NO. 49184-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN CHACON,
Appellant.

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

The Honorable Gary Tabor, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The erred by failing to instruct the jury on an applicable inferior-degree offense.
2. The court erred under RCW 10.61.003 by failing to give Mr. Chacon's proposed instruction on third degree assault.

> **ISSUE 1:** An accused person has an "unqualified right" to have the jury instructed on an applicable inferior-degree offense when there is evidence permitting the inference that s/he committed only the inferior offense. Did the court err by refusing to give Mr. Chacon's proposed instruction on third degree assault where the jury could have found that he had kicked the officer, but did not cause any injury?

3. Prosecutorial misconduct deprived Mr. Chacon of his Sixth and Fourteenth Amendment right to a fair trial.
4. The prosecutor's argument minimizing the state's burden of proof undermined Mr. Chacon's Fourteenth Amendment right to due process.
5. The prosecutor committed misconduct by mischaracterizing and minimizing the state's burden of proof to the jury.
6. Mr. Chacon was prejudiced by the prosecutor's improper arguments.
7. The prosecutor's misconduct was flagrant and ill-intentioned.

> **ISSUE 2:** A prosecutor commits misconduct by minimizing or mischaracterizing the state's burden of proof to the jury. Did the prosecutor commit misconduct by telling the jury that they should convict Mr. Chacon if they believed that he "did it," regardless of whether they thought that the state had proved its case against him?

8. The prosecutor committed misconduct by disparaging Mr. Chacon's defense theory.
9. The prosecutor committed misconduct by mischaracterizing defense counsel's arguments.

ISSUE 3: A prosecutor commits misconduct by disparaging defense counsel, attempting to "draw the cloak of righteousness" around the state's case, or mischaracterizing the defense theory to create a "straw man," easily destroyed in the minds of the jury. Did the prosecutor commit misconduct at Mr. Chacon's trial by calling the defense theory "white noise" and comparing defense counsel to inept characters in a television commercial?

10. The court's instructions violated Mr. Chacon's Fourteenth Amendment right to due process.
11. The court's instructions improperly relieved the state of its burden of proof.
12. The court erred by giving instruction number 3.

ISSUE 4: An accused person has a due process right to have the jury properly instructed on the presumption of innocence and the state's burden of proof. Did the court err by giving a jury instruction on the burden of proof that failed to inform jurors that Mr. Chacon had no burden of proving the existence of a reasonable doubt?

13. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.
14. The trial court erred by entering finding of fact 2.5 (CP 43).

ISSUE 5: 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. Chacon is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

John Chacon is a homeless veteran. RP 610.[1] He regularly uses the facilities at the Olympia Center to bathe and buy coffee. RP 610.

One day, the staff asked Mr. Chacon to leave the Senior Center area, where he was drinking his coffee. RP 67. He was eventually issued a formal trespass warning prohibiting him from returning to the Olympia Center.[2] RP 70-71. The trespass warning, however, did not indicate the length of time for which Mr. Chacon was barred from the center. Ex. 1.

Mr. Chacon went back to the Olympia Center the next day. RP 117. The staff called the police. RP 143.

The police came and arrested Mr. Chacon. RP 204. Mr. Chacon stood and cooperated with being handcuffed. RP 204. But he passively resisted being taken to the police cruiser and the officers dragged him across the floor. RP 207. Once they got to the door, however, Mr. Chacon stood when asked and walked outside with the officers. RP 207-208.

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[1] All citations to the Verbatim Report of Proceedings refer to the chronologically-numbered volumes recounting the events of 6/27/16 through 7/14/16.

[2] Staff said that Mr. Chacon refused to leave when asked and became hostile. RP 94-95.

Once they were outside, the officers perceived that Mr. Chacon was making it difficult for them to open the door to the police car. RP 385.

Officer Jeffrey Davis executed a "knee strike" to Mr. Chacon's leg. RP 386.

The "knee strike" is supposed to be disabling when it hits the soft part of the thigh. CP 387. But Davis's attempt at a "knee strike" had no effect on Mr. Chacon. RP 386.

Mr. Chacon was eventually taken to the ground and then taken to jail. RP 213, 216. Sometime in the process, Davis's knee dislocated and he had to pop his kneecap back into place. RP 394.

The state charged Mr. Chacon with criminal trespass and second degree assault. CP 9.

At trial, Davis said that Mr. Chacon had struck him with his right leg after Davis's attempted "knee strike." RP 389. Davis said that the pain in his knee started when Mr. Chacon struck him. RP 389.

Davis admitted, though, that Mr. Chacon only had about twelve to eighteen inches of space in which to strike him because of their positioning next to the car. RP 389.

There were two other officers helping with the arrest. Neither of them saw Mr. Chacon strike Davis. RP 236, 262. One of those officers

was holding one of Mr. Chacon's arms and watching him very carefully. RP 229. The other was watching the interaction closely from nearby. RP 260, 290.

Davis's knee dislocation caused him to miss a few days of work. RP 399. He was put on light duty for weeks after that. RP 399.

The doctor who treated Davis's knee also testified. She admitted that Davis's knee could have been dislocated when he attempted his "knee strike" to Mr. Chacon. RP 441, 447. She also said that it is possible to dislocate a knee by twisting it. RP 451.

Mr. Chacon asked the court to instruct the jury on the inferior-degree offense of third degree assault against a police officer. RP 484-485. He argued that the jury could find that Mr. Chacon had assaulted Davis but that he had not caused substantial bodily harm. RP 485-486.

The court refused to give Mr. Chacon's proposed instruction on third degree assault. RP 488.

The court's instruction to the jury on the state's burden of proof differed from the pattern instruction. CP 30-31. The instruction the jury received did not include the sentence providing that "The defendant has no burden of proving that a reasonable doubt exists." CP 30-31.

During closing argument, the prosecutor told the jury that they were convinced beyond a reasonable doubt if they believe Mr. Chacon

"did it." He said that the jury should convict Mr. Chacon even if they did not feel that the state had proved its case:

> And sometimes we'll hear from folks, ["]well, I believe he did it, I really believe he did it, but you didn't prove it to me.["] And I would submit to you I did. If you believe he did it, then I did prove it to you because remember, you came in here in terms of the evidence from this case, you came in here as a blank slate… You don't get to that point if it hasn't been proved to you beyond a reasonable doubt.
>
> RP 514.

The prosecutor also said that defense counsel's arguments were "white noise." RP 576. He summarized the defense theory as: "Listen, listen, listen, buzz, buzz, buzz. Don't pay attention to the facts and the legal instructions that you have been given." RP 576.

Finally, the prosecutor ended his rebuttal by comparing Mr. Chacon's defense theory to a television ad depicting people who have no understanding of technology:

> It's like that commercial, right, with the old gals that are trying to do Facebook and they've got like a lady and she's got her two friends and she's got pictures of her vacation on the wall and I think it's a Geico commercial. She's like look here, I put you on my wall, and there's one of the ladies that is sitting there going what? But that's not -- that's not how this works. No, and she's like no, it is. And here's this from this wall and this from this wall, and she doesn't like what she's saying, she says, 'I unfriend you,' because that's her understanding of Facebook and that's how she wants it to be. And the entire picture or premise of it is like that's not how this works, that's not how any of this works. And that is the white noise that counsel has asked you to accept.

RP 581.

The jury convicted Mr. Chacon of both charges. CP 38-39. Mr. Chacon timely appealed. CP 56.

ARGUMENT

I. THE COURT VIOLATED MR. CHACON'S "UNQUALIFIED RIGHT" TO HAVE THE JURY INSTRUCTED ON AN APPLICABLE LESSER DEGREE OFFENSE BY REFUSING TO GIVE HIS PROPOSED INSTRUCTION ON THIRD DEGREE ASSAULT.

Mr. Chacon presented evidence that Davis's knee injury could have resulted from David's "knee strike," rather than from Mr. Chacon's alleged kick. RP 441-447.

Indeed, any kick by Mr. Chacon had to have been limited to twelve to eighteen inches of space. RP 389. It was also so slight that neither of the other two officers saw it, even though one of those officers was holding onto Mr. Chacon at the time. RP 229, 236, 262.

Accordingly, a reasonable jury could have deduced that Mr. Chacon had kicked Davis, but that Davis's injury was caused by his "knee strike."

Even so, the trial court refused to give Mr. Chacon's proposed instruction for third degree simple assault against a police officer. RP 488. The court violated Mr. Chacon's "unqualified right" to have the jury

instructed on the applicable inferior-degree offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984).

An accused person has a statutory right to have the jury instructed on applicable inferior-degree offenses. RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.010 provides as follows:

> Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

These statutes guarantee the "unqualified right" to have the jury decide on the inferior-degree offense if there is "even the slightest evidence" that the accused person may have committed only that offense. *Parker*, 102 Wn.2d at 163-164 (citing *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)).

The instruction should be given even if there is contradictory evidence, or if the accused presents other defenses. *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). The right to an appropriate

inferior-degree offense instruction is "absolute;" failure to give such an instruction requires reversal. *Parker*, 102 Wn.2d at 164.

Unlike a lesser-included offense, the elements of an inferior-degree offense are not necessarily included within the charged offense. *See State v. Peterson,* 133 Wn.2d 885, 891, 948 P.2d 381 (1997); *See also State v. Tamalini,* 134 Wn.2d 725, 734, 953 P.2d 450 (1998) (delineating the differences between lesser-included and inferior-degree offenses).

Rather, a crime is an inferior-degree offense of another when:

> (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

Peterson, 133 Wn.2d at 891 (*citing State v. Foster,* 91 Wn.2d 466, 472, 589 P.2d 789 (1979) and *State v. Daniels,* 56 Wn. App. 646, 651, 784 P.2d 579 (1990)).

The third element of this test is equivalent to the second (factual) prong of the *Workman* test for lesser-included offenses. *Daniels*, 56 Wn. App. at 651. When considering evidence that the accused committed only the lesser crime, the court must take the evidence in the light most favorable to the party requesting the instruction. *State v. Condon*, 182 Wn.2d 307, 321, 343 P.3d 357 (2015).

Applying the first element of the test to Mr. Chacon's case, the statutory scheme for assault "proscribe[s] but one offense." *See Peterson*, 133 Wn.2d at 885.

As to the second element, Mr. Chacon was charged with second degree Assault. CP 9. Assault is divided into first through fourth degrees. *See* RCW 9A.36.01; RCW 9A.36.021; RCW 9A.36.031; RCW 9A.36.041. Mr. Chacon proposed an instruction for third degree assault, which is an inferior degree to the crime with which he was charged. RP 484-486.

Finally, regarding the third element, there was evidence that Mr. Chacon committed only third degree assault against a police officer.

Third degree assault (as it would have been instructed in Mr. Chacon's case) criminalizes simple assault against a police officer during the course of his/her duties. RCW 9A.36.031(1)(g).

Davis's doctor testified that his knee dislocation could have been caused by his knee strike to Mr. Chacon's leg. RP 441, 447. Indeed, any alleged strike by Mr. Chacon would have to have been very slight, given the limited space in which to withdraw his leg and the fact that the officer who was holding his arm did not even notice it. RP 229, 236, 389.

Taking the evidence in the light most favorable to the defense, the jury could have concluded that Mr. Chacon committed simple assault by hitting Davis with his leg but that he did not cause Davis's injury.

Accordingly, the jury could have inferred that Mr. Chacon committed only third degree assault.

Mr. Chacon was entitled to his proposed jury instruction on the inferior-degree offense of third degree assault. *Peterson*, 133 Wn.2d at 891.

The statutory right to instruction on an appropriate inferior-degree offense is "absolute." *Parker*, 102 Wn.2d at 164. When warranted by the evidence and requested by the defendant, failure to give such an instruction requires reversal. *Id.* Washington courts adopted this rule more than a century ago. The court's failure to give Mr. Chacon's proposed inferior-degree instruction requires reversal of his assault conviction. *Parker*, 102 Wn.2d at 164.

The trial court violated Mr. Chacon's right to have the jury instructed on the inferior-degree offense of third degree assault. *Id.*; *Peterson*, 133 Wn.2d at 891. Mr. Chacon's assault conviction must be reversed. *Id.*

II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. CHACON OF A FAIR TRIAL.

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, Wash. Const. art. I, § 22. A conviction must be

reversed where the misconduct prejudices the accused. *Id.* Even absent objection, reversal is required when misconduct is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

To determine whether a prosecutor's misconduct warrants reversal, the court looks to its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury 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." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

At Mr. Chacon's trial, the prosecutor committed misconduct by minimizing the state's burden of proof and disparaging defense counsel during closing argument.

A. The prosecutor committed misconduct by mischaracterizing and minimizing the state's burden of proof to the jury.

The prosecutor told the jury at Mr. Chacon's trial that they should convict him if they believed he "did it," regardless of whether they felt the state had proved its case. RP 514. But the jury could have believed that

Mr. Chacon "did it," and still harbored a reasonable doubt as to one or more elements.

The prosecutor committed misconduct by mischaracterizing and minimizing the state's burden of proof during argument. *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).

A prosecutor's misstatement of the state's burden of proof is improper and "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Id.* at 685-86.

Here, the due process required the jury to acquit Mr. Chacon if they felt that the prosecution had not proved each element of each offense, regardless of whether they "believe[d] he did it." *Id.* The prosecutor's argument – stating the direct opposite -- was improper.

There is a substantial likelihood that the prosecutor's improper arguments affected the outcome of Mr. Chacon's trial. *Glasmann*, 175 Wn.2d at 704.

There was reason to doubt at least one element of each of Mr. Chacon's charges. The jury could have believed that Mr. Chacon assaulted Davis by kicking him, but reasonably doubted that he was the cause of the injury. Likewise, the jury could have believed that Mr. Chacon reentered the Olympia Center the day after he was given a trespass

order, but reasonably doubted whether Mr. Chacon knew that the trespass order (which did not specify a length of time) was meant to be permanent.

Mr. Chacon was prejudiced by the prosecutor's improper minimization of the state's burden. *Id.*

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 prohibiting arguments that minimize the state's burden of proof. *See e.g. Johnson*, 158 Wn. App. at 685-86. The prosecutor's improper arguments were flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct at Mr. Chacon's trial by making an argument discouraging the jury from properly applying the reasonable doubt standard. . *Johnson*, 158 Wn. App. at 685-86. Mr. Chacon's convictions must be reversed. *Id.*

B. The prosecutor committed misconduct by disparaging Mr. Chacon's counsel in order to "draw the cloak of righteousness" around the state's case.

In rebuttal, the prosecutor summarized Mr. Chacon's defense theory as "white noise," equivalent to: "Listen, listen, listen, buzz, buzz, buzz. Don't pay attention to the facts and the legal instructions that you have been given." RP 576.

The prosecutor closed his argument by comparing defense counsel to "old gals" in a television commercial who are satirized for their ineptitude with technology. RP 581.

The prosecutor chose to mischaracterize and disparage Mr. Chacon's valid defense theory rather than to attack it based on the evidence presented at trial. RP 576, 581. The prosecutor committed misconduct. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002); *State v. Thierry*, 190 Wn. App. 680, 694, 360 P.3d 940 (2015), *review denied,* 185 Wn.2d 1015, 368 P.3d 171 (2016).

A prosecutor commits misconduct by disparaging the role of defense counsel. *Id.* Such an argument improperly attempts to "draw a cloak of righteousness" around the state's case. *Id.*

For example, it is improper for a prosecutor to argue that the defense theory involves "sleight of hand" and asks the jury to "look over here, but don't pay attention to there." *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011).

Rather than focusing on the facts of the case, the prosecutor's argument attempted to "draw the cloak of righteousness" around the state's case by dismissing Mr. Chacon's arguments as an attempt to divert the jury's attention from the real issues. *Id.*; *Gonzales*, 111 Wn. App. at 282.

This "tactic of misrepresenting defense counsel's argument in rebuttal, effectively creating a straw man easily destroyed in the minds of the jury, does not comport with the prosecutor's duty to 'seek convictions based only on probative evidence and sound reason.'" *Thierry*, 190 Wn. App. at 694 (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)).

The prosecutor's argument at Mr. Chacon's trial constituted misconduct. The state asked the jury to discount the defense theory based on a mischaracterization instead of on the evidence. Indeed, the argument was very similar to that found improper in *Thorgerson*. *Thorgerson*, 172 Wn.2d at 451-52.

There is a substantial likelihood that the prosecutor's improper argument affected the outcome of Mr. Chacon's trial. *Glasmann*, 175 Wn.2d at 704. As outlined above, Mr. Chacon presented significant evidence that Davis's knee was injured by his attempted "knee strike" upon Mr. Chacon. RP 236, 260, 262, 290, 441-451. The evidence against Mr. Chacon was not overwhelming. He was prejudiced by the prosecutor's improper arguments. *Id.*

Again, the prosecutor had access to long-standing case law prohibiting the arguments he made a Mr. Chacon's trial. *See e.g.*

Thorgerson, 172 Wn.2d at 451-52. The prosecutor's misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed prejudicial misconduct by turning Mr. Chacon's defense theory into a "straw man easily destroyed in the minds of the jury" and attempting to "draw a cloak of righteousness" around the state's case. *Gonzales*, 111 Wn. App. at 28; *Thierry*, 190 Wn. App. at 694. Mr. Chacon's convictions must be reversed. *Id.*

III. THE COURT'S INSTRUCTIONS IMPROPERLY RELIEVED THE STATE OF ITS BURDEN OF PROOF AND UNDERMINED THE PRESUMPTION OF MR. CHACON'S INNOCENCE.

The jury instruction defining reasonable doubt at Mr. Chacon's trial deviated from the pattern instruction. It did not specify that Mr. Chacon had no burden of proving the existence of a reasonable doubt. CP 30-31; *cf.* WPIC 4.01.

Mr. Chacon exercised his right not to testify in his own defense. A fair trial in his case hinged on the jury's proper application of the burden of proof and the presumption of innocence. But the court's instructions permitted the jury to convict if it felt that Mr. Chacon should have testified to raise a reasonable doubt.

The court erred by failing to give the reasonable doubt instruction mandated by the Supreme Court. *See State v. Bennett,* 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

Due process requires jurors to presume an accused person's innocence. U.S. Const. Amend. XIV. The presumption of innocence is "the bedrock upon which the criminal justice system stands." *Bennett*, 161 Wn.2d at 315.

A court commits reversible error when it instructs the jury in a manner relieving the state of its burden of proving each element beyond a reasonable doubt. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). Although the constitution does not require specific wording, jury instructions "must define reasonable doubt and clearly communicate that the state carries the burden of proof." *Bennett*, 161 Wn.2d at 307 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280–81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).

To that end, the Washington Supreme Court has used its inherent supervisory authority to order lower courts to instruct juries on the burden of proof using WPIC 4.01. That instruction reads as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. *The defendant has no burden of proving that a reasonable doubt exists.*
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt

> as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01 (certain bracketed material omitted; emphasis added); *Bennett*, 161 Wn.2d at 308.

A trial court may not give a reasonable doubt instruction that differs from the WPIC. *State v. Castillo*, 150 Wn. App. 466, 472, 208 P.3d 1201 (2009); *State v. Lundy*, 162 Wn. App. 865, 870-871, 256 P.3d 466 (2011).

The court at Mr. Chacon's trial gave an instruction omitting the sentence reading: "The defendant has no burden of proving that a reasonable doubt exists." CP 30-31. This instruction presents the same error at issue in *Castillo*.[3]

Divisions I and II approach the issue of harmlessness differently. Division I does not evaluate *Bennett* errors for harmlessness. *Castillo*, 150 Wn. App. at 473. Division I has noted that "the [*Bennett*] court neither said nor implied that lower courts were free to ignore the directive if they

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[3] Mr. Chacon did not object to the court's instruction, but he did propose an instruction that included the language clarifying that he had no burden of proving that a reasonable doubt exists. CP 9. This issue is preserved for appeal.

In the alternative, the court's instructional error presents manifest error affecting a constitutional right, which may be raised for the first time on appeal RAP 2.5(a)(3).

could find the error of failing to give WPIC 4.01 harmless beyond a reasonable doubt." *Id.*

By contrast, Division II applies the harmless error standard for constitutional error. *Lundy*, 162 Wn. App. at 870-871.

Even under Division II's approach, the error here requires reversal. In *Lundy*, the trial court used a modified instruction, which differed only slightly from the pattern instruction. *Lundy*, 162 Wn. App. at 870-71. The instruction unequivocally informed jurors "that the defendant has no burden of proving that a reasonable doubt exists." *Id, at* 873. Because the instruction correctly communicated the burden of proof and the reasonable doubt standard, the *Lundy* court found the error harmless beyond a reasonable doubt. *Id., at* 872-873.

Here, the court omitted the sentence reading: "The defendant has no burden of proving that a reasonable doubt exists." CP 30-31. This instruction presents the same error at issue in *Castillo*. It differs significantly from the instruction addressed by the *Lundy* court.

Unlike the instructions in *Bennett* and *Lundy*, the instruction in Mr. Chacon's case provided an incomplete statement regarding the burden of proof. The trial court in this case neglected to tell jurors that Mr. Chacon had no burden. In other words, the instruction did not make the relevant standard manifestly apparent to the average juror. *State v. Kyllo*, 166

Wn.2d 856, 864, 215 P.3d 177 (2009). The instruction left open the possibility that Mr. Chacon had the burden of raising a reasonable doubt. The same error persuaded Division I to reverse.[4] *Castillo,* 150 Wn. App. at 473.

This error was exacerbated at Mr. Chacon's trial by the fact that the prosecutor told the jury that they should convict if they believed that Mr. Chacon "did it," regardless of whether they felt the state had proved its case. RP 514.

The jury could have taken the prosecutor's argument together with the court's improper instruction to conclude that Mr. Chacon had the burden to raise any potential reasonable doubt.

The trial court erred when it failed to instruct the jury that Mr. Chacon had no burden of proving that a reasonable doubt existed. *Castillo,* 150 Wn. App. at 473. This instructional error requires reversal of Mr. Chacon's convictions. *Id.*

IV. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS UPON MR. CHACON, WHO IS INDIGENT.

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

[4] The instruction in *Castillo* suffered from other flaws as well.

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, 367 P.3 612 (2016).[5]

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

The trial court found Mr. Chacon indigent at both the beginning and the end of the proceedings in superior court. CP 3, 54-55. The court also declined to impose any discretionary legal financial obligations (LFOs) upon Mr. Chacon because of his apparent inability to pay.[6] RP 616; CP 45-46. That status is unlikely to change. Mr. Chacon is a homeless, partially disabled veteran. RP 607, 610.

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

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[5] Division II's commissioner has indicated that Division II will follow *Sinclair*.

[6] Even so, court entered a boilerplate finding on the Judgment and Sentence that Mr. Chacon had the ability to pay LFOs. CP 43. That finding appears to have been entered in error and has no support in the record. Finding 2.5 must be vacated.

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

CONCLUSION

The trial court violated Mr. Chacon's "unqualified right" to a jury instruction on an appropriate inferior-degree offense. The prosecutor committed misconduct by minimizing the state's burden of proof and mischaracterizing and disparaging Mr. Chacon's defense theory. The court's instructions failed to make the state's burden of proof manifestly clear. Mr. Chacon's convictions must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Chacon who is indigent.

Respectfully submitted on December 15, 2016,

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

John Chacon/DOC#351788
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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

Thurston County Prosecuting Attorney
paoappeals@co.thurston.wa.us

Lise Ellner
liseellnerlaw@comcast.net

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 Seattle, Washington on December 15, 2016.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

ELLNER LAW OFFICE

December 15, 2016 - 4:32 PM

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