

FILED

AUG 27 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 32088-0-III

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

THE STATE OF WASHINGTON

Respondent

v.

CORY W. MESECHER

Appellant

BRIEF OF RESPONDENT

Mr. Mathew J.ENZLER
WSBA#38105
Attorney for Respondent
Stevens County Prosecutor's Office
215 S. Oak Street
Colville, WA
(509) 684-7500

INDEX

ASSIGNMENTS OF ERROR.....1

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....2

 ISSUE 1..... 2

 ISSUE 2..... 4

 ISSUE 3..... 7

 ISSUE 4..... 9

CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Baldwin, 63 Wash.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)... 12, 13

State v. Bertrand, 165 Wash.App. at 404 n. 13, 267 P.3d 511.....12, 13, 14

State v. Brett, 126 Wash.2d at 173, 892 P.2d 29..... 3

State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006)..... 5

State v. Cross, 156 Wash.2d 580, 616, 132 P.3d 80 (2006) 2

State v. Curry, 118 Wash.2d 911, 918, 829 P.2d 166 (1992).....10, 11, 12, 13, 14, 15

State v. Kuster, No. 30548-1-III, 2013 WL 3498241 (Wash.Ct.App.,
July 11, 2013)..... 10

State v. Lord, 117 Wn.2d 829, 861, 822 P.2d 177 (1991), cert. denied, 506 U.S.
856 (1992).....8, 9

State v. Luna, 71 Wn.App. 755, 759, 862 P.2d 620 (1993).....7

State v. Lundy, 176 Wash.App. 96, 308 P.3d 755 (August, 2013).....9

State v. McNeal, 145 Wn.2d 352, 359, 37 P.3d 280 (2002)..... 5

State v. Moran, 119 Wn.App. at 209-10.....8

State v. Nunez, 174 Wash.2d 707, 718-19, 285 P.3d 21, 26-27 (2012)..... 3

State v. O’Neal, 159 Wn.2d 500, 506 n. 5 150 P.3d 1121 (2007)..... 8, 9

State v. Peasley, 80 Wash. 99, 141 P. 316 (1914)..... 7

State v. Riehl, 152 Wash.2d at 147, 94 P.3d 930..... 2

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)..... 5

State v. Southerland, 43 Was.App. 246, 250, 716 P.2d 933 (1986).....13

State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)..... 5, 6

<u>State v. Thompson</u> , 153 Wash.App. 325, 336, 223 P.3d 1165 (2009).....	11
<u>State v. Tili</u> , 139 Wn.2d 107, 126, 985 P.2d 365 (1999).....	7, 9
<u>State v. Trout</u> , 125 Wn.App. 403, 410, 105 P.3d 69, review denied, 155 Wn.2d 1005 (2005).....	7
<u>State v. Williams</u> , 149 Wash.2d 143, 146, 65 P.3d 1214 (2003).....	4
<u>State v. Willis</u> , 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).....	7

WASHINGTON STATUTE

RCW 7.68.035(1)(a).....	10
RCW 9.94A.753(4) and (5).....	10
RCW 9.94A.760(1).....	13
RCW 10.01.160.....	11, 12, 14, 15
RCW 10.101.020.....	12
RCW 36.18.020(2)(h).....	11
RCW 43.43.7541.....	10

FEDERAL CASES

<u>Allen v. United States</u> , 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896).....	3
<u>Jones v. United States</u> , 527 U.S. 373, 382, 199 S.Ct. 2090, 144 L.Ed.2d 370 (1999).....	2, 3
<u>United States v. Hutchings</u> , 757 F.2d 11, 14-15 (2d Cir.), cert. denied, 472 U.S. 1031, 105 S.Ct. 3511, 87 L.Ed.2d 640 (1985).....	10
<u>United States v. Pagan</u> , 785 F.2d 378, 381-82 (2d Cir.), cert. deneied, 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986).....	10

OTHER

11 Washington Practice: Washington Practice Jury Instructions: Criminal 10.51, at 136 (2d ed. 2005, sup.).....	8
--	---

11 Washington Practice: Washington Practice Jury Instructions: Criminal 10.51,
at 137 (2d ed. 2005, sup.)..... 8

CrR 3.1(d).....12
RAP 15.2.....12

Schryvers v. Coulee Cmty. Hosp., 138 Wash.App. 648, 654, 158 P.3d 113 (2007)
(quoting Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash.2d 169, 176, 4
P.3d 123 (2000))..... 12

I.

APPELLANT'S 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.

II.

ISSUES PRESENTED

1. Was the defendant prejudiced sufficient to have the special verdict vacated, simply because the jury was instructed it did not have to be unanimous to answer "no" to the special verdict?
2. Were two of the three factors given to the jury in the alternative as a basis to find the crime was a major economic offense either not supported by any evidence or not charged in the information? If so, should the special verdict be vacated?
3. Did the accomplice liability jury instruction contain contradictory language requiring reversal of the conviction?
4. Did the trial court abuse its discretion in finding the appellant has the current or future ability to pay legal financial obligation?

III.

STATEMENT OF THE CASE

The State accepts Appellant's Statement of the Case, for brevity.

IV.

ARGUMENT

ISSUE ONE: Was the defendant prejudiced sufficient to have the special verdict vacated, simply because the jury was instructed it did not have to be unanimous to answer "no" to the special verdict?

The defendant received the benefit of the Bashaw instruction on non-unanimity, to the detriment of full and fair consideration, ie: justice. This was not a prejudice to the defendant, but rather a significant benefit to him. In looking at how the Nunez decision came about, the decision makes it clear that the inclusion of this language, as suggested in Bashaw, was to the Defendant's advantage, but to the detriment of justice:

A rule that allows a jury to give a definite answer on a special verdict form when the jurors are not in agreement frustrates one of the core purposes of jury unanimity, which is to promote the jurors' full discussion and well-considered determinations before returning a verdict. *See Jones v. United States*, 527 U.S. 373, 382, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999); *State v. Cross*, 156 Wash.2d 580, 616, 132 P.3d 80 (2006) ("We want juries to deliberate, not merely vote their initial impulses and move on."). Requiring that a jury give a definitive "no" answer when its members cannot agree frustrates this purpose. A "no" answer on a special verdict form would not necessarily reflect the jury's considered judgment but could very well be the result of an unwillingness to fully explore the reasons for any disagreement.

Because the nonunanimity rule is both incorrect and harmful, we overrule *Goldberg* and the portion of *Bashaw* adopting the nonunanimity rule for aggravating circumstances. *See Riehl*, 152 Wash.2d at 147, 94 P.3d 930. We

are not called upon in these cases to develop a rule that would better serve both the purposes of jury unanimity and the policies of judicial economy and finality. We do note, however, that the instruction given in *Brett*, requiring a jury to leave a special verdict form blank if it could not agree, is a more accurate statement of the State's burden and better serves the purposes of jury unanimity. See 126 Wash.2d at 173, 892 P.2d 29. For these reasons, we endorse the *Brett* instruction going forward.

CONCLUSION

The “ ‘very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.’ “ Jones, 527 U.S. at 382, 119 S.Ct. 2090 (quoting *Allen v. United States*, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896)). Not only does the jury instruction rule from *Bashaw* ignore this objective, it conflicts with other authority, causes unnecessary confusion, does not fulfill the policies that prompted the rule, and undermines the purpose of jury unanimity. Therefore, the nonunanimity rule is overruled. The jury instructions challenged by Nuñez and Ryan were correct. Accordingly, we affirm Nuñez's sentence and reverse the Court of Appeals in *Ryan* and remand both cases for further proceedings consistent with this opinion.

--State of Washington v. Nunez, 174 Wash.2d 707, 718-19, 285 P.3d 21, 26-27 (2012)

It should be noted, in Nunez, the Supreme Court is encouraging a full and fair consideration of the evidence, consistent with the ends of justice, before a jury should answer “no.” The fear was that a jury may be too quick to rush to judgment on impulse, and enter “no,” without fully carrying out their duty. This cannot be said to be a detriment to the defendant, but rather a detriment to the ends of justice. Because there is no detriment to the defendant, while the instruction may have been incorrect, the verdict should stand, on this ground.

ISSUE TWO: Were two of the three factors given to the jury in the alternative as a basis to find the crime was a major economic offense either not supported by any evidence or not charged in the information? If so, should the special verdict be vacated?

The State begins the analysis of this issue with whether or not a sentence within the standard range should be vacated, even if there was an error in entering a special verdict. The State believes that, as a general rule, a Standard Range sentence is not appealable, unless there was an error in determining the Standard Range:

“As a general rule, the *length* of a criminal sentence imposed by a superior court is not subject to appellate review, so long as the punishment falls within the *correct* standard range.” State v. Williams, 149 Wash.2d 143, 146, 65 P.3d 1214 (2003) (emphasis added). For present purposes we need only note that while a defendant may appeal the sentencing court's determination of the appropriate standard range, he may not challenge the court's discretionary imposition of a sentence that lies within that range. *Cf. Williams*, 149 Wash.2d at 146–47, 65 P.3d 1214 (discussing the nuances of appealing a standard range sentence). Again, the alleged legal error in the form that Goodwin points to does not assist him. As further discussed below, Appellant Mesecher essentially only contends that as to the sentence imposed the trial court abused its discretion by sentencing him at the high end of the standard, he does not contend that the standard range the court applied was incorrect. “[S]o long as the sentence falls within the proper presumptive sentence’s length set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence’s length.” Williams, 149 Wash.2d at 146–47, 65 P.3d 1214.

While it is clear that the court sentenced the defendant to the high end of the standard range, with just shy of 6 months of that attributed to the special allegation, the court had the discretion to do the same sentence based upon the same facts, without the finding of the special allegation. The court did this, not only in consideration of the aggravating circumstance, but in deference to the comparability to the sentence that a co-defendant received. The Court's ruling was based on broad factors, the facts of this case, comparability to other cases, the facts heard during trial, etc. The facts themselves warranted the court using its discretion to impose the high end of the standard range, regardless of the Special Verdict. Taking those facts and circumstances into consideration, the court properly exercised its discretion in imposing a sentence at the high end of the standard range. The Sentence should not be effected by any irregularities in the determination of the Special Verdict.

SUFFICIENCY OF THE EVIDENCE

The test for determining the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). In determining whether evidence supports a jury verdict, we view "the evidence in a light most favorable to the State." State v. McNeal, 145 Wn.2d 352, 359, 37 P.3d 280 (2002). " 'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.' " McNeal, 145 Wn.2d at 360 (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). "Credibility determinations are for the trier of fact and are not subject to review." State v. Thomas,

150 Wn.2d 821, 874, 83 P.3d 970 (2004). And we “must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” Thomas, 150 Wn.2d at 874–75.

While we disagree with Appellants contentions as to the first two factors, the State, as Respondent, concedes, much as it did during closing argument at trial, that the third aggravating circumstance offered to the jury in the jury instructions is without evidence to support such a finding. In closing argument, the State told the jury as much. The inclusion of this factor in Jury Instructions was error.

THE INFORMATION:

The State, as Respondent, concedes that the jury instructions for the Special Verdict entered in this case, included the factor for consideration of whether the crime was a major economic offense that “The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time,” and that this factor was not pleaded in the information. As such, without further inquiry by way of special interrogatory, the Special Verdict should be stricken, on this ground.

CONCLUSION:

The Special Verdict should be stricken in this case, as the jury instructions included an additional ground/factor for consideration which was not in the information, or supported by the evidence. However, The defendant did not receive an aggravated sentence, despite the Special Verdict. The Trial Court properly exercised its discretion in imposing a high end of the Standard Range Sentence, based on the totality of facts and circumstances. Sentences within the Standard Range are generally not subject to

appeal, unless the Standard Range itself is incorrect. Here, while the Special Verdict should be vacated, further proceedings are unnecessary, as the Defendant/Appellant received a sentence within the correct Standard Range.

ISSUE THREE: Did the accomplice liability jury instruction contain contradictory language requiring reversal of the conviction?

Alleged errors in jury instructions are reviewed de novo. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Jury Instructions are sufficient when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the parties to argue their theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999).

Mr. Mesecher is correct that an overt act is required to establish accomplice liability. “Mere presence at the scene of the crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.” State v. Luna, 71 Wn.App. 755, 759, 862 P.2d 620 (1993), accord State v. Peasley, 80 Wash. 99, 141 P. 316 (1914) (holding that something more than mere assent to an act is required before one can be charged as an aider or abettor). The intent to facilitate another in committing the crime by providing assistance through presence and actions makes an accomplice criminally liable. State v. Trout, 125 Wn.App. 403, 410, 105 P.3d 69, review denied, 155 Wn.2d 1005 (2005).

Here, the trial court used the Washington Practice Jury Instruction 10.51 to instruct the jury on accomplice liability. 11 Washington Practice: Washington Practice Jury Instructions: Criminal 10.51, at 136 (2d ed.2005 supp.) (WPIC). The instruction provides:

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

WPIC 10.51

WPIC 10.51 is an accurate statement of the law. *See* 11 Washington Practice: Washington Practice Jury Instructions: Criminal 10.51, at 137 (2d. ed.2005 supp.) (“[t]he language used in this 2005 update [of WPIC 10.51] was approved in State v. Moran, 119 Wn.App. [at] 209–10[.]); *see also* State v. O’Neal, 159 Wn.2d 500, 506 n. 5, 150 P.3d 1121 (2007)).

Because the accomplice liability instruction here complied with a proper recitation of WPIC 10.51, it follows that it is an accurate statement of the law. When read as a whole, it explained that “more than mere presence and knowledge of the criminal activity of another must be shown.” Suppl. CP at 43. And juries are presumed to have followed the instructions given by the court. State v. Lord, 117 Wn.2d 829, 861, 822

P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). In short, DeFrang's due process rights were not violated.

Appellant Mesecher contends that the trial court's accomplice instruction was internally inconsistent, resulting in a clear misstatement of the law. This argument fails.

As discussed above, the trial court's accomplice liability instruction was an accurate statement of the law. *See* WPIC 10.51; *O'Neal*, 159 Wn.2d at 506 n. 5; *Moran*, 119 Wn.App. at 209–10. When taken as a whole, the jury instruction properly informed the jury of accomplice liability, they were not misleading, and permitted the State and Mr. Mesecher to argue their theories of the case. *See Tili, 139 Wn.2d at 126*. Therefore, this court should hold that the accomplice liability instruction is not internally inconsistent. The trial court's use of the instruction was not error.

ISSUE FOUR: Did the trial court abuse its discretion in finding the appellant has the current or future ability to pay legal financial obligation?

The Court of Appeals recently issued a ruling in *State v. Lundy* 176 Wash.App. 96, 308 P.3d 755 (August, 2013), which the state will herein borrow analysis (almost a direct quotation from pages 758-762), in answering this claim:

As a preliminary matter, we note that Mr. Mesecher, much like Mr. Lundy, does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for *mandatory* legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees,

and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g., State v. Kuster*, No. 30548–1–III, 2013 WL 3498241 (Wash.Ct.App., July 11, 2013). And our courts have held that these mandatory obligations are constitutional so long as “there are sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants.” *State v. Curry*, 118 Wash.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

Washington, like many other jurisdictions, has adopted the Second Circuit Court of Appeals reasoning in *United States v. Pagan*, 785 F.2d 378, 381–82 (2d Cir.), *cert. denied*, 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986) (internal quotation marks omitted) (quoting *U.S. v. Hutchings*, 757 F.2d 11, 14–15 (2d Cir.), *cert. denied*, 472 U.S. 1031, 105 S.Ct. 3511, 87 L.Ed.2d 640 (1985)), concerning whether imposing mandatory fees implicates a defendant's constitutional rights:

Constitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments “at a time when [the defendant is] unable, through no fault of his own, to comply.” The Washington Constitution forbids “imprisonment for debt, except in cases of absconding debtors.” Art. I, § 17.

RCW 9.94A.753(4) and (5) dictate that “[r]estitution **shall** be ordered whenever the offender is convicted of an offense which results in ... damage to or loss of property” and “[t]he court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.” Thus, the restitution owed is mandatory. Additionally, a \$500 victim assessment is required by RCW 7.68.035(1)(a), a \$100 DNA collection fee is required by RCW 43.43.7541, and a \$200 criminal filing

fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. See State v. Curry, 62 Wash.App. 676, 680–81, 814 P.2d 1252 (1991), *aff'd*, 118 Wash.2d 911, 829 P.2d 166; State v. Thompson, 153 Wash.App. 325, 336, 223 P.3d 1165 (2009). Because the legislature has mandated imposition of these legal financial obligations, the trial court's “finding” of a defendant's current or likely future ability to pay them is surplusage.

Unlike mandatory legal financial obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant's present or likely future ability to pay. As the Washington Supreme Court explained in Curry, the “salient features of a constitutionally permissible costs and fees structure” must meet the following requirements:

1. Repayment must not be mandatory;
 2. Repayment may be imposed only on convicted defendants;
 3. Repayment may only be ordered if the defendant is or will be able to pay;
 4. The financial resources of the defendant must be taken into account;
 5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
 6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
 7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.
- 118 Wash.2d at 915–16, 829 P.2d 166.

RCW 10.01.160, the statute codifying Washington's court costs and fee structure, meets the Curry requirements. RCW 10.01.160(3) provides that:

[t]he 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(4) allows the trial court to modify the monetary portion of a sentence and reduce the costs imposed when payment will impose a manifest hardship on the defendant or his family. Thus, unlike other portions of the judgment and sentence, these discretionary legal financial obligations are subject to revision and are not final. As with seeking appointment of counsel at public expense or review by an appellate court at the public's expense, it is the defendant's burden to prove manifest hardship and/or indigency. *See* RCW 10.101.020; CrR 3.1(d); RAP 15.2.

Neither RCW 10.01.160 “nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay [discretionary] court costs.” Curry, 118 Wash.2d at 916, 829 P.2d 166. But if an unnecessary finding is made perhaps through inclusion of boilerplate language in the judgment and sentence, we review it under the clearly erroneous standard. Bertrand, 165 Wash.App. at 404 n. 13, 267 P.3d 511 (quoting State v. Baldwin, 63 Wash.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). “A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’ ” Schryvers v. Coulee Cmty. Hosp., 138 Wash.App. 648, 654, 158 P.3d 113 (2007) (quoting Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash.2d 169, 176, 4 P.3d 123 (2000)).

RCW 9.94A.760(1) allows that “[t]he court must on either the judgment and sentence *or on a subsequent order to pay*, designate the total amount of a legal financial obligation.... If the court fails to set the offender monthly payment amount, the department [of corrections] shall set the amount if the department has active supervision of the offender.” (Emphasis added.) A finding of ability to pay more appropriately occurs when a subsequent order to pay is entered.

The Bertrand decision failed to distinguish between mandatory and discretionary costs. But in Curry, the Washington Supreme Court clearly differentiated between these types of legal financial obligations. *See also Baldwin*, 63 Wash.App. at 309, 818 P.2d 1116 (“As noted in Curry, different components of the financial obligations imposed on a defendant, such as attorney fees, court costs, and victim penalty assessments, require separate analysis.”).

The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one. In Baldwin, for instance, this burden was met by a single sentence in a presentence report that the defendant did not object to:

The presentence report contained the following statement, “Mr. Baldwin describes himself as employable, and should be held accountable for legal financial obligations normally associated with this offense.” Baldwin made no objection to this assertion at the time of sentencing.... [I]nformation contained in the presentence report may be used by the court if the defendant does not object to that information. [*State v. Southerland*, 43 Wash.App. 246, 250, 716 P.2d 933 (1986).] Therefore, when the presentence report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied.

63 Wash.App. at 311, 818 P.2d 1116.

The defendant in *Bertrand* presented this court with a markedly different situation. In *Bertrand*, the record did not just reveal that the trial court failed to consider whether the defendant could pay legal financial obligations but, to the contrary, showed that “in light of Bertrand's disability, her ability to pay [legal financial obligations] now or in the near future is arguably in question.” 165 Wash.App. at 404 n. 15, 267 P.3d 511. Essentially, the obligation in *Bertrand*—an obligation set to be imposed while the defendant was still incarcerated—potentially violated the fifth factor of the *Curry* test: “A repayment obligation may not be imposed if it appears there is *no* likelihood the defendant's indigency will end.” 118 Wash.2d at 915, 829 P.2d 166 (emphasis added).

Setting aside the logical impossibility of finding a future positive circumstance, we note that several recent cases mistakenly read the fifth *Curry* requirement—that a repayment obligation may not be imposed if it appears from the record there is no likelihood the defendant's indigency will end—as equivalent to the statement that “a repayment obligation may not be imposed unless it appears from the record that there is a likelihood that the defendant will have the future ability to pay legal financial obligations.” But these statements set clearly different standards and are not equivalent. Moreover, where a defendant does not object at sentencing to the trial court's imposition of legal financial obligations on the grounds that there is no likelihood that his indigency—if present at the time of sentencing—will end, the trial court has no indication that imposition of legal financial obligations may violate *Curry*. In addition, because the defendant retains the ability to move the court for modification of the legal

financial obligation on hardship grounds, RCW 10.01.160(4), the trial court does not violate Curry by imposing legal financial obligations at sentencing.

In the present case, the record, contrary to Mr. Mesecher's contention, is replete with evidence that Mr. Mesecher is in fact an industrious individual, capable of moving heavy objects, stripping wire, operating a motor vehicle, conducting business negotiations and sale of items. The sentencing hearing may be silent as to these factors, but the evidence presented during the course of the trial shows clearly, the defendant has the ability to work.

CONCLUSION

Based upon the arguments above, the State concedes that the Special Verdict may be vacated by the Court of Appeals. Including the third factor in determining whether the offense was a major economic offense was error as it was neither pleaded in the information nor proven at trial. While the jury instruction also included a non-unanimity language, this error was a benefit to the Appellant, and the special verdict should not be vacated on this ground. However, since the sentence imposed was within the standard range, and the court included numerous factors for imposing the high end of the standard range, the sentence should not be altered or adjusted.

With respect to Legal financial obligations, the court did not abuse its discretion as there is ample evidence of the defendants ability to work, based upon his actions in committing the offense. Also, the issue of ability to pay is not yet ripe, the sentencing

court maintains jurisdiction over the collection of monies ordered as Legal Financial Obligations, and may modify these amounts in the future. The Sentence imposed, including legal financial obligations should not be altered.

Respectfully submitted this 22nd day of August, 2014.



Mathew J. Enzler, WSBA#38105
Deputy Prosecuting Attorney
Stevens County Prosecuting Attorney's Office
Attorney for Respondent

Affidavit of Mailing

I certify under penalty of perjury under the laws of the State of Washington, that I mailed, by United States Postal Service, a true and correct copy of the foregoing Respondent's Brief to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and mailed to Mr. David Gasch, P.O. Box 30339, Spokane, WA 99223 and Corey Edward Mesecher, through his trial counsel, Paul J. Wasson, 2521 W Longfellow Ave, Spokane, WA 99205, this August 25th 2014.

Signed in Colville, WA this 25th day of August, 2014

Michele Lembcke

Michele Lembcke

Paralegal for Mathew J. Enzler, WSBA#38105

Stevens County Prosecutor's Office

215 S. Oak St. Colville, WA