v. Acrey</i> , 135 Wn. App. 938, 146 P.3d 1215 (2006).....	16
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	14, 15
<i>State v. Berube</i> , 171 Wn. App. 103, 286 P.3d 402 (2012).....	13
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	20
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005).....	10
<i>State v. Darden</i> , 145 Wn.2d 612, 26 P.3d 308 (2002).....	7, 8, 9
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	13
<i>State v. Fedorov</i> , 181 Wn. App. 187, 324 P.3d 784 <i>review denied</i> , 181 Wn.2d 1009, 335 P.3d 941 (2014).....	14, 15

<i>State v. Johnson</i> , 158 Wn. App. 677, 243 P.3d 936 (2010) <i>review denied</i> , 171 Wn.2d 1013, 249 P.3d 1029 (2011) (Johnson II) .....	10, 11, 12
<i>State v. Johnson</i> , 90 Wn. App. 54, 950 P.2d 981 (1998) (Johnson I).....	9
<i>State v. Kinzle</i> , 181 Wn. App. 774, 326 P.3d 870 <i>review denied</i> , 181 Wn.2d 1019, 337 P.3d 325 (2014).....	14, 15
<i>State v. Paumier</i> , 176 Wn.2d 29, 288 P.3d 1126 (2012) .....	15
<i>State v. Pierce</i> , 169 Wn. App. 533, 280 P.3d 1158 (2012).....	11
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	14, 15
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	19
<i>State v. Thieffault</i> , 160 Wn.2d 409, 158 P.3d 580 (2007).....	19

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VI .....	1, 2, 7, 10, 18
U.S. Const. Amend. XIV .....	1, 2, 10, 13
Wash. Const. art. I, § 3.....	1
Wash. Const. art. I, § 21 .....	2
Wash. Const. art. I, § 22 .....	2, 7, 10

**WASHINGTON STATUTES**

RCW 46.52.020 .....	18
RCW 9.94A.505.....	16
RCW 9.94A.607.....	16, 17

**OTHER AUTHORITIES**

<i>American Bar Association Standards for Criminal Justice</i> std. 3–5.8 .....	11
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ARS 28-663 .....	6, 17, 18
GR 34 .....	20
RAP 2.5 .....	15
WPIC 4.01 .....	14

### **ISSUES AND ASSIGNMENTS OF ERROR**

1. The court violated Mr. Hamel's Sixth and Fourteenth Amendment right to confront adverse witnesses.
2. The court violated Mr. Hamel's confrontation right by prohibiting him from impeaching Officer Bernsten with his prior suspension for lying to a superior officer.
3. Mr. Hamel was prejudiced by the court's violation of his confrontation right.

**ISSUE 1:** The confrontation clause guarantees the right to impeach the state's witnesses with prior wrongdoings that are probative of credibility. Did the court violate Mr. Hamel's confrontation right by prohibiting him from asking the state's key police witness about his prior thirty-day suspension for lying to a superior officer?

4. Prosecutorial misconduct deprived Mr. Hamel of his Fourteenth Amendment right to due process.
5. The prosecutor committed misconduct by minimizing the state's burden of proof to the jury.
6. The prosecutor's improper argument was flagrant and ill-intentioned.
7. Mr. Hamel was prejudiced by the prosecutor's misconduct.

**ISSUE 2:** A prosecutor commits misconduct by mischaracterizing the state's burden, which requires acquittal unless the state proves each element of a charge beyond a reasonable doubt. Did the prosecutor commit misconduct at Mr. Hamel's trial by equating the state's burden to the jury with belief in one's "gut" that "a crime was committed"?

8. The trial court erred by giving Instruction No. 3.
9. The trial court's reasonable doubt instruction violated Mr. Hamel's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.

10. The trial court's reasonable doubt instruction violated Mr. Hamel's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Cont. art. I, §§ 21, 22.
11. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
12. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

**ISSUE 3:** A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Hamel's constitutional right to a jury trial?

13. The court exceeded its sentencing authority by ordering Mr. Hamel to undergo a substance abuse evaluation, which was not crime-related.

**ISSUE 4:** A sentencing court may only order an offender to undergo a substance abuse evaluation if it finds that chemical dependency contributed to the offense. Did the court exceed its statutory authority by ordering Mr. Hamel to complete a substance abuse evaluation when there was no evidence of any drug or alcohol use?

14. The court exceeded its authority by adding a point to Mr. Hamel's offender score based on an out-of-state conviction that is not comparable to a Washington felony.
15. Mr. Hamel's 2003 Arizona conviction for "leaving the scene of an injury accident" is not comparable to a Washington felony.
16. The statute of Mr. Hamel's 2003 Arizona conviction encompasses conduct that is not criminalized under the analogous Washington statute.

**ISSUE 5:** An out-of-state conviction cannot add a point to an offender score at sentencing unless it is legally comparable to a Washington felony. Did the court err by adding a point to Mr. Hamel's offender score based on a 2003 Arizona conviction that encompasses failure to provide one's vehicle registration

number after an injury accident, which is not a crime in Washington?

**ISSUE 6:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Hamel is indigent?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Benjamin Hamel was walking down the street when Bremerton Police Officer Spencer Bernsten said he wanted to talk to him. RP 50-52.<sup>1</sup> Mr. Hamel did not wish to speak to the officer, so he kept walking. RP 52.

Bernsten grabbed Mr. Hamel's arm to prevent him from leaving. RP 52. Bernsten tried to handcuff Mr. Hamel -- who did not immediately comply -- so Bernsten took him to the ground and eventually tased him. RP 56-58, 62.

Bernsten said that Mr. Hamel had kicked him while he was on the ground. RP 61. He admitted that the "kicks" did not hurt. RP 71.

The state charged Mr. Hamel with third degree assault on a police officer. CP 10-11.

Pre-trial, Mr. Hamel argued that he should be permitted to impeach Bernsten by asking about his 2009 thirty-day suspension from duty for lying to his supervisor. RP 10-12; CP 4.

The court prohibited Mr. Hamel from eliciting that evidence. RP 15-16.

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<sup>1</sup> All citations to the Report of Proceedings are from Volume I, spanning October 19-21, 2015.

At trial, Bernsten testified that he stopped Mr. Hamel because he was walking near a RiteAid store where someone had been allegedly threatening customers. RP 49-51. Mr. Hamel was not charged with anything that occurred inside the RiteAid. CP 10-12.

An employee at the neighboring Verizon store took a video of the relevant portions of Mr. Hamel's interaction with Bernsten. Ex. 1. RP 107, 112-114. He claimed that he saw Mr. Hamel kick Bernsten three times. RP 110.

But there is no kicking on the video. Ex. 1; RP 122. There are only 2.5-3 seconds of the video when the camera is not pointed at Bernsten and Mr. Hamel. Ex. 1; RP 122.

There were two other eyewitnesses to the episode. RP 80-92, 93-105. One of them claimed that Mr. Hamel had kicked Bernsten twenty times. RP 86. The other did not say that he saw any kicking at all.<sup>2</sup> RP 93-105.

In closing argument, the prosecutor told the jury that the state's burden of proof could be boiled down to the following question: "In your gut, do you believe that a crime was committed[?]" RP 166.

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<sup>2</sup> The second eyewitness said that he could not see Mr. Hamel's legs. RP 98. But he also said that Mr. Hamel and Bernsten were both facing toward him while Mr. Hamel was on the ground, such that Mr. Hamel was facing down. RP 103.

The court gave a jury instruction regarding reasonable doubt that included the following: “If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” CP 22.

The court added a point to Mr. Hamel’s offender score at sentencing based on a 2003 Arizona conviction for “leaving the scene of an injury accident” under ARS 28-661 and ARS 28-663. CP 312.

The court also ordered Mr. Hamel to undergo a substance abuse evaluation as a condition of his community custody. RP 317.

This timely appeal follows. CP 323.

### **ARGUMENT**

**I. THE COURT VIOLATED MR. HAMEL’S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY PROHIBITING HIM FROM ELICITING THAT THE POLICE OFFICER ALLEGED VICTIM HAD PREVIOUSLY BEEN SUSPENDED FROM DUTY FOR LYING.**

A video of the relevant portion of Mr. Hamel’s interaction with Bernsten did not portray an assault. Ex. 1; RP 122. But Bernsten still claimed that Mr. Hamel had kicked him. RP 61. To convict, the jury had to have found that Mr. Hamel’s kicks serendipitously coincided with the three seconds (at most) when the camera was not pointed at the confrontation. In short, the jury found Bernsten so credible that they believed that such an unlikely event must have occurred.

But Bernsten was suspended from duty for thirty days in 2009 for lying to a superior officer. RP 10-12; CP 4. The court, however, prohibited Mr. Hamel from eliciting that critical impeachment evidence. Accordingly, the jury never knew that there was significant reason to doubt Bernsten's credibility. RP 15-16.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)); U.S. Const. Amend. VI; art. I, § 22.

The confrontation clause protects more than "mere physical confrontation." *State v. Darden*, 145 Wn.2d 612, 620, 26 P.3d 308 (2002) (quoting *Davis*, 415 U.S. at 315). The bedrock of the confrontation right is the guarantee of an opportunity to conduct a "meaningful cross-examination of adverse witnesses" to test for memory, perception, and credibility. *Darden*, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process. *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). The right to confront adverse witnesses must be "zealously guarded." *Darden*, 145 Wn.2d at 620.

The *Darden* court set out a three-part test for when cross-examination may be limited. *Darden*, 145 Wn.2d at 612. First, cross-

examination that is even minimally relevant must be permitted under most circumstances. Second, the state must demonstrate that the evidence is “so prejudicial as to disrupt the fairness of the fact-finding process.” Finally, the state’s interest in excluding the evidence must be balanced against the accused person’s need for the information sought. *Id.*

The confrontation clause protects an accused person’s right to impeach the state’s witnesses with prior wrongdoings probative of credibility. *Vasquez v. Jones*, 496 F.3d 564, 571 (6th Cir. 2007).

Here, the impeachment evidence against Bernsten was more than minimally relevant. *Id.*; *Darden*, 145 Wn.2d at 612. Bernsten’s credibility was central to the state’s case.<sup>3</sup>

The state’s only interest in excluding the impeachment evidence against Bernsten was because it could have caused the jury to question his veracity. The evidence was far from “so prejudicial as to disrupt the fairness of the fact-finding process.” *Darden*, 145 Wn.2d at 612. Indeed, the state routinely impeaches accused people with exactly the same type of evidence.

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<sup>3</sup> There were other eyewitnesses to the incident, but their testimony contained serious discrepancies. RP 80-92, 93-105.

When a court violates an accused person's right to confront the state's witnesses, prejudice is presumed. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998) (Johnson I).

The state cannot overcome the presumption of prejudice in this case. Bernsten was the alleged victim and a key state witness. The testimony of the other witnesses conflicted significantly. A video of the incident did not show Mr. Hamel kicking Bernsten and failed to record, at most, three seconds of the relevant portion of the interaction. The state cannot establish beyond a reasonable doubt that any rational jury would have convicted Mr. Hamel if it had known that there was reason to question Bernsten's credibility. *Id.*

The court violated Mr. Hamel's right to confront adverse witnesses by precluding him from impeaching Bernsten with evidence of his suspension for untruthfulness. *Darden*, 145 Wn.2d at 620-621. Mr. Hamel's conviction must be reversed. *Id.*

## **II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. HAMEL OF A FAIR TRIAL.**

Mr. Hamel exercised his right to remain silent at trial. Accordingly, his defense hinged upon the jury's proper application of the state's burden of proof.

But the prosecutor told the jury during closing that the state's burden had been satisfied if they "believe[d] in [their] gut" that "a crime was committed." RP 166.

The prosecutor committed misconduct by minimizing and mischaracterizing the state's burden of proof. *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011) (Johnson II).

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial. There is a risk that jurors will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office."

*Glasmann*, 175 Wn.2d at 706 (quoting commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8).

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). The misconduct here was flagrant and ill-intentioned, and could not have been cured.

A prosecutor commits misconduct by minimizing the state’s burden of proof to the jury. *Johnson II*, 158 Wn. App. at 685-86. Here, the prosecutor committed misconduct by mischaracterizing the state’s burden. *Id.* Belief in gut is not the same as being convinced beyond a reasonable doubt.

Jurors could believe in their “guts” that “a crime had been committed” while still harboring a reasonable doubt based on the evidence or lack of evidence. The prosecutor’s argument was improper. *Id.*

A prosecutor’s misstatement of the state’s burden of proof “constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights.” *Johnson II*, 158 Wn. App. at 685-86. Here, there is a substantial likelihood that the prosecutor’s mischaracterization of the state’s burden affected the outcome of Mr. Ford’s trial. *Glasmann*, 175 Wn.2d at 704.

The evidence against Mr. Hamel was not overwhelming. A video of almost the entire relevant portion of the interaction with Bernsten did not portray any assaultive behavior. Ex. 1; RP 122. One of the eyewitnesses to the event did not see Mr. Hamel kick Bernsten at all. RP 93-104.

There was, however, extensive testimony that Mr. Hamel acted disrespectfully toward the officer and did not comply with his commands. Some jurors may have believed in their “gut” that “a crime was committed” even if they felt the state had not proved each element of the assault charge. Mr. Hamel was prejudiced by the prosecutor’s improper argument. *Id.*

Prosecutorial misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to long-standing case law proscribing arguments misstating the state’s burden of proof. *See e.g. Johnson II*, 158 Wn. App. at 677, 685-86. The misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant and ill-intentioned misconduct by misrepresenting the state’s burden of proof during closing argument.

*Glasmann*, 175 Wn.2d at 707; *Johnson II*, 158 Wn. App. at 685. Mr.

Hamel's conviction must be reversed. *Id.*

**III. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. HAMEL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR "THE TRUTH," RATHER THAN ON WHETHER THE STATE HAD MET ITS BURDEN OF PROOF.**

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Here, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 22.

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 22.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error

stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 22. Jurors were obligated to follow the instruction.

Without analysis, Division I has twice rejected a challenge to this language. *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014). This court should not follow Division I.

Both *Kinzle* and *Fedorov* erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The *Bennett* decision does not support Division I’s position.

In *Bennett*, the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called *Castle* instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.<sup>4</sup> *Id.*

The *Fedorov* court also relied on *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In *Pirtle*, as in *Bennett*, the defendant favored the “truth of the charge” language. *Id.*, at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted

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<sup>4</sup> The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.*, at 318.

the language found in the pattern instruction. *Id.*, at 656.<sup>5</sup> The *Pirtle* court was not asked to rule on the constitutionality of the “truth of the charge” provision.

Neither *Bennett* nor *Pirtle* should control this case. Division II should not follow Division I’s decisions in *Kinzle* and *Fedorov*.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

Improper instruction on the reasonable doubt standard is structural error.<sup>6</sup> *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Hamel his constitutional right to a jury trial.

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<sup>5</sup> The challenged language in *Pirtle* read as follows: “If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.” *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction “invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit.” *Id.*, at 656.

<sup>6</sup> RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is “a special category of manifest error affecting a constitutional right.” *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); see also *Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) (“If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a ‘manifest error affecting a constitutional right.’”)

Mr. Hamel's conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

**IV. THE COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. HAMEL TO UNDERGO A DRUG AND ALCOHOL EVALUATION AS A CONDITION OF HIS SENTENCE WHEN THERE WAS NO EVIDENCE THAT THE ALLEGED CRIME INVOLVED DRUGS OR ALCOHOL.**

There was no evidence presented at trial that Mr. Hamel had been using drugs or alcohol at the time of the conflict with Bernsten. Indeed, there was no evidence that he had ever used drugs or alcohol in his life.

Still, the court ordered him to undergo a substance abuse evaluation as a condition of his sentence. CP 317. The court exceeded its statutory authority. *State v. Acrey*, 135 Wn. App. 938, 942, 146 P.3d 1215 (2006).

A court's sentencing authority is limited by statute. *Id.* The legislature has authorized sentencing courts to impose only "crime-related" conditions. RCW 9.94A.505(9). This includes the power to order a person to undergo a chemical dependency evaluation only "[w]here the court finds that the offender has any chemical dependency that has contributed to his or her offense." RCW 9.94A.607(1).

An unlawful or erroneous sentence can be challenged for the first time on appeal. *In re Call*, 144 Wn.2d 315, 331, 28 P.3d 709 (2001).

Here, there was no evidence that Mr. Hamel had any chemical dependency issues, much less that substance abuse contributed to his offense. Accordingly, the court did not have the authority to order him to undergo a chemical dependency evaluation. RCW 9.94A.607(1).

The court exceeded its authority by ordering Mr. Hamel to complete a non-crime-related chemical dependency evaluation. RCW 9.94A.607(1). Mr. Hamel's case must be remanded for correction of the Judgment and Sentence to remove that condition.

**V. THE COURT ERRED BY ADDING A POINT TO MR. HAMEL'S OFFENDER SCORE FOR A 2003 ARIZONA CONVICTION THAT IS NOT LEGALLY COMPARABLE TO A WASHINGTON FELONY.**

The court added a point to Mr. Hamel's offender score based on a 2003 Arizona conviction for "leaving the scene of an injury accident" under ARS 28-661 and ARS 28-663. CP 312.

The court erred because the statute upon which Mr. Hamel's Arizona conviction was based is broader than its Washington counterpart. This renders it not legally comparable for sentencing purposes.

If an out-of-state conviction is not "comparable" to a Washington felony, then it cannot be used to increase an offender score at sentencing. *Id.* at 415. To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-

of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *Id.*<sup>7</sup>

The statute of Mr. Hamel’s 2003 Arizona conviction prohibited a driver’s failure to provide “the driver’s name and address and the registration number of the vehicle the driver is driving” after an accident causing an injury. ARS 28-661 (2003); ARS 28-663 (2003).

The analogous statute in Washington, however, criminalizes only failure to provide “his or her name, address, insurance company, insurance policy number, and vehicle license number....” RCW 46.52.020(3) (2003).

The Arizona statute is broader than its Washington counterpart because it criminalizes conduct that is not a crime in Washington. Mr. Hamel’s Arizona conviction could have been based on his failure to provide a vehicle *registration* number. ARS 28-661 (2003); ARS 28-663 (2003). The Washington statute, however, prohibits only failure to provide a *license* number. RCW 46.52.020(3) (2003).

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<sup>7</sup> If the elements of the out-of-state statute are broader than its Washington counterpart, it would “(at least) raise serious Sixth Amendment concerns” to attempt to discern the underlying facts that were not found by a court or jury. *Descamps v. United States*, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013) *reh’g denied*, 134 S.Ct. 41, 186 L.Ed.2d 955 (2013).

Because the statute of Mr. Hamel’s Arizona conviction encompasses conduct that is not a felony in Washington, it is not legally comparable for sentencing purposes. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The court should not have added a point to Mr. Hamel’s offender score based on that prior conviction. *Id.* Mr. Hamel’s case must be remanded for resentencing. *Id.* at 420.

**VI. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THE COURT SHOULD NOT ORDER MR. HAMEL – WHO IS INDIGENT – TO PAY THE COSTS OF THIS APPEAL.**

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016).<sup>8</sup>

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary

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<sup>8</sup> Division II’s commissioner has indicated that Division II will follow *Sinclair*.

decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Hamel indigent at the end of the proceedings in superior court. CP 324-326. That status is unlikely to change, especially with the addition of a lengthy prison term. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

### **CONCLUSION**

The court violated Mr. Hamel’s right to confront the state’s witnesses by prohibiting him from eliciting critical impeachment evidence. The prosecutor committed misconduct by minimizing the state’s burden of proof in closing argument. The court’s reasonable doubt instruction violated Mr. Hamel’s rights to due process and to a jury trial. Mr. Hamel’s conviction must be reversed.

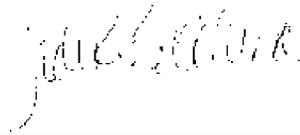
In addition, the court erred by adding a point to Mr. Hamel’s offender score based on a non-comparable Arizona conviction. The court also exceeded its authority by ordering him to comply with a non-crime-

related community custody condition. Mr. Hamel's case must be remanded for resentencing.

If the state substantially prevails on appeal, this court should not require Mr. Hamel – who is indigent – to pay the cost of this appeal.

Respectfully submitted on April 28, 2016,

**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:

Benjamin Hamel, DOC #876531  
Larch Corrections Center  
15314 NE Dole Valley Road  
Yacolt, WA 98675

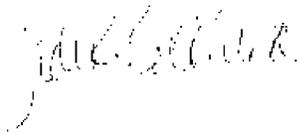
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney  
kcpa@co.kitsap.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 April 28, 2016.



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