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Division III
State of Washington
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No. 35705-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY ZIMMER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Bradley Zimmer failed to stop his car when an officer signaled him to do so. Mr. Zimmer was experiencing great personal trauma at the time, and he remembered little of the incident. But the video from the police car showed Mr. Zimmer in distress.

Mr. Zimmer went to trial because he wanted to “say my piece” to the jury and explain his behavior. But his lawyer refused to elicit available information showing Mr. Zimmer’s emotional state and did not ask for an affirmative defense instruction on the reasonableness of Mr. Zimmer’s behavior. Mr. Zimmer was convicted without having the chance to “say [his] piece” as he desired. The jury’s verdict reflects the agreement of only 11 jurors, even though 12 jurors must be unanimous to support a conviction.

Because Mr. Zimmer was deprived of effective assistance of counsel and his right to be convicted only upon the unanimous agreement of 12 jurors, his conviction should be reversed.

B. ASSIGNMENTS OF ERROR.

1. Mr. Zimmer was denied his right to counsel and to present the defense of his choice under the Sixth Amendment and article I, section 22.

2. Mr. Zimmer was denied his right to a unanimous jury verdict.

3. The court imposed legal financial obligations despite Mr. Zimmer's on-going indigence and mental health issues.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. An accused person maintains the right to make fundamental choices about the type of defense he wishes to present. Defense counsel disagreed with Mr. Zimmer's desire to present the jury available information showing why he did not immediately stop his car when signaled to do so. Did defense counsel's refusal to let Mr. Zimmer meaningfully present the defense of his choice violate his right to control his case under the Sixth Amendment and article I, section 22?

2. The right to the effective assistance of counsel requires an attorney to know relevant law, including presenting available affirmative defenses. There is an affirmative defense

to attempting to elude a police officer based on the reasonableness of the driver's actions, but defense counsel did not elicit available information or seek a jury instruction on this affirmative defense. Was Mr. Zimmer denied his right to the effective assistance of counsel?

3. A jury's verdict must rest on the unanimous agreement of 12 people under article I, sections 21 and 22. Here, only 11 jurors agreed upon the verdict when polled by the court. Was Mr. Zimmer denied his right to a unanimous verdict based on the agreement of 12 jurors?

4. When the court has a reason to know a criminal defendant has mental health problems and is indigent, it may not impose legal financial obligations other than restitution or the victim's penalty assessment. Did the court improperly impose LFOs on Mr. Zimmer despite his indigence and mental health issues?

5. The legislature recently amended the statutory scheme governing LFOs to make abundantly clear that the court may not impose LFOs on indigent people. Do the amendments to the

LFO statutes demonstrate the court's LFO order must be stricken?

D. STATEMENT OF THE CASE.

At almost two o'clock in the morning, a state trooper "working speed enforcement," signaled a car to pull over. RP 80, 83.¹ The driver turned on his hazard lights and continued. Ex. 3 (1:36). Officer Grant Smith followed him for the next eleven minutes. RP 93; Ex 3 (1:10 through 12:50). Traffic was "sparse" and the car was driving about ten to 20 miles faster than the posted speed. RP 85, 87-88. The car went through one red light and made some improper lane changes. RP 84, 86, 100. Eventually, officers put spike strips on the road that deflated several tires and the driver stopped in a cul de sac. RP 89.

The driver, Bradley Zimmer, stayed in his car with the window down. Ex. 3 (12:53). He signaled with his left arm but initially did not put both hands out the window as the police asked. Ex. 3 (12:53, 13:30). The police begged him to get out of the car and talk to them. *See, e.g.*, Ex. 3 (16:42, 19:21, 20:04,

¹ The transcript of trial and sentencing are contained in a single volume referred to as "RP." Pretrial proceedings from June 15, 2017 are contained in a separate volume referred to as "6/15RP."

21:10). They told him, “we want to help you. We know there’s something going on”; and “we understand there is a crisis.” Ex. 3 (19:16, 19:51, 20:02, 21:17). After close to two hours where Mr. Zimmer sat in his car while the police begged him to let them get him help, the police shot pellets at his car and he got out. RP 23, 108; Ex. 3 (27:36. 33:00, 1:33:00, 1:57:58).

Afterward, Mr. Zimmer could not remember most of the incident. RP 23. But Officer Smith’s dash cam video showed his interaction with Mr. Zimmer. Ex. 3. Mr. Zimmer asked his lawyers to show him the dash cam video because he “didn’t remember a whole lot about that incident” and seeing the video would help him recall it. RP 23, 108. His first lawyer refused and his second lawyer would not show him more than the portion where he was driving, which is the first 12:53 minutes of a two hour long video. RP 24; 6/15RP 5, 9.

Mr. Zimmer insisted he wanted to have a trial where he could say his “2 cents” about what occurred. RP 9, 25. He refused to change out of his jail uniform for trial, insisting that whatever happened, his goal was to have a chance to say his piece before the jury. RP 8-9.

Defense counsel deemed the dash cam video too prejudicial for the jury to see, beyond the initial period of driving, over Mr. Zimmer's objection. RP 18, 26. Counsel did not show most of the video to Mr. Zimmer before the trial, despite his many requests to see it. RP 24; 6/15RP 5, 9. Mr. Zimmer testified he was experiencing traumas at the time of the incident and was driving to his counselor's office. RP 107-08. He also testified that he was looking for help, and could not remember more without seeing the dash cam video. RP 105-06.

The jury convicted Mr. Zimmer of attempting to elude a pursuing police vehicle. CP 39. But when the court polled the jury, only 11 jurors responded that they voted to convict Mr. Zimmer. RP 150-52. The court accepted the verdict without noticing this discrepancy. CP 152.

Having no criminal history, Mr. Zimmer received a sentence of 60 days with credit for time served. RP 153-54. The court deemed him indigent for purposes of legal financial obligations and appeal, but imposed several LFOs it deemed mandatory. RP 155-56.

E. ARGUMENT.

1. Defense counsel failed to elicit Mr. Zimmer’s defense or seek a jury instruction on an available affirmative defense, denying Mr. Zimmer his right to counsel and to present the defense of his choice.

a. Mr. Zimmer has a right to effective assistance of counsel.

The right to effective representation is guaranteed by the federal and state constitutions. U.S. Const. amend. 6; Const. art. I, § 22. An attorney renders constitutionally inadequate representation when there is no legitimate strategic or tactical reason for conduct that prejudices the accused. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). Merely having a strategic or tactical reason for certain actions does not constitute effective assistance; “[t]he relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylllo*, 166 Wn.2d 856, 862, 868-69, 215 P.3d 177 (2009). For example, an attorney

who fails to discover relevant case law that discredits a pattern jury instruction and proposes this disfavored instruction performs unreasonably. *Id.* at 867-68. “Failing to research or apply relevant law” constitutes deficient performance. *Id.* at 868.

While an attorney’s decisions are treated with deference and her competence is presumed, her actions must be reasonable based on all circumstances. *Wiggins v. Smith*, 539 U.S. 510, 533-34, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *State v. Tilton*, 149 Wn.2d 775, 785, 72 P.3d 735 (2003). To assess prejudice, the defense must demonstrate there is a reasonable probability of a different outcome, but need not show the attorney’s conduct altered the result of the case. *Tilton*, 149 Wn.2d at 784.

b. Mr. Zimmer was entitled to present his defense with the assistance of competent counsel.

i. Defense counsel is prohibited from undermining Mr. Zimmer’s right to choose the objective of the defense.

The right to defend against a charged offense “is personal” and “a defendant’s choice in exercising that right must be honored out of that respect for the individual which is the

lifeblood of the law.” *McCoy v. Louisiana*, _ U.S. _, 138 S. Ct. 1500, 1507 (2018) (internal citation omitted).

An accused person’s choice to be represented by counsel “is not all or nothing.” *Id.* at 1508. The accused does not “surrender control entirely to counsel” by opting to be represented by a lawyer. *Id.* While counsel provides “assistance” over matters such as when to make evidentiary objections, some decisions “are reserved for the client.” *Id.* Such decisions include the “[a]utonomy to decide . . . the objective of the defense.” *Id.*

In *McCoy*, the defendant insisted he did not kill his family members and testified at trial that he was innocent, but his attorney conceded his guilt to the jury. *Id.* at 1506-07. His lawyer believed it was a better strategy to tell jurors his client was guilty but urge them not to impose the death penalty. *Id.* at 1507. The United States Supreme Court reversed, holding it was structural error for counsel to pursue this theory of defense over his client’s objection. *Id.* at 1508, 1511.

Mr. Zimmer unambiguously asserted his objective at trial was to fully explain the circumstances of the incident, including his mindset. RP 4, 6, 9, 25. Similarly to the defendant in *McCoy*,

it was most important to him that he gave the jury his explanation of events, regardless of what happened at trial. But even though he testified, his lawyer did not permit him to meaningfully present his version of the incident to the jury.

At the trial, Mr. Zimmer came to court wearing his jail clothes. RP 4. Defense counsel opposed this choice of clothes, complained his client was not following his advice, and asked to be removed from the case. RP 4. The judge told Mr. Zimmer jurors might view his jail uniform prejudicially, but Mr. Zimmer said he did not care how jurors treated his jail garb because the reason he wanted a trial was to “give my two cents,” regardless of the result. RP 9. He wanted “to speak my ground” at trial before the jury. RP 6. The judge agreed he could wear his jail clothes at trial. RP 14-15.

Mr. Zimmer believed the dash cam video of the entire incident was a critical component of the case. He was unable to recall the incident and believed the video would help him remember and explain his state of mind. RP 23, 108. He could not access the video on his own and complained to the court that his lawyers would not show him the entire video. 6/15RP 11, 19;

RP 23-25. The video would show “what happened exactly” and would let him “put my two cents in.” RP 25. But defense counsel viewed the video as unfairly prejudicial and insisted, “I will not be showing it to the jury, whether my client likes it or not.” RP 26.

The audio during the first 12 minutes contained the officer repeatedly referring to the traffic as light or very light and noting Mr. Zimmer’s varying speeds. *See e.g.*, Ex. 3 (10:25) (officer indicates car traveling at “30 mph” and “no traffic”). The rest of the video shows Mr. Zimmer sitting in his car as the police beg him to exit. *See e.g.*, Ex. 3 (12:58) (police tell Mr. Zimmer to “put both hands out the window,” as he waves one hand). The video shows the police repeatedly telling Mr. Zimmer they understand he is having “a crisis,” “we’d like to help you,” and that “nothing is worth this. Things can be worked out . . . whatever problem you are going through.” Ex. 3 (21:17, 22:33). The jury did not hear or see this part of the video.

Mr. Zimmer testified so he could tell the jury about what happened during the incident and because his attorney did not otherwise present evidence explaining it. Near the start of his

testimony, he asked his attorney, “can I speak freely” and his attorney said, “No.” RP 104. He told the jury he had been “sitting in jail waiting for my time to get up here and say my piece.” RP 107. He began explaining he had gone through “losing a child,” and “losing a 25-year marriage,” but the court sustained the prosecution’s objection to relevance. RP 107.

Mr. Zimmer said he did not “recall much” of the incident and mostly remembered after he was stopped and the police shot him with non-lethal pellets. RP 108. He said the video helped him piece together what happened, due to his “traumas [and] my PTSD.” RP 109. Defense counsel ended his questions without further exploring the incident and without showing him the video to refresh his recollection. *Id.*

Defense counsel’s refusal to permit his client to pursue the objective of his defense is structural error. *McCoy*, 138 S. Ct. at 1511. Mr. Zimmer had the right to “make the fundamental choices about his own defense,” which included his right to give the jury evidence of the distress affecting him at the time of the incident. *Id.*

He wanted to “get up here and say my piece,” which was the reason he went to trial, but he was not permitted to do so. RP 107. His attorney refused to let Mr. Zimmer watch the video beyond the first 12 minutes of driving, even though Mr. Zimmer needed to see it to refresh his recollection and tell his story RP 24-25. His attorney refused to let the jury see any of the video after Mr. Zimmer stopped his car or hear any audio because he viewed it as too prejudicial, even if Mr. Zimmer wanted the jurors to understand he was in distress and that was why he acted as he did. RP 25, 29.

Mr. Zimmer was denied his right to control the fundamental objectives of the trial. His attorney denied him his right to pursue the defense of his choice by his attorney. He “must therefore be accorded a new trial without any need first to show prejudice.” *McCoy*, 138 S. Ct. at 1511.

ii. Defense counsel did not permit Mr. Zimmer to present his defense and did not seek an available jury instruction explaining his defense.

Defense counsel’s failure to elicit evidence and apply legal authority relevant to a client’s defense, without any legitimate tactical purpose, is constitutionally deficient performance. *In re*

Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015).

A defendant is entitled to a jury instruction supporting his theory of the case when some evidence supports it. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). And the failure to request a necessary instruction can constitute ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Attempting to elude a pursuing police vehicle requires proof a driver “willfully” failed or refused to immediately stop his car and drove “in a reckless manner while attempting to elude a pursuing police vehicle” after receiving a visible or audible signal to stop. RCW 46.61.024(1).

Speeding or violating traffic laws does not necessarily constitute driving in a reckless manner. *See State v. Randhawa*, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997) (driving 10 to 20 miles per hour over posted speed limit not “so excessive that one can infer solely from that fact that the driver was driving in a rash or heedless manner, indifferent to the consequences.”); *see also State v. Smith*, 188 Wn. App. 1060, 2015 WL 4400974, *2 (2015) (“In no case has the definition of ‘driving in a rash or heedless

manner, indifferent to the consequences' been reduced down to a requirement that the behavior include driving at a high rate of speed.") (unpublished, cited as non-binding authority under GR 14.1).

The prosecution does not prove attempting to elude a pursuing police officer if the driver reasonably continued driving despite being signaled to stop. This statutory affirmative defense applies when a preponderance of evidence shows a "(a) reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances." RCW 46.61.024(2). To prove this defense by a preponderance of evidence, the defendant simply has to show "it is more probably than not true." *In re Sego*, 82 Wn.2d 736, 739 n.2, 513 P.2d 831 (1973). If there is probable evidence supporting this defense, the jury must find the defendant not guilty. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal, 94.10 at 339 (2008) (WPIC).

The court must give the statutory reasonable person instruction if some evidence to supports it. *Powell*, 150 Wn. App.

at 154. In determining if the defendant has met this burden, the court must review the entire record in the light most favorable to the defendant. *State v. Ginn*, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005).

The evidence supports this affirmative defense. Mr. Zimmer testified, “I was looking for help when all of this occurred.” RP 105. He explained he was going through a personal crisis at the time, and the video supports this testimony. He was driving to see his counselors whose offices were in the area, even though it was the middle of the night. RP 105. He did not recall using excessive speed or violating traffic laws and was not trying to run from the police. RP 106. The video shows he turned on his hazard lights when the police car appeared behind him, thus signaling he was in distress, and he continued to drive with the hazards blinking. Ex. 3 (1:36). It was only at the end, shortly before he stopped, that he realized the police were behind him. RP 104.

He stopped his car after he drove over spike strips and his tires flattened. Ex. 3 (12:50). But he remained inside the vehicle, with his window down. *Id.* Although his voice cannot be heard,

the dash cam video shows the police expressing their concern and assuring him they “understand there’s a crisis” for which he needed help. Ex. 3 (21:17). The police video of the arrest shows Mr. Zimmer sitting in his car for close to two hours, while the police beg him to let them help him. Ex. 3 (12:50 through 1:57:55).

However, defense counsel prevented Mr. Zimmer from presenting more evidence supporting his theory of defense. The jury did not see or hear any part of the dash cam video depicting the obvious distress Mr. Zimmer was in during this incident, and defense counsel did not let Mr. Zimmer view this part of the video either. RP 24-25, 97-98. Defense counsel elicited brief testimony from Mr. Zimmer that he suffered “a lot of traumas in a very short period of time” and saw counselors due to brain injuries. RP 108. But the incident itself was a “fog” to him and he did not remember it well. RP 109-10. He was not aware the police were behind him for most of the time he was driving and drove because he was compelled to seek out help from his counselor and was experiencing grave distress RP 107-08.

Immediately after the trial, Mr. Zimmer complained, “I wasn’t able to voice my piece in the matter.” RP 154. His purpose for going to trial had been to explain the underlying circumstances of the incident. RP 9, 25, 154. But his lawyer refused to introduce the video that documented his crisis and refused to show him the entire video so he could refresh his memory about the incident. His lawyer did not elicit testimony or seek an instruction on the affirmative defense that he was reasonably unaware that police were pursuing him.

Had defense counsel sought the affirmative defense instruction, the court would have given it because there was evidence to support it, viewing that evidence in the light most favorable to him. *Powell*, 150 Wn. App. at 154. But defense counsel did not offer this instruction and did not elicit available information to explain Mr. Zimmer’s reasonable belief that he was not being pursued by the police and was not able to stop.

iii. Mr. Zimmer was prejudiced by his attorney’s failure to present an available defense.

Mr. Zimmer was entitled to present his defense, including a reasonable belief instruction, as there was evidence

that a reasonable person in his position might not have understood a police officer had given him a signal to stop, and his driving was not unreasonable given the circumstances.

The jury, however, did not have the opportunity to determine if a reasonable person in Mr. Zimmer's shoes would not have understood a law enforcement officer had signaled him to stop because they were not provided with instructions on the statutory defense. The jury was not presented with the evidence showing the police understood Mr. Zimmer was experiencing a grave crisis. They did not have the affirmative defense that (1) allowed them to weigh the legal significance of the evidence, such as his brain injuries and his use of his hazard lights to signal his distress, and (2) allowed them to acquit Mr. Zimmer if they concluded a reasonable person would not have understood he was being signaled to stop by a police. Thus, the jury had no alternative but to convict Mr. Zimmer if it found the police gave a signal to stop, regardless of whether it also found Mr. Zimmer reasonably did not believe the police were signaling an immediate stop. *See Powell*, 150 Wn. App. at 156.

Furthermore, Mr. Zimmer made plain his objective for going to trial. But his lawyer refused to let him testify about the incident and explain the circumstances underlying his conduct. This structural error requires reversal because it denied Mr. Zimmer his right to choose the basic parameters of his defense. *McCoy*, 138 S. Ct. at 1511.

c. Mr. Zimmer's conviction must be reversed.

Mr. Zimmer did not receive a fair trial because he did not receive constitutionally mandated assistance of counsel, was not able to present the defense of his choice, and his attorney did not propose an instruction concerning the statutory defense that he reasonably believed he had not been signaled to stop by a law enforcement officer. This Court should reverse his conviction and remand for a new trial. *Thomas*, 109 Wn.2d at 229, 232; *Powell*, 150 Wn. App. at 157-58.

2. The jury verdict was not the result of unanimous agreement of 12 jurors.

a. Unanimous agreement by 12 jurors is a mandatory, structural requirement for a criminal conviction.

Unanimous agreement by 12 jurors is mandated for all felony convictions by article I, sections 21 and 22 of the

Washington Constitution. *State v. Stegall*, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994), citing *State v. Ellis*, 22 Wash. 129, 60 P. 136 (1900); Const. art. I, § 21 (“The right of trial by jury shall remain inviolate” and shall not be “any number less than twelve” in courts of record); Const. art. I, § 22 (guaranteeing right to “trial by impartial jury” in all criminal prosecutions).

“Included in the constitutional requirement of jury unanimity is the requirement that the jury unanimously agree on the act underlying each charge.” *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995). In *Holland*, the court reversed two convictions because “[i]t is impossible, on this record, to conclude that all 12 jurors agreed on the same act to support convictions on each count.”

As a fundamental constitutional requirement, the unanimity of 12 jurors may be raised for the first time on appeal and is reviewed de novo. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014); RAP 2.5(a). In a criminal case, courts “must be certain that the verdict is unanimous” for all 12 jurors. *Lamar*, 180 Wn.2d at 588. Polling a jury “is generally evidence

of jury unanimity.” *Id.* at 587-88; see *State v. Badda*, 63 Wn.2d 176, 182-83, 385 P.2d 859 (1963).

b. The verdict does not reflect the unanimous agreement of 12 jurors.

The court polled the jurors at the end of the case to determine whether the verdict reflected the unanimous agreement of each juror. RP 149. Eleven jurors agreed. RP 149-53. But no 12th juror verified that he or she agreed with the verdict. *Id.* The court addressed each juror by number and repeated each number twice, asking each person, “is this your verdict,” and “Is this the verdict of the jury?” *Id.* Juror 6 sat during the trial but did not respond and agree to the verdict. RP 150. The verdict form does not specify the number of jurors agreeing with the verdict. It simply says, “We, the jury, find the defendant” guilty, and is signed by the foreperson. CP 39.

The court’s instructions similarly told the jurors “each of you must agree for you to return a verdict.” CP 36. The court did not instruct the jury that 12 jurors must unanimously agree as article I, section 21 mandates.

The court reported recorded and transcribed the polling of the jury, and also witnesses the proceedings along with the rest of the trial. *See* RP 38 (court reporter asking juror to provide her number for the record). The court reporter painstakingly listed each juror who endorsed the verdict, noting whether it was their individual verdict and “the verdict of the entire jury.” RP 149-53. But only 11 jurors agreed it was their verdict. *Id.* The court concluded its polling by stating, “Thank you” and releasing the jurors from their service. RP 152.

c. The lack of a 12-juror unanimous verdict undermines the conviction.

In a criminal case, this Court “must be certain the verdict is unanimous.” *Badda*, 63 Wn.2d at 182. When the jury’s verdict does not clearly demonstrate the unanimous agreement of 12 jurors, the conviction violates article I, sections 21 and 22 and must be reversed. *Lamar*, 180 Wn.2d at 589; *Badda*, 63 Wn.2d at 182.

3. This Court should strike non-mandatory LFOs imposed upon an indigent person who suffers from mental health conditions.

a. The court imposed non-mandatory LFOs despite Mr. Zimmer's mental health conditions.

RCW 9.94A.777(1) requires that before imposing any LFOs upon a defendant who suffers from a mental health condition, the court must assess the defendant's ability to pay any LFOs other than restitution or the victim penalty assessment. *State v. Tedder*, 194 Wn. App. 753, 756, 378 P.3d 246 (2016).

The court knew Mr. Zimmer suffers from mental health conditions. Before trial, he refused to wear civilian clothes and two lawyers expressed concern with his mental state. RP 4-5, 9. During trial, he testified that he has suffered many traumas and has post-traumatic stress disorder (PTSD). RP 108. He was desperately looking for his counselor during the incident. RP 105. He had brain injuries. RP 108. He was unable to work. RP 153.

Based on this information, the court should have considered waiving the non-mandatory DNA fee and court fee.

The court understood Mr. Zimmer’s circumstances left him unable to pay other non-mandatory fees. The court does not appear to have been aware it could waive the DNA fee and court costs under RCW 9.94A.777. As a result, the court failed to assess whether Mr. Zimmer’s mental health issues authorized waiver of all these other legal financial obligations. RCW 9.94A.777.

This Court should remand to trial court for a consideration of whether Mr. Zimmer’s remaining legal financial obligations, including the court filing fee and the DNA fee, should be waived. *Tedder*, 194 Wn. App. at 757.

b. The legislature amended the LFO statutes so courts may not impose fees on an indigent person.

The legislature recently amended the statutory scheme governing imposition of LFOs upon an indigent person. As before, courts must consider whether a person “is or will be able to pay” LFOs before imposing them. RCW 10.01.160(3). But the new law clarifies what being “able to pay” means.

Under the revised statute, the court “shall not order a defendant to pay costs” if “the defendant at the time of

sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).”² Laws of 2018, ch. 269, § 6. If a person is indigent, the court does not further examine the person’s financial resources or the nature of the burden payment of costs would impose. *Id.*

The amendments further clarify the non-mandatory nature of certain LFOs when a person is indigent. It specifies that the \$200 clerk’s filing fee “shall not be imposed on a defendant who is indigent as defined in RCW 10.101.020(3)(a) through (c).” RCW 36.18.020(2)(h).

c. The non-mandatory nature of the court filing fee should apply to Mr. Zimmer’s pending case.

Amendments to a statute that are remedial may be applied to pending cases. *State v. Heath*, 85 Wn.2d 196, 197-98,

² RCW 10.101.010(3)(a)-(c) provides:

(3) "Indigent" means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

532 P.2d 621 (1975). In *Heath*, the trial court retroactively applied an amendment to the habitual traffic offenders act that allowed judges to stay license revocations when a person is engaged in treatment. *Id.* The Supreme Court agreed the amendment applied retroactively as a remedial change to the statute. The purpose of the amendment was to allow alcoholics to receive treatment rather than lose their driving privileges. *Id.* at 198. Because the amendment was remedial the court held, “the presumption of retroactivity therefore applies.” *Id.*

Heath also explained that the effect of the amendment “reduced the penalty for a crime.” *Id.* “When this is so, the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one.” *Id.* Even though statutes generally apply prospectively, this presumption does not control changes in the law enacted to reduce punishment or ease the harshness of criminal prosecutions. *Heath*, 139 Wn.2d at 198; *State v. Rose*, 191 Wn. App. 858, 365 P.3d 756 (2015).

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established

Under the common law, pending cases are decided according to the law in effect at the time of the decision. *Rose*, 191 Wn. App. at 868. This rule applies to a case in pending on appeal. If “a controlling law changes” during the pendency of the case, “the appellate court should apply the new or altered law, especially where no vested rights are involved, and the Legislature intended retroactive application.” *Marine Power & Equip. Co. v. Wash. State Human Rights Comm’n Hearing Tribunal*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985).

To determine the legislature’s intent to apply a law to pending cases, the legislature is not required to use explicit language. *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970). Instead, the question is whether the law “fairly convey[s]” the intent to apply to pending litigation. *Id.*

The legislature is also aware that statutory changes operate retroactively when they are remedial in nature or intended to clarify an ambiguity. *State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999). An amendment is remedial when it “applies to practice, procedure, or remedies and does not affect a

poverty level

substantive or vested right.” *Id.* Here the amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) are remedial and should be applied retroactively.

The changes to the LFO statutory scheme are remedial and should be applied retroactively because they provide guidance on how to apply existing liabilities. The legislature’s directive not to recoup the \$200 filing fee from indigent individuals under RCW 36.18.020(2)(h) is also remedial. In fact, although the Court of Appeals has said the \$200 filing fee is in mandatory in some cases the changes to RCW 36.18.020(2)(h) reflect the practice of some trial courts, which regularly waive the \$200 filing fee for indigent individuals. *See, e.g., State v. Mathers*, 193 Wn. App. 913, 917, 376 P.3d 1163 (2016) (finding the DNA fee and Victim Penalty Assessment fee mandatory but noting the trial court “waived all other LFOs” because the individual was indigent); *but see State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (construing criminal filing fee as mandatory). The changes to this provision should be applied retroactively.

Finally, this Court should apply the general rule that “a new rule applies prospectively to all cases pending on direct review or not yet final.” *State v. Hanson*, 151 Wn.2d 783, 790, 91 P.3d 888 (2004). Because Mr. Jackson’s case remains pending on direct review, this Court may apply the amendments to RCW 10.01.160(3) prospectively here.

As a result, the clerk’s fee should not be construed as mandatory. The court intended to strike non-mandatory fees and this case should be remanded so the court may properly exercise that discretion.

F. CONCLUSION.

Mr. Zimmer's conviction should be reversed because he was denied the right counsel, to present the defense of his choice, and to a unanimous 12-person jury. Alternatively, the court should strike the non-mandatory LFOs or remand the case for further proceedings.

DATED this 13th day of June 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy P. Collins', written in a cursive style.

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35705-8-III
)	
BRADLEY ZIMMER,)	
)	
APPELLANT.)	

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