

No. 49871-5-II

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

State of Washington,

Respondent,

v.

Purcell Devoir Toston, Jr.

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

According to the medical definition of “fracture,” a chipped tooth is not a fracture. After Geovanny Blanco called Purcell Toston a “drama queen,” Mr. Toston hit Mr. Blanco in the face. This caused Mr. Blanco to experience some swelling on his nose and a slight chip on one of his lower teeth. Because RCW 9A.04.110(4)(b), in part, defines “substantial bodily injury” as an injury that causes “the fracture of any bodily part,” the State relied heavily on Mr. Blanco’s chipped tooth to argue it met its burden in proving assault in the second degree. But a careful reading of the statute reveals that “fracture” must be afforded its medical definition. Therefore, the State’s proposed jury instruction that defined “fracture” according to its dictionary definition was legally deficient. The same jury instruction impermissibly relieved the State of its burden to prove every element of assault in the second degree beyond a reasonable doubt.

For these reasons and the other reasons stated in this brief, Mr. Toston asks this court to reverse his conviction.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient evidence to find Mr. Toston guilty of assault in the second degree.

2. Jury Instruction 7 was legally deficient because it permitted the jury to find Mr. Toston guilty of assault in the second degree on an incorrect legal basis.

3. Jury Instruction 7 constitutes an impermissible comment on the evidence which is contrary to Const. art. IV, § 16.

4. Jury Instruction 7 relieved the State of its burden to prove every element of assault in the second degree beyond a reasonable doubt.

5. The trial court committed reversible error when it failed to instruct the jury on the lesser-included offense of assault in the fourth degree.

6. In violation of the Due Process Clause of the Fourteenth Amendment and article I, section 3 of the Washington constitution, the trial court erred when it ordered Mr. Toston to comply with any condition of community custody his Community Corrections Officer deemed suitable.

7. The trial court erred when it imposed discretionary Legal Financial Obligations without conducting an individualized inquiry into Mr. Toston's present and future ability to pay.

C. ISSUES

1. The constitution commands the State to provide sufficient evidence to prove each element of a charged offense beyond a reasonable

doubt. At Mr. Toston's trial, the State was required to prove beyond a reasonable doubt that Mr. Toston inflicted substantial bodily harm on Geovanny Blanco. However, as a consequence of the assault, Mr. Blanco only sustained some swelling on his nose and a slightly chipped tooth. Additionally, the State relied on an erroneous interpretation of the term "fracture" to argue that Mr. Blanco sustained substantial bodily harm. In light of Mr. Blanco's minor injuries and the State's erroneous interpretation of the term "fracture," did the State meet its burden in proving every element of assault in the second degree beyond a reasonable doubt?

2. A jury instruction is legally deficient if it permits the jury to find the defendant guilty on an incorrect legal basis. Jury Instruction 7 permitted the jury to find Mr. Toston guilty of assault in the second degree based on an erroneous definition of the term "fracture." The jury instruction defined fracture as "the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue." Was Jury Instruction 7 legally deficient?

3. The Washington Constitution prohibits judges from instructing the jury that the State has established a fact in issue. The main issue in contention at Mr. Toston's trial was whether he inflicted "substantial bodily harm" on Mr. Blanco. Jury Instruction 7 permitted the jury to find

that Mr. Toston inflicted substantial bodily harm on Mr. Blanco based on a broad definition of the term “fracture” that necessarily required the jury to find Mr. Toston guilty of assault in the second degree. Does Jury Instruction 7 constitute an impermissible comment on the evidence that relieved the State of its burden of proving every element of assault in the second degree beyond a reasonable doubt?

4. A defendant is entitled to a lesser degree offense instruction if two conditions are satisfied. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. Each of the elements of assault in the fourth degree is a necessary element of assault in the fourth degree. Additionally, Mr. Blanco merely sustained a slightly chipped tooth and some minor swelling on his nose after the assault. Did the trial court commit reversible error when it denied Mr. Toston’s request for a jury instruction for assault in the fourth degree?

5. Community custody conditions must have standards that are definite enough to protect against arbitrary enforcement. One of Mr. Toston’s conditions of community custody requires him to adhere to any condition his Community Corrections Officer deems fit. Should this

condition of community custody be stricken because it is subject to arbitrary enforcement?

6. Sentencing courts may only require a defendant to pay legal financial obligations if the defendant possesses the present or future ability to pay. Therefore, the record must reflect that the trial court made an individualized inquiry into the defendant's ability to pay. This individualized inquiry requires the court to consider a number of non-exclusive factors, including the defendant's incarceration and other debts. After hearing that Mr. Toston could not pay all of the State's requested costs, the sentencing court merely asked Mr. Toston if he could pay the costs if the court set payments "at a reasonable rate." Did the sentencing court engage in the required individualized inquiry into Mr. Toston's ability to pay?

D. STATEMENT OF THE CASE

Purcell Toston was in his room at American Behavioral Health Systems (ABHS), a treatment center, when a fellow patient, Geovanny Blanco, stopped by. RP 74. Mr. Blanco stopped at Mr. Toston's room after hearing from another patient that Mr. Toston took offense to something Mr. Blanco previously said. RP 74. Mr. Blanco came by the room to acknowledge that we he said to Mr. Toston may have come off "a little bit offensive." RP 74. Curiously, after acknowledging this, Mr. Blanco

proceeded to call Mr. Toston “a drama queen” and told him to “stay away.” RP 74. Mr. Blanco walked away from the room, and Mr. Toston followed. RP 78.

According to a witness, both men started “cursing at each other” and “getting in each other’s faces.” RP 79, 111, 113. Mr. Blanco told Mr. Toston he did not want to talk to him anymore. RP 111. Mr. Toston hit Mr. Blanco in the mouth. RP 111.

A witness present during the incident did not see any injuries on Mr. Blanco after the assault. RP 123. However, a police officer who arrived shortly after the incident noted Mr. Blanco seemed a bit “discombobulated.” RP 130. The same officer observed that Mr. Blanco chipped a portion of his tooth and also had some swelling on his face. RP 132.

At the hospital, the doctor who treated Mr. Blanco, Dr. Kim Thuy Le, did not observe any bruising on his face. Ex. 6, pg. 4. Dr. Le did, however, observe some swelling at the bridge of Mr. Blanco’s nose. Ex. 6, pg. 3 Just 20 minutes after the assault, Mr. Blanco did not appear to be in any acute distress, and he denied any loss of consciousness. Ex. 6, pg. 2. Dr. Le did not discover any broken bones. In light of these injuries, Dr. Le simply recommended that Mr. Blanco take ibuprofen if he experienced any pain and apply some ice on his nose to ease the swelling. RP 107.

The State charged Mr. Toston with assault in the second degree. CP 5. Mr. Toston exercised his right to a jury trial. He proposed a lesser-included instruction for assault in the fourth degree, which the trial court rejected. RP 143-48. The trial court permitted the State to submit to the jury an instruction that defined the term “fracture” under the relevant assault statute as “the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue.” CP 40.

The jury convicted Mr. Toston of assault in the second degree. RP 173. At sentencing, the court imposed \$1,246 in discretionary legal financial obligation.

Mr. Toston appeals.

E. ARGUMENT

1. Insufficient evidence supports Mr. Toston’s conviction for assault in the second degree.

a. The State must prove every element of the crime beyond a reasonable doubt.

The State must provide sufficient evidence to prove *each element* of a charged offense beyond a reasonable doubt. U.S. Const. amend XIV; *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). If a reviewing court finds that no rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt,

the court must dismiss the conviction with prejudice. *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

b. The State failed to prove that Mr. Toston inflicted “substantial body harm” onto Mr. Blanco.

Because the State failed to prove that Mr. Toston inflicted “substantial bodily harm” onto Mr. Blanco within the meaning of RCW 9A.04.110(4)(b), this court should reverse.

The essential elements of assault in the second degree require the State to prove the defendant 1) intentionally; 2) assaulted another; 3) and thereby recklessly inflicted; 4) substantial bodily harm. RCW 9A.36.021. Our legislature defined “substantial bodily harm” as

bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of *any bodily part or organ*, or which *causes the fracture of any bodily part*.

RCW 9A.04.110(4)(b)(emphasis added).

i. The canons of construction require this court to adhere to the medical definition of “fracture” rather than the dictionary definition of “fracture.”

Here, the State relied heavily on Mr. Blanco’s chipped tooth to argue that Mr. Toston inflicted “substantial bodily harm” on Mr. Blanco. At both opening and closing argument, the State argued and emphasized that Mr. Blanco’s chipped tooth constituted a “fracture.” RP 67, 167.

Upon the State's request, the court issued a jury instruction defining "fracture" according to its dictionary definition. RP 139-41, 163; CP 40.

However, because the State and trial court's understanding of the term "fracture" is contrary to the meaning evinced in RCW 9A.36.021, insufficient evidence supports Mr. Toston's conviction. This court reviews questions of statutory construction de novo. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

Statutory construction begins with a reading of the text of the statute(s) in question. *Id.* Each word of a statute must be accorded meaning, and "when the legislature uses two different terms in the same statute, courts presume the legislature intended the terms to have different meanings." *Id.*; *Densley v. Dep't of Retirement Systems*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). This is because the legislature is presumed to use no superfluous words. *Roggenkamp*, 153 Wn.2d at 624.

In keeping with the presumption that the legislature acts purposefully when drafting legislation, this court adheres to the doctrine of *expressio unius est exclusio alterius*. *In re Hopkins*, 137 Wn.2d 897, 976 P.2d 616 (1999). This doctrine holds that "the legislative inclusion of certain items in a category implies that other items in that category [were] intended to be excluded." *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). In other words, a Court must presume that the Legislature's

omission of a term used elsewhere within a statute was deliberate; therefore, the term cannot be “read in” to a portion of the statute that does not mention the term in question.

Because the legislature used two separate terms to distinguish between “bodily part” and “organ,” this court must presume that the legislature intended these terms to have two separate meanings. *Densley*, 162 Wn.2d at 219; *accord In the Matter of the Dependency of D.L.B.*, 186 Wn.2d 103, 118, 376 P.3d 1099 (2016). Again, RCW 9A.04.110(4)(b) defines “substantial bodily harm” as

bodily injury which involves a temporary but substantial disfigurement,¹ or which causes a temporary but substantial loss or impairment of the function of *any bodily part or organ*,² or which *causes the fracture of any bodily part*.³

(emphasis added).

The doctrine of *expressio unius est exclusio alterius* requires this court to interpret the term “fracture” to exclude the fracture of any “organ.” This is because if the legislature intended for the term “fracture” to also apply to an organ, it would have included the term under subsection three of RCW 9A.04.110(4)(b).

¹ This section of RCW 9A.04.110(4)(b) will be referred to as “subsection one.”

² This section of RCW 9A.04.110(4)(b) will be referred to as “subsection two.”

³ This section of RCW 9A.04.110(4)(b) will be referred to as “subsection three.”

Therefore, the trial court erred when it interpreted the term “fracture” according to its dictionary definition because that definition would require the court to hold that a fractured organ could constitute “substantial bodily harm” within the meaning of RCW 9A.04.110(4)(b).

The dictionary defines “fracture” as follows:

- 1) the result of fracturing: break
- 2) a: the act or process of breaking or the state of being broken; especially: the breaking of hard tissue (such as bone)
b: the rupture (as by tearing) of soft tissue, e.g. *kidney fracture*
- 3) the general appearance of a freshly broken surface of a mineral

Fracture, Merriam Webster, <https://www.merriam->

[webster.com/dictionary/fracture](https://www.merriam-webster.com/dictionary/fracture) (last visited July 1, 2017) (emphasis added).

Because this interpretation of the statute contravenes the legislature’s intent, this court should not interpret the term “fracture” according to its dictionary definition. This court’s primary goal in interpreting a statute is to effectuate legislative intent. *In re Welfare of L.N.B.-L*, 157 Wn. App. 215, 238, 237 P.3d 944 (2010). Instead, this court should read the term “fracture” according to its medical definition. The ordinary definition of a term is not dispositive of a statute’s meaning when the term is also a term of art. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015) (holding that the term “respiratory disease” must be afforded its medical meaning rather than its dictionary meaning under

RCW 51.32.185(1)(a)). The medical meaning of “fracture” applies only to fractured bones.⁴

ii. Because a chipped tooth does not constitute a “fracture” within the meaning of RCW 9A.04.110(4)(b), insufficient evidence supports Mr. Toston’s conviction.

Because teeth are not bone, the term “fracture” as used under subsection three of RCW 9A.04.110(4)(b) does not apply to teeth.⁵ Consequently, Mr. Blanco’s chipped tooth was insufficient to convict Mr. Toston of assault in the second degree.

iii. The minor swelling on Mr. Blanco’s nose was not a temporary, but substantial disfigurement within the meaning of RCW 9A.04.110(4)(b).

Additionally, the minor swelling on Mr. Blanco’s nose was not a substantial disfigurement within the meaning of RCW 9A.04.110(4)(b). The term “substantial” as applied to RCW 9A.04.110(4)(b) “signif[ies] a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence.” *State v. McKague*,

⁴ See *Fracture*, Oxford Reference Concise Medical Dictionary (9th ed. 2015); *Fracture*, Black’s Medical Dictionary 86, 281 (41st ed. 2005); Danielle Campagne, MD, *Overview of Fractures, Dislocations, & Sprains*, Merck Manual: Professional Version, <http://www.merckmanuals.com/professional/injuries-poisoning/fractures,-dislocations,-and-sprains/overview-of-fractures,-dislocations,-and-sprains>.

⁵ See Black’s Medical Dictionary, *supra* note 4, at 695 (defining “teeth” as “hard organs developed from the mucous membranes of the mouth and embedded in the jaw bones); see also Remy Melina, *Why are Teeth not Considered Bones?*, Live Science (Mar. 18, 2011), <https://www.livescience.com/33130-why-are-teeth-not-considered-bones.html>.

172 Wn.2d 802, 806, 262 P.3d 1225 (2011). Besides the slightly chipped tooth, the doctor who observed Mr. Blanco shortly after the assault merely noted that he had some mild swelling at the bridge of his nose. Ex. 6, pg. 3. The doctor did not observe any bruising on Mr. Blanco. Ex. 6, pg. 4. In fact, just 20 minutes after the assault, Mr. Blanco did not appear to be in any acute distress and denied any loss of consciousness. Ex. 6, pg. 2. Accordingly, while Mr. Blanco's slightly chipped tooth and minor nasal swelling show the mere existence of injuries, these injuries do not rise to the level of "substantial bodily injury."

c. Reversal is required.

Mr. Blanco's chipped tooth is not a "fracture" within the meaning of RCW 9A.04.110(4)(b), and the minor swelling on Mr. Blanco's nose does not arise to the level of a "substantial bodily injury." Therefore, insufficient evidence supports Mr. Toston's conviction for assault in the second degree.

This court should dismiss Mr. Toston's conviction with prejudice. *Burks*, 437 U.S. at 11.

2. **The jury instructions were legally deficient because they misstated the law, and the jury instructions amounted to an impermissible comment on the evidence.**
 - a. **Jury Instruction 7 was legally deficient because it allowed the jury to find Mr. Toston guilty of assault in the second degree on an incorrect legal basis.**

This court assesses whether a jury instruction is legally correct de novo. *State v. Chenoweth*, 188 Wn. App. 521, 535, 354 P.3d 13 (2015). Trial courts must produce jury instructions that “accurately state the law, permit the defendant to argue his theory of the case, and that the evidence supports.” *State v. Staley*, 123 Wn.2d 794, 803, 872 P.3d 502 (1994). “A jury instruction is legally deficient if it permits the jury to find the defendant guilty on an incorrect legal basis.” *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). An erroneous jury instruction that misstates an element of the charged crime is subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). This standard of review necessitates reversal if a court cannot hold beyond a reasonable doubt that the jury instruction did not contribute to the verdict. *Id.*

Jury Instruction 7 is legally deficient because it allowed the jury to find Mr. Toston guilty of assault in the second degree based on an erroneous definition of the term “fracture.” As previously explained, the

term “fracture” under RCW 9A.04.110(4)(b) refers only to a bone fracture; however, Jury Instruction 7 defined “fracture” as follows:

Fracture means: the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue.

CP 40.

Jury Instruction 7 uses the Merriam Webster dictionary definition of the term “fracture.” RP 140. For the reasons stated fully in part one of the Argument section of this brief, this definition is incorrect. Because this definition erroneously allowed the jury to find Mr. Toston guilty of assault in the second degree on a broader basis than RCW 9A.04.110(4)(b) permits, Jury Instruction 7 is legally deficient.

b. Jury Instruction 7 constitutes an impermissible comment on the evidence.

Additionally, Jury Instruction 7 constitutes an impermissible comment on the evidence. This court evaluates whether a jury instruction amounts to a comment on the evidence de novo. *In re L.T.S.*, 197 Wn. App. 230, 234, 389 P.3d 660 (2016).

The Washington Constitution forbids judges from “charg[ing] juries with respect to matters of fact, nor comment thereon.” Const. art. IV, § 16. Instead, judges “shall declare the law.” *Id.* Therefore, judges cannot convey their personal opinion about the merits of a case or instruct

the jury that the State has established a fact at issue. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Our constitution prohibits judicial comments on the evidence “to prevent the trial judge’s opinion from influencing the jury.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Const. art IV, § 16. Courts presume that judicial comments are prejudicial, and the State bears the burden of proving no prejudice resulted from the judicial comment. *Levy*, 156 Wn.2d at 723.

Jury Instruction 7 constitutes an impermissible comment on the evidence because it resolved a contested factual issue in favor of the State. *See State v. Brush*, 183 Wn.2d 550, 353 P.3d 213 (2015) (finding that a jury instruction constituted an impermissible comment on the evidence because the court improperly defined a term that resolved a contested factual issue in favor of the state, which relieved the State of its burden). The main issue in contention at Mr. Toston’s trial was whether he inflicted “substantial bodily harm” on Mr. Blanco. *See, e.g.* RP 168-72. Jury Instruction 7 relieved the State of its burden of proving that Mr. Toston inflicted “substantial bodily harm” on Mr. Blanco because it permitted the jury to find Mr. Toston guilty of assault in the second degree merely because Mr. Blanco’s slightly chipped tooth constituted a “fracture” as defined in the jury instruction. CP 40.

c. Reversal is required.

Jury Instruction 7 improperly stated the law. The jury instruction also relieved the State of its burden to prove every element of assault in the second degree beyond a reasonable doubt because it impermissibly instructed the jury that the State has established a fact at issue.

In light of Mr. Blanco's minor injuries, the State cannot meet its heavy burden in proving that Jury Instruction 7 did not prejudice Mr. Toston beyond a reasonable doubt.

This court should reverse.

3. Under both prongs of the *Workman* test, Mr. Toston was entitled to a lesser-included assault in the fourth degree jury instruction.

Mr. Toston was entitled to a lesser-included assault in the fourth degree jury instruction. A defendant is entitled to an instruction on a lesser-included offense if two conditions are satisfied. *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). "First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." *Id.* at 447-48.

The legal prong of the *Workman* test is satisfied because each of the elements of assault in the fourth degree is a necessary element of assault in the second degree. "A person is guilty of assault in the fourth

degree if...he or she *assaults* another.” RCW 9A.36.041 (emphasis added). And “[a] person is guilty of assault in the second degree if he or she...intentionally *assaults* another and thereby recklessly inflicts substantial bodily harm.” RCW 9A.36.021 (emphasis added); *see State v. Hagler*, 150 Wn. App. 196, 208 P.3d 32 (2009) (describing assault in the fourth degree as a lesser-included offense of assault in the second degree).

The factual prong of the *Workman* test is also satisfied because the evidence produced at trial supported an inference that the incident between Mr. Toston and Mr. Blanco only demonstrated an assault in the fourth degree. To determine whether the evidence at trial was sufficient to support a lesser-included offense instruction, this court must view the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The trial court should administer a requested jury instruction on a lesser-included offense if the evidence permits a jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater. *Id.* at 456; *accord Beck v. Alabama*, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). A trial court must consider *all* of the evidence produced at trial when it decides whether the jury should receive the instruction, regardless of the source of the evidence. *Fernandez-*

Medina, 141 Wn.2d at 456; accord *State v. Bright*, 129 Wn.2d 257-269-70, 916 P.2d 922 (1996).

The evidence presented at trial warranted an instruction for assault in the fourth degree. Primarily, Mr. Blanco's minor injuries supported this instruction. As a consequence of the assault, Mr. Blanco only sustained a slightly chipped tooth and some swelling on his nose. Exs. 2 & 3, Ex. 6, pg. 4. Because Mr. Blanco's injuries were minor, the jury could have rationally found that the assault did not result in Mr. Blanco experiencing "substantial bodily harm." Therefore, it was entirely plausible for the jury to have acquitted Mr. Toston of assault in the second degree, which necessitates a finding that the victim endured substantially bodily harm, and convicted him instead of assault in the fourth degree, which merely required the jury to find that the assault occurred. RCW 9A.36.021; RCW 9A.36.041.

"The failure to give a lesser included offense instruction necessitates a new trial." *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (2004). This court should reverse.

4. The community custody condition that requires Mr. Toston to comply with conditions “as ordered by [his] CCO” is unconstitutionally vague and the sentencing court possessed no authority to impose this condition.

The condition of community that permits Mr. Toston’s CCO to impose any condition of community he or she deems fit should be stricken because it is unconstitutionally vague. This court reviews a court’s sentencing conditions for an abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A sentencing court abuses its discretion if it imposes an unconstitutional condition of community custody. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

The Due Process Clause of the Fourteenth Amendment and article I, section 3 of the Washington constitution forbid vague laws. U.S. Const. XIV; *Bahl*, 164 Wn.2d at 752-53. To comport with both the federal and Washington constitutions, laws must “1) provide ordinary people fair warning of proscribed conduct; and 2) have standards that are definite enough to protect against arbitrary enforcement.” *State v. Irwin*, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). This same analysis applies when courts determine whether a community custody condition is

unconstitutionally vague, and a community custody condition is unconstitutionally vague if it fails to do either. *Id.* at 652-53.

This court does not presume that community custody conditions are constitutional. *Irwin*, 191 Wn. App. at 652 (referencing *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 364 P.3d 830 (2015)).

This court should strike the condition of community custody that requires Mr. Toston to comply with “other conditions: as ordered by [his] CCO [Community Corrections Officer]” because the condition is subject to arbitrary enforcement. CP 56. For example, in *Irwin*, the defendant was charged with second degree child molestation and second degree possession of depictions of minors engaged in sexually explicit conduct. 191 Wn. App. at 647. The trial court imposed a community custody condition commanding the defendant not to “frequent areas where minor children are known to congregate as defined by the supervising CCO.” *Id.* at 652. The defendant challenged this condition, arguing it was unconstitutionally vague. *Id.* This court struck this condition as void for vagueness under both prongs of the vagueness analysis. *Id.* at 654-55.

Critically, this court found that allowing the CCO to determine locations “where children are known to congregate” would leave the condition vulnerable to arbitrary enforcement, which “render[ed] the

condition unconstitutional under the second prong of the vagueness analysis.” *Id.* at 655.

Similarly, here, the condition that subjects Mr. Toston to *any* condition his CCO deems fit is certainly subject to arbitrary enforcement. Conditions ranging from an outright prohibition on possessing literature to a serious curtailment of Mr. Toston’s ability to exercise his religious freedom could be imposed on Mr. Toston at his CCO’s discretion.

Therefore, this condition is impermissibly vague and should be stricken.

5. This court should reverse the court’s imposition of discretionary legal financial obligations because the court did not conduct the required individualized inquiry into Mr. Toston’s ability to pay.

Upon a defendant’s conviction, a sentencing court may order the defendant to pay costs (legal financial obligations, or LFOs). RCW 10.01.160(1). However, sentencing courts cannot require a defendant to pay costs unless the defendant possesses the present or future ability to pay. RCW 10.01.160(3).

Recognizing that the imposition of LFOs creates numerous obstacles for indigent offenders, our Supreme Court exercised its RAP 2.5 discretion and reached the merits of an unpreserved challenge to LFOs in *Blazina*. *Id.* at 834-36. Because the inability to pay LFOs enables a court

to retain jurisdiction over indigent offenders long after they are released from prison, “the court’s long term involvement in defendant’s lives inhibits reentry.” *Id.* at 837. This is because the active record results in serious negative consequences in employment, housing, and finances. *Id.*⁶

With these concerns in mind, our Supreme Court held, “the record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry *must* consider non-exhaustive factors such as the defendant’s incarceration and other debts. *Id.* at 838. Furthermore, our Supreme Court instructed sentencing courts to look to GR 34 for guidance to determine a defendant’s ability to pay. *Id.*

Despite our Supreme Court’s mandate that sentencing courts assess numerous factors prior to imposing LFOs, here, the sentencing court simply asked Mr. Toston,

I have a question to ask you about your physical, mental, emotional or financial situation. Is there anything about any of those or anything else that would limit your ability to pay financial obligations if I set them at a reasonable rate, say, \$25 a month?

RP 183.

⁶ Referencing *Am. Civ. Liberties Union, In for a Penny: The Rise of America’s New Debtors’ Prisons* 68-69, https://www.aclu.org/files/assets/InForAPenny_web.pdf.

After misunderstanding the question, the sentencing court asked Mr. Toston once again,

THE COURT: That actually wasn't my question. My question is whether you have the ability to pay this, or is there something about you physically, mentally, emotionally or financially or anything else.

THE DEFENDANT: *All of it, no.*

THE COURT: So you should be able to do that if I set it at a reasonable rate. Is that right?

THE DEFENDANT: Yeah, I should.

RP 184 (emphasis added).

Instead of asking Mr. Toston *why* he could not pay all of the proposed legal financial obligations, the court merely ignored Mr. Toston's response. Moreover, the court did not inquire as to Mr. Toston's other debts, and nothing in the record indicates the court looked to GR 34 for guidance prior to imposing LFOs. The sentencing court ultimately ordered Mr. Toston to pay \$1,246 in LFOs at a rate of \$25 a month despite *Blazina's* warning that "a person who pays \$25 a month in LFOs will owe the state more ten years after conviction than they did when the LFOs were assessed." 182 Wn.2d at 836; CP 56-57; RP 186.

An individualized inquiry into a defendant's ability to pay LFOs consists of more than asking the defendant if he subjectively believes he has the ability to pay. This court should reverse with instructions for the court to engage in the inquiry mandated in *Blazina*. See *State v. Ralston*,

185 Wn.2d 1025, 377 P.3d 724 (2016) (granting petition for review on the issue of imposition of discretionary LFOs and remanding the case to the superior court because it did not conduct an individualized inquiry into the appellant's current and future ability to pay in light of the non-exhaustive factors noted in *Blazina* and the factors for determining indigency as described in GR 34); accord *State v. Christopher*, 135 Wn.2d 1001, 369 P.3d 149 (2016); *State v. Como*, 185 Wn.2d 1025, 377 P.3d 730 (2016).

F. CONCLUSION

Insufficient evidence and deficient jury instructions warrant this court's reversal of Mr. Toston's conviction.

Alternatively, this court should remand so that the sentencing court may strike the offending condition of community custody and conduct an individualized inquiry into Mr. Toston's ability to pay.

DATED this 20th day of July, 2017 .

Respectfully submitted,

/s Sara S. Taboada

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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 49871-5-II
v.)	
)	
PURCELL TOSTON,)	
)	
Appellant.)	

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