

No. 34705-2-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Raymond Raab,**

Appellant.

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Okanogan County Superior Court Cause No. 15-1-00385-1

The Honorable Judges Henry A. Rawson and Christopher E. Culp

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. The court's instructions included unconstitutional judicial comments on the evidence, in violation of Wash. Const. art. IV, §16.
2. The trial court erred by giving Instruction No. 6.
3. The trial court erred by giving Instruction No. 9.
4. The trial court erred by giving Instruction No. 11.
5. The trial court erred by giving Instruction No. 12.

**ISSUE 1:** A judge may not comment on the evidence. Did the trial court's instructions include judicial comments because they informed jurors that Ortega and Epps qualified as public servants and law enforcement officers?

6. The court erred by ordering Mr. Reynolds to pay discretionary legal financial obligations absent a finding that he had the ability or likely future ability to pay.
7. Any implied finding of Mr. Raab's ability to pay discretionary LFOs is not supported by the evidence.

**ISSUE 2:** A court may not order a person to pay discretionary legal financial obligations (LFOs) absent individualized inquiry into his ability to do so. Did the court err by ordering Mr. Raab to pay discretionary LFOs without the required individualized finding that he has or will likely have the ability to pay?

8. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

**ISSUE 3:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Raab is indigent, as noted in the Order of Indigency?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Raymond Raab lives on 100 acres in rural Okanogan county. RP 213. He takes care of his neighbor's acreage as well. RP 211-213. At times, he has to burn some of the growth to reduce fuel for fires and allow for healthy growth of his trees. RP 213-214. When he needs to do this, he contacts the Department of Natural Resources (DNR) in Olympia as well as the local dispatch service and notifies them of his intent. RP 220. Usually, if there is a ban in effect that would limit his ability to do a controlled burn he is notified in that call. RP 247.

Mr. Raab planned to do a burn on October 22, 2016. He called DNR and dispatch and told them of his intent. RP 220, 242. He was not told that he could not burn that day, so he did. RP 247. The fire did not burn right away, he had to light small areas multiple times. RP 124, 152. The resulting fire was described as a creeping small terrain fire with little flame that covered roughly either ten square feet, or one-tenth to one-half acre. RP 101, 127, 147-148, 159, 241.

At some point, DNR firefighters saw the smoke from Mr. Raab's burn. RP 97-98. They went to Mr. Raab's location and began gearing up to put out the fire. RP 99, 131.

Mr. Raab experienced several frustrating interactions with DNR in the past, including what he felt was harassment. RP 221. DNR had come

to his property before and caused damage to it, at a time when Mr. Raab believed his burn was legal. RP 215-216.

On this day, Mr. Raab believed that while there may have been a ban applicable to some types of fires, his would comply with law. RP 81-83, 247. He was not happy to see the firefighters, and made his displeasure known. RP 102-103, 132, 144, 160, 217. Mr. Raab felt that his fire was lawful. RP 217, 247.

When he came out to talk to the firefighters, Mr. Raab was not wearing a shirt and he had no shoes on. RP 120, 144, 148. He urged the men to leave, to not come back, and said that if they did come back, he would shoot them. RP 113, 115. All of the firefighters saw that he did not have a gun. RP 113, 133-134, 151. Mr. Raab made no moves to go into the house, which was about 75 feet away, to get any sort of weapon. RP 120.

The firefighters, led by their truck leaders Ortega and Epps, left because of Mr. Raab's statements. RP 114, 123, 145, 162. After close to an hour, a deputy sheriff came to talk to Mr. Raab. RP 86-90, 118. By that time, there was only smoldering ground with no flames visible. RP 190-191, 196. That officer arrested Mr. Raab. RP 91, 194. Mr. Raab had no weapons. RP 195. The DNR fire team then put out the fire at the property. RP 119.

The state made no charges against Mr. Raab related to the fires. CP 68-71. The prosecutor charged instead; four counts of intimidating a public servant witness and four counts of obstructing. CP 68-71.

The case was tried to a jury. The judge dismissed two of the obstructing counts after the state rested its case. RP 199-210.

The state proposed an elements instruction on each of the charges that included the requirement that the state prove the alleged victim was a public servant. CP 25-31. The instructions then listed the name of one of the firefighters. CP 25-31. The defense objected to these instructions, but the court gave them to the jury. RP 273-274.

The jury voted to acquit Mr. Raab of two of the intimidating charges. RP 317-321. He was convicted of the remaining counts. CP 6.

At sentencing, Mr. Raab told the court his only income was his SSI benefit. RP 349. Without further evidence or information, the court indicated that because Mr. Raab does not support a family and apparently owns land, he should pay a total of \$1260.50, starting with payments of \$50 per month. RP 349, CP 11. The court did not make a written finding regarding Mr. Raab's future ability to pay. CP 6-13.

Mr. Raab timely appealed. CP 3.

## ARGUMENT

### **I. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE, TIPPING THE JURY TOWARD CONVICTION ON ALL FOUR CHARGES.**

- A. The court's "to-convict" instructions contained improper comments on the evidence and suggested that an essential element "had been proved to be true" for each offense.

The Washington constitution provides "Judges shall not charge juries with respect to matters of fact, nor comment thereon..." Wash. Const. art. IV, §16. Violation of this provision directly invades a fundamental right, and thus can always be raised for the first time on review. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); *State v. Levy*, 156 Wn.2d 709, 720, 132 P.3d 1076 (2006).<sup>1</sup>

Here, the court's instructions commented on the evidence. This violated Mr. Raab's rights under Wash. Const. art. IV §16. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136, 140 (2006), *as corrected* (Feb. 14, 2007). The court's comments in this case are akin to those at issue in *Jackman*.

The defendant in *Jackman* was charged with several crimes against four minor boys. *Id.*, at 740. The child victims provided their birth dates in testimony, and the state introduced corroborating evidence for three of

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<sup>1</sup> In addition, defense counsel objected to some of the challenged instructions here, although the basis for the objections is not clear. RP 273-274.

the four boys. *Id.*, at 740. The defendant did not contest the children’s ages at trial. *Id.*, at 743, 745.

To link each count with a specific child, each “to-convict” instruction included the minor victim’s initials and date of birth. *Id.*, at 740-741.<sup>2</sup> The defendant did not object to these instructions. *Id.*, at 741.

However, following conviction, the defendant appealed, arguing that the date-of-birth references improperly commented on the evidence. *Id.*, at 741-42. The Supreme Court agreed, and reversed his convictions:

By stating the victims' birth dates in the instructions, the court conveyed the impression that those dates had been proved to be true. Absent the instructions, the jury would have had to consider whether it believed the evidence presented at trial with respect to the victims' birth dates.

*Id.*, at 744.

*Jackman* controls here. The court’s instructions in this case included the same kind of comment at issue in *Jackman*.

As in *Jackman*, “the fundamental basis for the offenses” charged here involved each victims’ status. *Id.* In *Jackman*, it was the victims’ status as minors that made the defendant’s conduct criminal; here, the “fundamental basis” for each offense was Ortega’s and Epps’s status as

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<sup>2</sup> The operative language for each instruction told jurors that conviction required proof (for example) that the defendant “(1)...aided, invited, employed, authorized, or caused B.L.E., *DOB 04/21/1985* to engage in sexually explicit conduct; [and] (2) That B.L.E., *DOB 04/21/1985*, was a minor.” *Id.*, at 741 n. 3 (emphasis added).

public servants (for the intimidating charges) and law enforcement officers (for the obstructing charges). *Id.*; RCW 9A.76.180; RCW 9A.76.020; CP 25, 28, 30, 31.

Just as in *Jackman*, the court’s instructions here “conveyed the impression that” Ortega’s and Epps’s status as public servants and law enforcement officers “had been proved to be true.” *Id.*; CP 25, 28, 30, 31.<sup>3</sup>

For example, one instruction told jurors of the state’s burden to prove that Mr. Raab “willfully hindered, delayed, or obstructed a law enforcement officer (Enrique Ortega) in the discharge of [his duties.]” CP 30.<sup>4</sup> This instruction told jurors that Ortega was a law enforcement officer, just as the trial court in *Jackman* told jurors what each child’s date of birth was. *Id.*, at 744. The same error occurred in each of the “to-convict” instructions. CP 25, 28, 30, 31.

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<sup>3</sup> In fact, the judicial comments here are arguably worse than those in *Jackman*. In that case, the instructions separately informed jurors of the state’s burden to prove that each child “was a minor.” *Id.*, at 741 n. 3. Here, by contrast, the to-convict instructions did not separately tell jurors of the state’s burden to prove that Ortega “was a public servant” or that he “was a law enforcement officer.” CP 25, 30.

<sup>4</sup> Similarly, the intimidating to-convict instruction as to Ortega told jurors of the state’s burden to prove that Mr. Raab “attempted to influence a public servant’s opinion, decision or other official action as a public servant (Enrique Ortega).” CP 25. The same errors appeared in the instructions regarding counts four and six, which involved Epps. CP 28, 31.

The court's instructions "removed [these] facts from the jury's consideration. *Id.*, at 745. Because "the record does not affirmatively show that no prejudice could have resulted," Mr. Raab's convictions must be reversed. *Id.*

B. The errors require reversal under the heightened test for judicial comments.

Judicial comments are presumed prejudicial. *Levy*, 156 Wn.2d at 725. A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Id.* This is a higher standard than normally applied to constitutional errors. *Id.*

In *Jackman*, the Supreme Court reversed even though undisputed evidence established each child's date of birth. *Jackman*, 156 Wn.2d at 743, 745. The Supreme Court also noted that the defendant had not "challenged the *fact* of [the boys'] minority." *Id.*, at 745 (emphasis in original). Despite this, the *Jackman* court found that the state had failed to meet its burden of affirmatively showing that no prejudice could have resulted from the error:

Nevertheless, it is still conceivable that the jury could have determined that the boys were *not* minors at the time of the events, if the court had not specified the birth dates in the jury instructions.

*Id.*, at 745.

Likewise, in this case the record does not affirmatively show an absence of prejudice. The state produced scant evidence that either Ortega or Epps met the statutory requirements outlined in the court’s instructions defining “public servants” and “law enforcement officers.” CP 32, 38; *see also* RCW 9A.04.110(23); RCW 9A.76.020(2).

For example, the phrase “public servant” includes any “officer or employee of government [or] any person participating as an advisor, consultant, or otherwise in performing a governmental function.” CP 32; RCW 9A.04.110(23). Epps testified that he worked “with DNR,” but did not say he was an employee, advisor, or consultant of the department. RP 156. Nor did he testify regarding his role, or claim that he was “participating... in performing a governmental function.” CP 32. RP 156-164.<sup>5</sup>

Similarly, the phrase “law enforcement officer” includes “public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.” CP 38; RCW 9A.76.020(2). At no point did Epps

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<sup>5</sup> By contrast, Ortega testified that he worked for the state. RP 93.

testify that he was responsible for enforcement of any codes.<sup>6</sup> RP 156-164. Nor did he testify that he was a “public officer.” RP 156-164.<sup>7</sup>

Ortega told the jury that he enforced “burning regulations,” but did not explain what “burning regulations” are or whether they are equivalent to the “codes” listed in the court’s instructions. CP 38; RP 93, 94.

Although the defense theory did not focus on the status of either man, “it is still conceivable that the jury could have determined that [Ortega and Epps] were *not* [public servants or law enforcement officers] at the time of the events, if the court had not specified [otherwise] in the jury instructions.” *Jackman*, 156 Wn.2d at 745.

The judicial comments infringed Mr. Raab’s rights under Wash. Const. art. IV, §16. *Id.* His convictions must be reversed and the charges remanded for a new trial. *Id.*

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<sup>6</sup> The trial judge erroneously said Epps had testified to having “coded enforcement authority.” RP 200. This is incorrect; Epps did not provide such testimony. RP 156-164. Nor did anyone else testify that Epps had such authority.

<sup>7</sup> Furthermore, even if Epps qualified as a “public servant,” this did not make him a “public officer;” the two definitions are overlapping but not identical. *Compare* CP 32 *with* CP 39.

**II. THE COURT SHOULD NOT HAVE ORDERED MR. REYNOLDS TO PAY ANY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.<sup>8</sup>**

The legislature has mandated that a court “‘*shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.’” *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)) (emphasis in *Blazina*).

This imperative language prohibits a trial court from ordering discretionary LFOs absent individualized findings on the person’s ability to pay. *Id.* The *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* (“[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs”).

Mr. Raab is a 75-year-old man who receives SSI. CP 69, RP 349. The trial court found him indigent at the end of the proceedings in superior court. CP 1-2. That status is unlikely to change, especially since he has now been convicted of two felonies. CP 6.

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<sup>8</sup> RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, 182 Wn.2d at 835. The *Blazina* court found that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” *Id.* The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85. This court should follow the Supreme Court’s lead and consider the merits of Mr. Raab’s argument even though it was not raised below.

The court did not find Mr. Raab having the ability or likely future ability to pay LFOs.<sup>9</sup> CP 8. Despite this, the court imposed discretionary LFOs, including a \$400 public defender fee, a \$40 booking fee, and \$20.50 in sheriff service fees. CP 11. The total obligation imposed (including mandatory LFOs) amounted to \$1,260.50. CP 11.

The sentencing court abused its discretion by ordering Mr. Raab to pay discretionary LFOs. *Blazina*, 182 Wn.2d at 838. The public defender fee, booking fee, and sheriff service fees must be stricken.<sup>10</sup> *Id.*

**III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.**

The Court of Appeals should decline to award appellate costs because Mr. Raab “does not have the current or likely future ability to pay such costs.” RAP 14.2. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on

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<sup>9</sup> After imposing discretionary LFOs and while setting Mr. Raab’s monthly payment, the sentencing judge observed that Mr. Raab owns property; however, the court made no inquiry into the value of the property, the amount owing, Mr. Raab’s income, or the existence of other debts. RP 349-357. The court’s oral statements are not reflected in any written findings on Mr. Raab’s present or future ability to pay. *See* CP 8.

<sup>10</sup> In the alternative, the case must be remanded to the trial court for a hearing on Mr. Raab’s ability to pay. Before imposing discretionary LFOs, the court must enter a finding regarding his present or likely future ability to pay.

appellate costs. If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

**CONCLUSION**

For the foregoing reasons, Mr. Raab's convictions must be reversed, and the case remanded for a new trial with proper instructions. In the alternative, the court should vacate the order directing payment of discretionary LFOs. If the state substantially prevails, the court should decline to award appellate costs.

Respectfully submitted on March 10, 2017,

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 10, 2017.



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**March 10, 2017 - 9:03 AM**

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