

FILED

FEB 28, 2013

Court of Appeals
Division III
State of Washington

No. 30945-2-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JORGE ENRIQUE RODRIGUEZ,
Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Vic L. VanderSchoor, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....5

 1. This Court should reverse the no contact order conviction because the jury instructions failed to ensure jury unanimity.....5

 2. The express finding that Mr. Rodriguez has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.....9

 a. Relevant statutory authority.....10

 b. There is no evidence to support the trial court's express finding that Mr. Rodriguez has the present and future ability to pay legal financial obligations.....10

 c. The remedy is to strike the unsupported finding.....12

D. CONCLUSION.....14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Fuller v. Oregon</u> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).....	9
<u>Nordstrom Credit, Inc. v. Dep't of Revenue</u> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	11
<u>State v. Baldwin</u> , 63 Wn. App. 303, 818 P.2d 1116 837 P.2d 646 (1991).....	11, 12, 14
<u>State v. Bertrand</u> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	11, 12, 14
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	11
<u>State v. Brown</u> , 159 Wn. App. 1, 248 P.3d 518 (2010).....	6, 7
<u>State v. Coleman</u> , 159 Wn.2d 509, 150 P.3d 1126 (2007).....	5, 8
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	9
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	9, 10, 11
<u>State v. Fiallo-Lopez</u> , 78 Wn. App. 717, 899 P.2d 1294 (1995).....	6
<u>State v. Handran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	6
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	5, 8
<u>State v. Loehner</u> , 42 Wn. App. 408, 711 P.2d 377 (1985) (Scholfield, J., concurring), <i>rev. denied</i> , 105 Wn.2d 1011 (1986).....	8
<u>State v. Lohr</u> , 164 Wn. App. 414, 263 P.3d 1287 (2011).....	13
<u>State v. Love</u> , 80 Wn. App. 357, 908 P.2d 395 (1996).....	6
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	5

<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	6
<u>State v. Schelin</u> , 147 Wn.2d 562, 55 P.3d 632 (2002).....	13
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	5
<u>State v. Souza</u> , 60 Wn. App. 534, 805 P.2d 237, <i>recon. denied, rev. denied</i> , 116 Wn.2d 1026 (1991).....	13
<u>State v. VanderHouwen</u> , 163 Wn.2d 25, 177 P.3d 393 (2008).....	8

Statutes

U.S. Const. amend. 6.....	5
Const. art. I, § 22.....	5, 6
RCW 9.94A.760(1).....	10
RCW 9.94A.760(2).....	9
RCW 10.01.160.....	11
RCW 10.01.160(1).....	10
RCW 10.01.160(2).....	10
RCW 10.01.160(3).....	9, 10
RCW 13.40.192.....	10

A. ASSIGNMENTS OF ERROR

1. Mr. Rodriguez was deprived of his right to a unanimous jury verdict.

2. The record does not support the express finding that Mr. Rodriguez has the current or future ability to pay Legal Financial Obligations.

Issues Pertaining to Assignments of Error

1. Whether Mr. Rodriguez' right to a unanimous jury was violated, where there was evidence of multiple acts which could have formed the basis for the no contact order violation conviction, the State failed to specify the act upon which the jury should rely for the conviction, and the court failed to instruct the jury it must be unanimous as to the chosen act?

2. Should the finding that Mr. Rodriguez has the current or future ability to pay Legal Financial Obligations be stricken from the Order of Disposition as clearly erroneous where it is not supported in the record?

B. STATEMENT OF THE CASE

The defendant, Jorge Enrique Rodriguez, was charged by amended information with felony violation on or about September 25, 2011 of a no contact order ("NCO") issued on September 9, 2011. CP 73; Exhibit PLF

3. The NCO protected Diana L. Houck, and included a provision

restraining Mr. Rodriguez from coming within two blocks of her address at **115** North 7th Avenue in Pasco, Washington. Exhibit PLF 3. Mr. Rodriguez owns the house. Ms. Houck, a friend, had been staying there with him for a little while due to some medical issues. 6/6/12 RP 48–49, 66.

Mr. Rodriguez testified that sometime after his arrest on September 9, Ms. Houck wanted to bail him out but he wanted her to get someone else to do it because she might get in trouble. Their neighbor, who was a friend, arranged for a bail bond on September 12. 6/6/12 RP 54, 63–65. That night, Pasco City Police Officer Eric Fox conducted a civil standby at Mr. Rodriguez' request, allowing him to collect things from his house while Ms. Houck was present. 6/6/12 RP 17–22, 65–66. The officer and Mr. Rodriguez both heard Ms. Houck say that she would be moving out. 6/6/12 RP 22–23, 52–53, 55–56.

Mr. Rodriguez testified he'd gone back to the house because Ms. Houck was unable to administer the medication some of his dogs needed for Parvo disease and because he needed a place to stay after drinking with some buddies. 6/6/12 RP 49–50, 55, 67. On September 25, 2011, Pasco City Police Officer Randall Roach responded to a call concerning the **115** North 7th address and found Mr. Rodriguez asleep there. The officer

arrested Mr. Rodriguez for violation of the NCO. 6/6/12 RP 12–16, 50.

The NCO was apparently later modified to remove the provision restricting Mr. Rodriguez from his own house. 6/6/12 RP 49–50, 52–53, 59, 67–70.

In closing, the State argued in pertinent part:

The order – it’s clear [Mr. Rodriguez] knew about it. It’s also very clear in this case that he knowingly violated that order. The reactions you see throughout this case, the reactions you saw as the defendant testified earlier are reactions of someone who knew he did something wrong. He called the police for civil stand-by. He became concerned. Then he moved into the house despite the fact the no-contact order said he could not do that.

He also admits he violated the order in another [way]. He admitted he spoke to Diana Houck. On the stand he said I walked to her and told her she shouldn’t do that because she would get in trouble. Clear case he knew about the provisions of this order because he told her she wasn’t supposed to have any contact with him. He corrected that and said it was a neighbor, but he very clearly said he spoke to her.

So he violated the order by speaking to her and he violated the order at the same time by returning to the residence listed clearly on the order. Then on September 25th he is caught red-handed. So this isn’t a case where you have a layperson report he was seen here at this location. He was caught there by the evidence.

6/7/12 RP 88–89 [alteration added].

The jury found Mr. Rodriguez guilty as charged of the NCO violation.¹ CP 23.

At sentencing, the court imposed a mid-standard range term of confinement of 26 months, and 12 months of community custody. CP 11, 16. The court also ordered a total amount of Legal Financial Obligations (“LFOs”) of \$2,876.75. CP 13 at ¶ 4.1. The court made no inquiry into Mr. Rodriguez’ financial resources and the nature of the burden that payment of LFOs would impose. 6/14/12 RP 99–103. As part of the Judgment and Sentence, the court made the following pertinent findings:

¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.

The court finds:

[X] That the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753 [sic].²

...

CP 12. The court ordered Mr. Rodriguez to make monthly payments of \$100 on the LFOs, “commencing immediately”. CP 14.

¹ The jury also found Mr. Rodriguez not guilty of count II—bail jumping (CP 22), and could not agree on count III—bail jumping, which resulted in the count being dismissed (CP 12; 6/7/12 RP 96).

² The Judgment and Sentence at ¶ 2.5 incorrectly cites to RCW 9.94A.753, which concerns restitution. The correct authority is RCW 9.94A.760.

This appeal followed. CP 2–4.

C. ARGUMENT

1. This Court should reverse the no contact order conviction because the jury instructions failed to ensure jury unanimity.

A conviction requires that a unanimous jury conclude that the defendant committed the criminal act charged in the information. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the United States Constitution and in article I, section 22 of the Washington Constitution. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Const. art. I, § 22; U.S. Const. amend. 6).

When a defendant has committed several criminal acts but is charged with only one count, the prosecution normally has two options. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Either the State may elect the act it will rely on or the judge must instruct the jury as to the unanimity requirement. Petrich, 101 Wn.2d at 572. If neither option is taken, the State cannot prove the verdict was unanimous. A court's failure to follow one of these options, therefore, is constitutional error. State v. Coleman, 159 Wn.2d 509, 511–12, 150 P.3d 1126 (2007); Kitchen, *supra*; Petrich, 101 Wn.2d at 572; U.S. Const. amend. 6; Const.

art. I, § 22. The adequacy of jury instructions is reviewed *de novo*. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

The unanimity rule does not apply when the evidence shows a “continuing course of conduct.” State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether there is a continuing course of conduct, the facts are evaluated in a commonsense manner considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). In distinguishing between distinct criminal acts and a continuing course of conduct, courts have held that “evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred ...,” while “evidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct....” State v. Fiallo–Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

In State v. Brown, the State presented evidence of multiple acts (repeated phone calls and some in-person contacts) the jury could have relied upon to convict for five counts of alleged violations of a no-contact order. 159 Wn. App. 1, 13-15, 248 P.3d 518 (2010). The court concluded

that the continuing course of conduct exception applied. “Although the criminal acts did not occur at the same time, the time separating the criminal acts was short. The criminal acts involved the same parties (Brown and Apodaca), the same locations (at Apodaca's apartment and on her phones), and the same ultimate purpose (to contact and confront Apodaca). The trial court did not err by declining to give a unanimity instruction.” Brown, 159 Wn. App. at 15.

Here, there was also evidence of multiple acts the jury could have relied upon to convict. As emphasized by the prosecutor in closing, the acts were speaking to Ms. Houck, going to the protected address and/or being found asleep in the house by police. Unlike in Brown, these were distinct acts and there was no evidence from which to conclude they were separated by only a short amount of time. And while Mr. Rodriguez should not have talked to Ms. Houck or been at the house, his actions did not have the same ultimate purpose. Through wholly discrete conduct, Mr. Rodriguez sought to get out of jail, provide medical assistance to his beloved dogs, and simply sleep in his house. This was not a continuing course of conduct.

In closing, the prosecutor did not elect which act the jury should rely on to convict. 6/7/12 RP 88–89. Nor was the jury instructed it must

be unanimous as to which act it relied upon. CP 24–45. This violated Mr. Rodriguez’ right to a unanimous jury verdict.

The lack of jury unanimity is constitutional error. It is presumed prejudicial and requires reversal unless the prosecution proves the error harmless beyond a reasonable doubt. State v. VanderHouwen, 163 Wn.2d 25, 38–39, 177 P.3d 393 (2008); Coleman, 159 Wn.2d at 510, 512. This presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. Coleman, 159 Wn.2d at 512 (citing Kitchen, 110 Wn.2d at 411–12). Put another way, the State does not meet its burden unless it convinces this Court that no rational juror could have a reasonable doubt regarding either of the incidents. Kitchen at 409, 412 (citing State v. Loehner, 42 Wn. App. 408, 411, 711 P.2d 377 (1985) (Scholfield, J., concurring), *rev. denied*, 105 Wn.2d 1011 (1986)).

The State cannot meet its burden because a rational juror could have reasonable doubts about several of the contacts alleged. Under both direct and cross examinations, Mr. Rodriguez’ testimony was not a model of clarity. 6/6/12 RP 48–70. Mr. Rodriguez’ rendition of how he came to be released from jail on bond was confusing enough that the prosecutor claimed in closing Mr. Rodriguez first said he’d talked to Ms. Houck and

then changed his story upon cross-examination to say he'd only talked to a neighbor. Mr. Rodriguez' testimony about returning to the house was unclear, and he could have been there one or more times. Ms. Houck did not testify at trial. And the State presented no independent evidence to corroborate these two (or more) events. Yet the State confidently argued in closing there were three distinct criminal acts any of which could support a conviction. On this record, the State cannot meet its burden of showing no rational jury could have entertained a reasonable doubt that each incident established the crime of violating a no contact order beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). This court should reverse the conviction.

2. The express finding that Mr. Rodriguez has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal

protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.”³ RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

b. There is no evidence to support the trial court's express finding that Mr. Rodriguez has the present and future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific

³ It appears that imposition of legal financial obligations is also contemplated by the Juvenile Justice Act. *See* RCW 13.40.192.

finding of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

Here, there is nothing in the record to suggest the court considered Mr. Rodriguez' "present and future ability to pay legal financial obligations". Yet the court made an express finding that Mr. Rodriguez had the ability to pay those LFOs. Whether a finding is express or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be

sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ”

Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Rodriguez’ financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court’s express finding that Mr. Rodriguez has the present or future ability to pay LFOs. The finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no inquiry and no evidence to support the trial court’s express or implied finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to

support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. *Cf.* State v. Souza (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); Lohr (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

Mr. Rodriguez is not challenging *imposition* of the LFOs; rather, the trial court made the express finding that he has the ability to pay them and, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's finding of present and future ability to pay LFOs simply forecloses

the ability of the Department of Corrections to begin collecting LFOs from Mr. Rodriguez until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ [t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*’ ” Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

D. CONCLUSION

The conviction should be reversed. Alternatively, the matter should be remanded to strike the finding of ability to pay legal financial obligations from the Judgment and Sentence.

Respectfully submitted on February 28, 2013.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 28, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Jorge Enrique Rodriguez
115 North 7th Avenue
Pasco WA 99301

E-mail: appeals@co.franklin.wa.us
Shawn P. Sant
Franklin County Prosecutor's Office
1016 N 4th Ave
Pasco WA 99301-3706

s/Susan Marie Gasch, WSBA #16485