

FILED
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Court of Appeals
Division III
State of Washington

No. 32088-0-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CORY E. MESECHER,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....6

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....6

C STATEMENT OF THE CASE.....7

D. ARGUMENT.....11

 1. The sentence and special verdict must be vacated because the jury was incorrectly instructed it did not have to be unanimous to answer “no” to the special verdict.....11

 2. The special verdict must be stricken because two of the three factors given to the jury in the alternative as a basis to find the crime was a major economic offense were either not supported by any evidence or not charged in the information.....12

 3. The accomplice liability jury instruction contained contradictory language requiring reversal of the conviction.....16

 4. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.....18

E. CONCLUSION.....25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bearden v. Georgia</i> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).....	19
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).....	13
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)....	19
<i>Babcock v. M. & M. Constr. Co.</i> , 127 Wash. 303, 220 P. 803 (1923).....	17
<i>Brown v. Spokane County Fire Protection Dist. No. 1</i> , 100 Wn.2d 188, 668 P.2d 571 (1983).....	17
<i>Hall v. Corporation of Catholic Archbishop</i> , 80 Wn.2d 797, 498 P.2d 844 (1972).....	17
<i>Matteson v. Thiel</i> , 162 Wash. 193, 298 P. 333 (1931).....	17
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	20
<i>Smith v. Rodene</i> , 69 Wn.2d 482, 418 P.2d 741, 423 P.2d 934 (1966)....	17
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	12, 14
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	20, 21, 23
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	12
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011)...	20, 21, 23, 24
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	20
<i>State v. Brown</i> , 45 Wn. App. 571, 726 P.2d 60 (1986).....	16

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 Spokane WA 99223-3005
 (509) 443-9149
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gaschlaw@msn.com

<i>State v. Calvin</i> , __ Wn. App. __, 302 P.3d 509, 521 (2013).....	18, 24
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	13
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	19, 20, 23
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	18
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	13
<i>State v. Guzman Nunez</i> , 160 Wash. App. 150, 248 P.3d 103 (2011), aff'd and remanded sub nom. <i>State v. Nunez</i> , 174 Wash. 2d 707, 285 P.3d 21 (2012).....	11
<i>State v. Kirwin</i> , 166 Wash. App. 659, 271 P.3d 310 (2012).....	15
<i>State v. LeFaber</i> , 128 Wn.2d 896, 913 P.2d 369 (1996).....	17
<i>State v. Lohr</i> , 164 Wn. App. 414, 263 P.3d 1287 (2011).....	22
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	13
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	14
<i>State v. Nunez</i> , 174 Wash. 2d 707, 285 P.3d 21 (2012).....	11, 12
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	11
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	14
<i>State v. Rehak</i> , 67 Wn. App. 157, 834 P.2d 651 (1992), <i>review denied</i> , 120 Wn.2d 1022, 844 P.2d 1018 (1993).....	16
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	13, 14
<i>State v. Schelin</i> , 147 Wn.2d 562, 55 P.3d 632 (2002) (Sanders, J. dissenting).....	22
<i>State v. Souza</i> , 60 Wn. App. 534, 805 P.2d 237, recon. denied, rev. denied, 116 Wn.2d 1026 (1991).....	22

<i>State v. Stephens</i> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	11
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	13
<i>State v. Theroff</i> , 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).....	14
<i>State v. Zamora</i> , 63 Wn. App. 220, 817 P.2d 880 (1991).....	14

Constitutional Provisions and Statutes

United States Constitution, Sixth Amendment.....	11
United States Constitution, Fourteenth Amendment.....	12
Washington Constitution, Article 1, § 3.....	12
Washington Const. art. I, § 21.....	11
RCW 9.94A.760(1).....	19
RCW 9.94A.760(2).....	19
RCW 10.01.160(1).....	19
RCW 10.01.160(2).....	19
RCW 10.01.160(3).....	19, 23

A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving a nonunanimity special verdict instruction to the jury.
2. The aggravating circumstance of the crime being a major economic offense was not supported by the evidence.
3. The trial court erred in giving an accomplice liability instruction over defense counsel's objection that contained contradictory language.
4. The record does not support the finding Mr. Mesecher has the current or future ability to pay the legal financial obligations imposed.
5. The trial court erred by imposing discretionary costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the sentence and special verdict be vacated because the jury was incorrectly instructed it did not have to be unanimous to answer "no" to the special verdict?
2. Should the special verdict be stricken because two of the three factors given to the jury in the alternative as a basis to find the crime was a major economic offense were either not supported by any evidence or not charged in the information?
3. Did the accomplice liability jury instruction contain contradictory language requiring reversal of the conviction?

4. Should the directive to pay legal financial obligations based on a finding of current or future ability to pay be stricken from the Judgment and Sentence as clearly erroneous, where the implied finding is not supported in the record? Did the trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took Mr. Mesecher's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

C. STATEMENT OF THE CASE

Mr. Mesecher was charged both as a principal and an accomplice with first degree theft and first degree trafficking in stolen property with aggravating circumstances. CP 1-3. He was convicted by a jury of trafficking in stolen property with the aggravating circumstance of the crime being a major economic offense. CP 54-55.

The information contained the following language pertaining to the charge of trafficking in stolen property:

Furthermore, the State hereby provides notice, pursuant to RCW 9.94A.537(1), of intent to seek an aggravated sentence, above the Standard Range for this offense, pursuant to RCW 9.94A.535(3)(d) and/or RCW 9.94A.535(3)(z), specifically alleging, the current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense (9.94A.535(3)(d).

CP 3.

The jury was instructed as follows regarding the aggravating circumstance charged for trafficking in stolen property:

To find that this crime is a major economic offense, at least one of the following factors must be proved beyond a reasonable doubt:

- (1) The crime involved multiple victims or multiple incidents per victim; or
- (2) The crime involved attempted or actual monetary loss substantially greater than typical for the crime; or
- (3) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time.

The above factors are alternatives. This means that if you find from the evidence that any one of the alternative factors has been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form(s). To return a verdict of "yes," the jury need not be unanimous as to which of the alternatives has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

Jury Instruction No. 14, CP 27.

The jury was instructed as follows in pertinent part regarding the special verdict:

If you find the defendant guilty of these crimes, you will then use the corresponding special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes." you must

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," *or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."*

Jury Instruction No. 31, CP 45 (emphasis added in italics).

At the jury instruction conference, Mr. Mesecher objected and took exception to the accomplice liability instruction because the language was internally inconsistent. RP 155-56, 195. Specifically, his attorney noted that while the instruction states, "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice," it also states, "A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not." RP 195

The jury was instructed as follows regarding accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, *more than mere presence* and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime *whether present at the scene or not*.

Jury Instruction No. 23, CP 36 (emphasis added in italics).

The sentencing court imposed discretionary costs of \$1150, \$4800 restitution, and mandatory costs of \$700¹, for a total Legal Financial Obligation (LFO) of \$6650. CP 62-63. The Judgment and Sentence contained the following language:

¶ 2.5 Legal Financial Obligations/Restitution. (RCW 9.94A760)
The court has considered the total amount owing, the defendant's 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. (RCW 10.01.160).

CP 60.

The Court did not inquire further into Mr. Mesecher's financial resources and the nature of the burden that payment of the LFOs would impose on him. RP 284-85. The court ordered the payment schedule to be set by DOC or the clerk of the court, commencing immediately. CP 63.

¹ \$500 Victim Assessment and \$200 criminal filing fee. CP 62.

This appeal followed. CP 76.

D. ARGUMENT

1. The sentence and special verdict must be vacated because the jury was incorrectly instructed it did not have to be unanimous to answer “no” to the special verdict.

Mr. Mesecher did not make this argument below. But the failure to require a unanimous verdict is a manifest constitutional error that may be raised for the first time on appeal. *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). Furthermore, Washington Const. art. I, § 21, providing that “[t]he right of trial by jury shall remain inviolate,” preserves the right to a jury trial as it existed at common law when section 21 was adopted, which includes, in criminal cases, a right to a unanimous jury verdict in order to convict. *State v. Guzman Nunez*, 160 Wash. App. 150, 160, 248 P.3d 103 (2011), aff'd and remanded sub nom. *State v. Nunez*, 174 Wash. 2d 707, 285 P.3d 21 (2012), citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The Sixth Amendment to the United States Constitution requires that a jury must unanimously find beyond a reasonable doubt any aggravating circumstances that increase a defendant's sentence. *State v. Nunez*, 174 Wash. 2d 707, 709, 285 P.3d 21 (2012). In Washington, a jury

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

uses special verdict forms to find these aggravating circumstances. *Id.* In *State v. Bashaw*, 169 Wn.2d 133, 146, 234 P.3d 195 (2010), our Supreme Court held in part that a jury may reject a special finding on an aggravating circumstance even if the jurors are not unanimous. In *Nunez*, the Court reversed *Bashaw* holding that the jury must be unanimous to either accept or reject the aggravating circumstances. *Nunez*, 174 Wash. 2d at 716-19, 285 P.3d 21.

Here, the special verdict instruction mistakenly followed the old nonunanimity rule in *Bashaw* by allowing the jury to answer “no” to the special verdict if it could not reach agreement. Since the instruction is contrary to *Nunez* and the constitutional principles discussed therein, the special verdict must be stricken and the sentence reduced accordingly.

2. The special verdict must be stricken because two of the three factors given to the jury in the alternative as a basis to find the crime was a major economic offense were either not supported by any evidence or not charged in the information.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488,

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

Herein, the jury was instructed to consider three factors in the alternative to find the crime was a major economic offense. The jury was instructed it only had to find from the evidence that any one of the alternative factors had been proved beyond a reasonable doubt to answer

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

"yes" on the special verdict form, but the jury need not be unanimous as to which of the alternatives had been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt. Jury Instruction No. 14, CP 27. Since we have no way of determining which factor an individual juror relied upon to answer "yes", the special verdict is invalid if any one factor is unsupported by the evidence or invalid for some other reason.

The second factor stated "The crime involved attempted or actual monetary loss substantially greater than typical for the crime." The State offered no evidence of what would be a typical monetary loss for the jury to find this factor. The jury had no way of knowing on its own what would be a typical monetary loss for trafficking in stolen property. Therefore, there is insufficient evidence to support the second factor.

The third factor stated "The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time." This factor was not charged in the information. The information only charged the first two factors. See CP 3. When an information alleges only one crime, it is constitutional error to instruct the jury on a different, uncharged crime. *State v. Kirwin*, 166 Wash. App. 659, 669, 271 P.3d 310 (2012). If the jury is instructed on an uncharged crime, a new trial is appropriate

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

when it is possible that the defendant was mistakenly convicted of an uncharged crime. *Id.* *State v. Brown*, 45 Wn. App. 571, 576–77, 726 P.2d 60 (1986).

Moreover, this factor is also unsupported by the evidence. The State presented no evidence of any sophistication or planning. Nor did the offense occur over a lengthy period of time. The information charged the offense occurred between April 1, 2013 and May 16, 2013. CP 3. The evidence showed trafficking in stolen property occurred only at the end of April or first week in May 2013. RP 168, 187. In addition, the jury was not given any evidence of what would constitute a lengthy period of time. Therefore, there is also insufficient evidence to support the third factor. Since there is no way of determining which factor each juror relied upon to answer “yes” in finding the crime was a major economic offense, the special verdict is invalid and must be stricken.

3. The accomplice liability jury instruction contained contradictory language requiring reversal of the conviction.

Trial courts have considerable discretion in wording jury instructions. *State v. Rehak*, 67 Wn. App. 157, 165, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018 (1993). As a general rule, instructions are sufficient if they properly inform the jury of the applicable

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

law without misleading the jury, and permit each party to argue its theory of the case. *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). For erroneous instructions to require reversal, prejudice must be shown. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

It is well settled in Washington that it is prejudicial error to give irreconcilable instructions upon a material issue in the case. *Hall v. Corporation of Catholic Archbishop*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972); *Smith v. Rodene*, 69 Wn.2d 482, 486, 418 P.2d 741, 423 P.2d 934 (1966). Where instructions are inconsistent or contradictory on a given material point, their use is prejudicial because it is impossible to know what effect they may have on the verdict. *Hall*, 80 Wn.2d at 804, 498 P.2d 844; *Matteson v. Thiel*, 162 Wash. 193, 298 P. 333 (1931); *Babcock v. M. & M. Constr. Co.*, 127 Wash. 303, 220 P. 803 (1923).

Here, as noted by trial counsel, the accomplice liability instruction states, “[M]ore than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.” Jury Instruction No. 23, CP 36. However, in the very next sentence it states, “A person who is an accomplice in the commission of a

crime is guilty of that crime *whether present at the scene or not.*” *Id.*

These two sentences of the instruction clearly contradict one another.

Therefore, reversal is required in accordance with the legal authority cited above.

4. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.²

Mr. Mesecher did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Calvin*, ___ Wn. App. ___, 302 P.3d 509, 521 fn 2 (2013), citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).³

a. The directive to pay must be stricken. There is insufficient evidence to support the trial court's implied finding that Mr. Mesecher has the present and future ability to pay legal financial obligations and the directive to pay must be stricken. Courts may require an indigent

² Assignments of Error Nos. 4 & 5.

³ Appellant is aware that this Court recently issued an opinion holding that this issue may not be challenged for the first time on appeal. *See State v. Duncan*, No. 29916-3-III, 2014 WL 1225910, at *2-6 (March 25, 2014). However, this issue is now pending before the Washington Supreme Court in *State v. Blazina*, No. 89028-5, consolidated with *State v. Paige-Colter*, No. 89109-5. The cases were scheduled for oral argument February 11, 2014. Therefore, this issue is raised in order to preserve the argument, should the Washington Supreme Court overrule this Court's opinion in *Duncan*.

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. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” 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.” *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings 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." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized 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 insufficient evidence to support the trial court's finding that Mr. Mesecher has the present or future ability to pay legal financial obligations. Although the trial court made no express finding that Mr. Mesecher had the present or future ability to pay the LFOs, the finding is implied because the court ordered the payment schedule to be set by DOC or the clerk of the court, commencing immediately. CP 63.

Whether a finding is expressed 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).

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

“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, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Mesecher's financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's implied finding that he has the present or future ability to pay LFOs. RP 284-85. Therefore, the implied finding that Mr. Mesecher has the present or future ability to pay LFOs is simply not supported in the record. Since it is clearly erroneous, the directive must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

This remedy of striking the unsupported finding 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.

b. The imposition of discretionary costs of \$1150 must also be stricken. Since the record does not reveal that the trial court took Mr.

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

Mesecher's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary 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. *Baldwin*, 63 Wn. App. at 312. 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.*

The trial court may order a defendant to pay discretionary 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 *Curry*, 118 Wn.2d at 916. 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. *Bertrand*, 165 Wn. App. at 404. Where the trial court does enter a finding, it must be supported by evidence. In

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(509) 443-9149
FAX - None
gaschlaw@msn.com

the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *Calvin*, 302 P.3d at 521-22.

Here, the court imposed discretionary costs of \$1150. The record reveals no further balancing by the court of Mr. Mesecher's financial resources and the nature of the burden that payment of LFOs would impose on him. RP 284-85.

In sum the record reveals the trial court did not take Mr. Mesecher's particular financial resources and his ability (or not) 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 costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay *and* the imposition of the discretionary costs. *Calvin*, 302 P.3d at 522; *Bertrand*, 165 Wn. App. at 405.

E. CONCLUSION

For the reasons stated the conviction should be reversed, or in the alternative, the matter should be remanded for resentencing to strike the directive to pay and the imposition of discretionary costs from the Judgment and Sentence.

Respectfully submitted June 28, 2014,

s/David N. Gasch
Attorney for Appellant
WSBA #18270

PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on June 28, 2014, 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 Appellant's Brief:

Cory Mesecher
3064 5th Ave
Valley WA 99181

E-mail: trasmussen@co.stevens.wa.us
Timothy Rasmussen
Stevens County Prosecutor
215 South Oak, Rm. 114
Colville WA 99114

s/David N. Gasch
WSBA #18270