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Court of Appeals
Division III
State of Washington

No. 31316-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

NEIL MCGINNIS,

Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Gregory D. Sypolt, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

Primarily Mr. McGinnis relies upon his Brief of Appellant to address the issues raised by the State. Additionally he states as follows in direct Reply.

1. As an issue of first impression, Mr. McGinnis’ constitutional right to a jury trial was violated by the court’s instruction, which affirmatively misled the jury about its power to acquit.

Our Washington State Supreme Court has not ruled on the issue whether the language “it will be your duty to convict” in a jury instruction affirmatively misleads a jury about its power to acquit, in violation of a defendant’s constitutional right to a jury trial.¹ Nor have Divisions I and II ruled on the precise issue. Division III has not ruled on the precise issue *or* the peripheral issues ruled on by the Division I and II opinions.

Standard of review. As an initial matter, the State asserts that because appellant did not object to the “to convict” instruction, he has waived the right to contest it on appeal. However, Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de*

¹ The State’s misperception that appellant’s issue is instead whether “a defendant in Washington State is entitled to a jury instruction on ‘jury nullification’ ” could easily be corrected by a thoughtful and fair reading of appellant’s argument on this issue. Brief of Respondent at 5; *see* Brief of Appellant at 4–25.

novo. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) ,
overruled in part on other grounds, 174 Wn.2d 707, ___ P.3d ___ (June 7,
2012). Instructions must make the relevant legal standard manifestly
apparent to the average juror. State v. Kylo, 166 Wn.2d 856, 864, 215
P.3d 177 (2009). The elements instruction given in this case affirmatively
misled the jury to conclude it was without power to nullify, therefore, it
was improper. *E.g.*, State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d
93 (2008) (explaining that jury instructions are improper if they mislead
the jury). Moreover, because this error occurred in the elements
instruction, which is the “yardstick” by which the Jury measures a
defendant’s guilt or innocence, the error directly prejudiced Mr.
McGinnis’ right to a fair trial and, thus, constituted a manifest
constitutional error. RAP 2.5(a). The issue is properly before this Court
for resolution.

Supplemental argument. Appellant has set forth his supporting
arguments in the brief of appellant. The State responds that the law is
“well-settled” in its favor. The State cites no Washington Supreme Court
authority that has ruled on the issue, for there is none.

The State further argues that the Division I and II Washington
appellate court cases cited by appellant support its position. However it

does so without addressing the distinctions raised and addressed by appellant in his briefing, including appellant's conclusion that Divisions I and II have not addressed the issue on appeal herein.

Further, the State does not claim that Division III has in any manner ruled on the issue. Yet there is authority that recognizes that the choice of words does have subtle distinctions in the world of law. For example, "duty" is the challenged language herein. As this Court's very recent decision in State v. Smith, ___ Wn. App. ___, 298 P.3d 785 (2013) suggests, a more accurate and complete elements instruction would substitute the word "should" for "duty." For as this Court has recognized, the term "duty" is equivalent to the obligatory or mandatory terms "ought", "shall" or "must", while the term "should" strongly encourages a particular course of action but is still the "weaker companion" to the obligatory "ought". Smith, ___ Wn.2d ___, 298 P.3d at 790 (citations omitted). By substituting "should" for "duty", a trial court would be able to strongly suggest that the jury convict if it has found all the elements proved beyond a reasonable doubt. Indeed, as this Court recognizes, the language might even be considered to be nearly mandatory. Id. Yet, by

using the term “should”, the trial court would no longer be affirmatively misleading jurors about their power to nullify.²

The particular words used in law are critical. As is evident from the briefing of both parties and despite the State’s assertions to the contrary, the law on the issue raised by appellant is not “well-settled” but instead is non-existent. For this and the reasons previously asserted in Brief of Appellant at 4–25, the instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The trial court’s error violated Mr. McGinnis’ state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial.

2. Erroneous sentences may be addressed for the first time on appeal, and the unsupported findings regarding legal financial obligations as well as the imposition of discretionary court costs must be stricken from the Judgment and Sentence.

Mr. McGinnis did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. State v. Calvin, No. 67627–0–I, 2013 WL 2325121 at *11 (Wash.Ct.App. May 28, 2013), citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

² For example, a constitutionally proper instruction would read as follows:
If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then you should return a verdict of guilty.

The State's response is offensive. The State overall responds that "the arguments put forth by the defendant are fairly pointless", apparently because the trial court only imposed \$800 worth of LFOs. Brief of Respondent at 5. The issues raised by Mr. McGinnis are properly before this court regardless of amount at stake.

In its five paragraph "response" devoted to this issue, the State cites no legal authority that "these [\$800] fees are mandatory" (not all of them are) and gives no citation to the record to support its conclusory and incorrect statement that the "sentencing court held the LFO payments until the defendant's appeal was decided" (the record reveals no such purpose). Brief of Respondent at 6. Identification of the record and supporting authority in a responsive brief are properly required by the rules of appellate procedure of all respondents regardless of an attorney's disinterest in a given issue.

Mr. McGinnis' issues on appeal are important. This Court should not condone the State's treatment of this issue of legal financial obligations—or any other issue— as unimportant by mischaracterizing it, trivializing it and responding conclusorily. To the extent briefing does not seriously reflect on the arguments and meet them, fairness and justice is not served.

a. The directive to pay on a date certain must be stricken. There is insufficient evidence to support the trial court's implied finding that Mr. McGinnis has the present and future ability to pay legal financial obligations, and the directive to pay must be stricken. *See* Brief of Appellant at 25–31.

b. The imposition of discretionary court costs of \$200 must also be stricken. Since the record does not reveal that the trial court took Mr. McGinnis' financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary court costs must be stricken from the judgment and sentence.

A 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. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991). The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. Id.

Relevant statutory authority. Here, the court ordered Mr. McGinnis to pay a \$500 Victim Assessment, a \$100 DNA collection fee and \$200 in court costs, for a total legal financial obligation of \$800. CP

271–72. The trial court may order a defendant to pay court costs pursuant to RCW 10.01.160. But,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). It is well-established that this provision does not require the trial court to enter formal, specific findings. *See State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). Where the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *Calvin*, No. 67627–0–I, 2013 WL 2325121 at *11.

Here, after considering Mr. McGinnis’ “present and future ability to pay legal financial obligations” (in boilerplate language), the court imposed discretionary court costs of \$200. CP 269, 271. At a minimum the imposition of discretionary costs represents an implied finding that Mr. McGinnis is or will be able to pay them. However, the record reveals no

balancing by the court through inquiry into Mr. McGinnis' financial resources and the nature of the burden that payment of LFOs would impose on him. 12/4/12 RP 144–59. Further, there was no evidence of Mr. McGinnis' past, present or future employment, his financial resources or employability. *See Calvin*, No. 67627–0–I, 2013 WL 2325121 at *11.

In sum, the record does not show that the trial court took Mr. McGinnis' financial resources and ability to pay into account as required by RCW 10.01.160(3). The implied finding of ability to pay is unsupported by the record and clearly erroneous. Further, the court's imposition of discretionary court costs without compliance with the requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay on a date certain *and* the imposition of court costs. *Calvin*, No. 67627–0–I, 2013 WL 2325121 at *12; *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

3. The parties agree the Judgment and Sentence should be amended to accurately reflect the date of the offense.

Appellant accepts the State's concession that the scrivener's error as to date of the offense should be corrected. Brief of Respondent at 6.

B. CONCLUSION

For the reasons stated here and in the brief of appellant, this Court should find the to-convict instructions constituted manifest constitutional error and reverse the conviction and remand for a new trial. Alternatively, the matter should be remanded to correct the scrivener's error and to strike the implied finding of present and future ability to pay legal financial obligations *and* the imposition of \$200 in court costs from the Judgment and Sentence.

Respectfully submitted on July 8, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 8, 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 reply brief of appellant:

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