

FILED
Court of Appeals
Division III
State of Washington
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No. 35705-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

BRADLEY ZIMMER,

Appellant

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

BRIEF OF RESPONDENT

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I. TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF FACTS1

 A. The events on November 6, 2016: “It was a dark and stormy night1

 B. Two-hour standoff with the defendant refusing to exit his vehicle3

 C. The trial and defendant’s testimony.....4

III. ARGUMENT5

 A. State’s response to defendant’s argument 1: “Defense counsel failed to elicit Mr. Zimmer’s defense or seek a jury instruction on an available defense, denying Mr. Zimmer his right to counsel and to present the defense of his choice”5

 1. A summary of the defendant’s complaints about his attorney5

 2. Structural error complaints6

 a. Structural error, definition, and standard on review6

 b. Structural error complaints against defense attorney: All decisions were within the province of the defense attorney’s trial management.....7

 3. Ineffective assistance of counsel.....10

 a. Standard on review10

 b. Ineffective assistance complaints.....10

	i.	Jail clothing.....	11
	ii.	Jury instruction.....	11
B.		State’s response to the defendant’s argument 2: “The jury verdict was not the result of unanimous agreement of 12 jurors.	13
	1.	The issue is concerning the adequacy of the polling of the jury, not the unanimity of the jury’s verdict	13
	2.	The adequacy of the polling procedure cannot be raised for the first time on appeal	14
	a.	Standard for review and discussion of whether the defendant meets this standard	14
	b.	Defendant’s citations are distinguishable and cases suggest polling procedure issues cannot be raised for the first time on appeal	16
	3.	Even if the issue can be raised for the first time on appeal, the error is harmless	18
C.		State’s response to the defendant’s argument 3: “This Court should strike non-mandatory LFOs imposed upon an indigent person who suffers from mental health conditions”.	19
IV.		CONCLUSION.....	20

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Detention of Reyes, 184 Wn.2d 340, 358 P.3d 394 (2015).....7
State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963).....17
State v. Barnett, 104 Wn. App. 191, 16 P.3d 74 (2001)15
State v. Flora, 160 Wn. App. 549, 249 P.3d 188 (2011).....12
State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011)10, 13
State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) 14-16, 18
State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)15
State v. St. Peter, 1 Wn. App. 2d 961, 408 P.3d 361 (2018)17
State v. Strine, 176 Wn.2d 742, 293 P.3d 1177 (2013).....18

UNITED STATES SUPREME COURT CASES

Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302,
59 U.S.L.W. 4235 (1991).....7
McCoy v. Louisiana, 138 S. Ct. 1500, 200 L. Ed. 2d 821, 86 U.S.L.W.
4271 (2018).....7

WASHINGTON STATUTES

RCW 10.7711
RCW 46.61.024 (1)..... 11-12
RCW 46.61.024 (2).....6
RCW 9.94A.777.....19
RCW 9.94A.777 (1).....1

REGULATIONS AND COURT RULES

CtR 6.13 (a)(3).....16
ER 6119
RAP 2.5 (a)(3)..... 14-15
RPC 1.2 (a).....7

OTHER AUTHORITIES

WPIC 94.10.....11

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. “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.” The State disagrees with this claimed error; at every step the defense attorney provided high quality legal services.
- B. “The jury verdict was not the result of unanimous agreement of 12 jurors.” The State disagrees with this claimed error. In polling the jury, the trial judge skipped one juror, but there was no objection at the time and this Court should not review the issue. In any event, any error was harmless because all evidence shows beyond a reasonable doubt that the jury’s verdict was “guilty”.
- C. “This Court should strike non-mandatory LFOs imposed upon an indigent person who suffers from mental health conditions.” The State disagrees. The defendant did not meet the requirements of RCW 9.94A.777 (1).

II. STATEMENT OF FACTS

- A. **The events on November 6, 2016: “It was a dark and stormy night.”**

Whether he meant it as a literary allusion or not, Trooper Grant

Smith, a 22-year veteran with the Washington State Patrol, stated that November 6, 2016 was a dark and stormy night. RP¹ at 78-80. He was doing speed enforcement at approximately 1:50 A.M., when he tried to stop a vehicle, which, according to his radar was going 71 MPH. RP at 79, 81, 83-84.

What followed was a series of maneuvers by the driver, including, running a red light, pulling into a parking lot and doing a U-turn, partially driving on a sidewalk and running another red light, driving 50 MPH in the city of Richland, cutting across a “gore point” (defined as two white painted lines that form a triangle that is considered part of the shoulder of the roadway) to exit from a State Route to an Interstate, making a prohibited turn into a retail area, making a prohibited left turn onto a county road, pulling into a parking lot of a business (the business was a restaurant, “3 Eyed Fish”) and then back into a roadway, continuing to elude the police for an additional 4-5 miles including through residential areas, driving over spike strips set up by the West Richland Police Department, continuing to try to evade the police for another mile although three of the four tires were deflated, finally coming to a stop at a dead end. RP at 84-90, 98-99, Ex. 3 at 7:01. Even with deflated tires, the driver reached speeds up to 65 MPH. RP at 90.

¹ Unless otherwise indicated, RP refers to the verbatim report of proceedings from the

The pursuit lasted approximately 11 miles and approximately 11 minutes. RP at 93.

All the while, Trooper Smith had his emergency lights on and had activated his siren. RP at 83-84. There was light traffic during the pursuit RP at 88. For instance, it appeared to Trooper Smith that the driver went onto the sidewalk at one point to get around other vehicles. RP at 85.

B. Two-hour standoff with the defendant refusing to exit his vehicle.

For the jury, Trooper Smith's dash camera video was played up to the point where the pursuit ended. Ex. 3, RP at 98-99. The defense attorney moved prior to trial that the remainder of the video, about two hours during which the defendant refused to exit the vehicle, be excluded. RP at 18. The State agreed with this motion. RP at 21.

The following was on the dash camera video which the jury did not hear: the defendant refused commands that he show his hands to the police, turn off the truck and exit the vehicle. Ex. 3 at 12:55. The defendant said he wanted to die and "I don't want to be here anymore." Ex. 3 at 16:57-17:19 and 23:14. The police brought in a negotiator, who mainly encouraged, cajoled, and requested that the defendant come out of the vehicle for the next two hours. See Ex. 3, at among others, 17:44, 21:40, 28:51, 36:50, 44:51, 55:39, 1:03:15, 1:10:00, 1:20:30, 1:29:20,

jury trial in this matter, held November 13, 2017.

1:38:48, 1:46:50, 1:52:05. At one point the defendant responded, “Unless you’re the big man upstairs you can’t help me.” Ex. 3 at 26:37. The police also discussed among themselves the defendant’s criminal history from Oregon. Ex. 3 at 46:00 and 46:34. The defendant finally came out of his vehicle at 1:58:25 into the video. Ex 3.

C. The trial and defendant’s testimony

The defendant’s pre-trial statements included: “Win, lose or draw, I don’t care . . . Let’s get it done, you know, and let me—I would like to say my piece.” RP at 9. “Win, lose or draw, I really don’t care. I am good with whatever happens today. I just want to, you know, see what happened exactly and want to put my two cents in . . .” RP at 25. This attitude may have led him to wear jail clothes even with an offer from the trial judge for new clothing. RP at 8.

The defendant did testify and stated that he did not remember a whole lot about the incident. RP at 104. He did realize a police officer was behind him “towards . . . the end of the stand or the chase . . .” *Id.*

Although he has “a hard time recollecting what happened,” the defendant stated that he was in the Queensgate / 3 Eyed Fish area because a counselor and former counselor had offices in the vicinity, even though he knew they would not be open after midnight. RP at 106. He was seeing the counselors for PTSD. RP at 108.

The defendant stated, “[I]t’s definitely a conviction of eluding. But . . . losing a child . . . and losing a 25-year marriage”RP at 107. At that point the prosecutor’s objections were sustained. *Id.*

The defense attorney argued for and received an instruction for a lesser included offense of Failure to Obey Police Officer. CP 32-34; RP at 135-36. In closing argument, the defendant’s attorney argued that based on his emotional state and the defendant’s testimony, he did not knowingly refuse to stop his vehicle. RP at 145. Further, the defense attorney argued that the defendant did not drive recklessly. RP at 145-46.

The jury found the defendant guilty. RP at 149. All jurors who were polled stated that each juror individually found the defendant guilty, and that the jury’s verdict as a unit was also guilty. RP at 149-52. For whatever reason, there is no record showing Juror number 6 was polled. RP at 150.

III. ARGUMENT

A. State’s response to defendant’s argument 1: “Defense counsel failed to elicit Mr. Zimmer’s defense or seek a jury instruction on an available defense, denying Mr. Zimmer his right to counsel and to present the defense of his choice.”

1. A summary of the defendant’s complaints about his attorney.

On appeal, the defendant has a host of criticisms against his trial attorney. He states that “even though he testified, his lawyer did not permit

him to meaningfully present his version of the incident to the jury.” App. Br. at 10. The “defense counsel opposed this choice of clothes [wearing jail clothes], complained his client was not following his advice, and asked to be removed from the case. *Id.* The defendant states that he wanted the dash cam video of the entire incident, including the two-hour standoff played for the jury. *Id.* The defense attorney told him he could not speak freely and that the defense attorney’s questions ended without “further exploring the incident and without showing him the video to refresh his recollection.” *Id.* at 12. The defense 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.” *Id.* at 13. The defense attorney “denied him his right to pursue the defense of his choice by his attorney.” *Id.* Finally, the defense attorney was ineffective by not proposing a jury instruction pursuant to RCW 46.61.024 (2).

2. Structural error complaints:

a) Structural error, definition, and standard on review.

The defendant argues that some of these complaints constitute structural error. These include not permitting the defendant to meaningfully testify, telling the defendant he cannot speak freely, not playing the two-hour standoff portion of the dash camera video, and not showing him the video to refresh his recollection. Structural error “falls

under a special category of constitutional error that ‘affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” *In re Detention of Reyes*, 184 Wn.2d 340, 345, 358 P.3d 394 (2015), citing *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302, 59 U.S.L.W. 4235 (1991). *McCoy v. Louisiana* stated an error might count as structural when its effects are too hard to measure, “as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge’s failure to tell the jury that it may not convict unless it finds the defendant’s guilt beyond a reasonable doubt.” *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511, 200 L. Ed. 2d 821, 86 U.S.L.W. 4271 (2018).

If the error is structural, the defendant need not show prejudice.

b) Structural error complaints against defense attorney: All decisions were within the province of the defense attorney’s trial management.

As stated in *McCoy v. Louisiana*, “Trial management is the lawyer’s province: Counsel provides his or her assistance by making decisions such as ‘what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.’” *Id.* at 6. This is consistent with RPC 1.2 (a), which states “In a criminal case, the lawyer shall abide by the client’s decision, after

consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”

Regarding the two-hour standoff dash camera video, the defense attorney had the authority to object to this evidence. With the defendant’s suicidal statements and refusal to obey commands, it is difficult to understand how the defense attorney could be faulted. It did not help the defendant’s argument at trial that he did not know a police officer wanted to stop him or that he was driving recklessly. It also does not help his position on appeal that he was in desperate need of mental health counseling at 2:00 A.M. If he was in such need, he would have gotten out of his vehicle immediately and asked the police for help.

It is also not accurate to state that the defendant wanted this standoff played for the jury. The defendant told the judge that he wanted to watch the entire video to refresh his memory: “I want to watch the whole thing. And, like I said, I am trying to piece it all together anyway.” RP at 25. The judge states that the defense attorney could show him portions of the video during the lunch hour. RP at 25-26. The defendant then states, “So after viewing them and it was determined that we could maybe put those in, could we revisit that?” RP at 26. The defense attorney then states that he viewed the standoff as prejudicial to the defendant and

would not seek to admit it. *Id.* So, the defendant never requested or insisted that the standoff portion of the video be admitted for the jury.

Regarding the defense attorney's direction to the defendant during direct examination that he could not speak freely, nonresponsive or narrative answers are objectionable. RP at 104; ER 611. When the defendant started to talk about the loss of his child and marriage, the prosecutor objected and the trial court properly sustained that objection. RP at 107. When testifying, a witness does not have the right to speak freely.

The defendant's other two complaints are conclusory. He does not state how his lawyer did not permit him to meaningfully present his version, or how the defense attorney could have further explored the incident. At sentencing, the defendant did not claim that he was muzzled or unable to present his version of events. RP at 154.

The statement that the defense attorney failed to show him the video to refresh his recollection is contradicted by the defendant's testimony. The defense attorney in a pre-trial colloquy stated that the defendant saw most of the video. RP at 24. The defendant then said, "That is not true. I watched it until the standoff started and that was it." *Id.* However, during his testimony, the defendant stated, "I know after we first watched the video here a few months ago...", "[W]atching the video again

today, I am pretty sure after we watched it the first time I pretty much knew why I was in that Queensgate/ 3 Eyed Fish area ...,” “[T]he video was nice to see again...” RP at 105-06, 109.

In any event, if the defense attorney did not show the entire 2-hour standoff to the defendant, it does not mean there was any error, structural or otherwise. The defendant was in distress during the standoff, talking about suicide, and the defense attorney may not have wanted him to relive that experience.

3. Ineffective assistance of counsel

a) Standard on review

The remainder of the complaints can be grouped as arguments that the defendant’s attorney was legally ineffective. The defendant has the burden of showing that the defense attorney’s performance was deficient by falling below an objective standard of reasonableness. This is a high bar because there is a strong presumption that the trial counsel’s performance was reasonable and deference is given to trial tactics. The defendant also must show that the trial counsel’s errors prejudiced the defense. *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

b) Ineffective assistance complaints

There are two such complaints. One, the defense attorney opposed the defendant’s choice of clothes and asked to be removed from the case

and two, the defense attorney did not ask for a jury instruction pursuant to RCW 46.61.024 (2), WPIC 94.10.

(i) Jail clothing.

The defense attorney was obviously concerned that by wearing jail clothing the defendant would send a message to the jury that a judge had determined he was a dangerous person, but he did not ask to be removed from the case because of the defendant's decision. The defense attorney suggested that the judge decide what to do: either proceed to trial with the defense attorney, allow the defendant to proceed pro se, or enter an Order for a Competency Exam under RCW 10.77. RP at 11-12.

(ii) Jury instruction.

Regarding the jury instruction, the evidence does not support that instruction and would contradict both the defendant's testimony and the defense attorney's argument. WPIC 94.10 is an affirmative defense and the defendant must prove 1) that a reasonable person would not have believed that the signal to stop was given by a police officer and 2) that the defendant's driving after the signal to stop was reasonable under the circumstances.

The defendant testified that he did not know a police officer was pursuing him until he hit the spike strips, or possibly right before. RP at 107. This may have some traction under the elements of the crime, RCW

46.61.024 (1), because the State would have to prove that the defendant himself willfully failed to immediately stop. But it would do no good for the defendant to claim a reasonable person would not know the pursuer was a police officer. Trooper Smith's lights and sirens were on, the defendant engaged in evasive maneuvers and hand-motioned for the police to do something, possibly stop the pursuit. Ex. 3 at 10:28. The defendant himself testified that "anyone in their right mind . . . probably would have stopped." RP at 110.

There was also no evidence that the defendant's driving was reasonable under the circumstances. To repeat the facts, the defendant went onto a curb, ran two red lights, engaged in various illegal turns. His explanation, that he wanted to go to the office of one of his counselors at 2:00 A.M. makes no sense.

This is an affirmative defense, which means that the defendant would have to admit he knew he was being signaled to stop. Since he did not do so, the instruction should not have been given. *State v. Flora*, 160 Wn. App. 549, 556, 249 P.3d 188 (2011). *Flora* dealt with an allegation on appeal that the trial attorney was ineffective on an Attempt to Elude Pursuing Police Vehicle charge because counsel failed to propose the affirmative defense instruction. The court held the affirmative defense would not likely have been given because the driving was not reasonable.

The *Flora* court also stated that the defendant did not argue that the affirmative defense would have succeeded even if the instruction was given.

If the defense attorney had proposed the instruction, it would have contradicted the defendant's testimony and prevented the attorney from arguing in closing that the defendant did not know he was being pursued. It was a reasonable strategic decision not to attempt to ask for the affirmative defense instruction and the defense attorney should not be termed ineffective because of that strategy. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011).

B. State's response to the defendant's argument 2: "The jury verdict was not the result of unanimous agreement of 12 jurors."

1. The issue is concerning the adequacy of the polling of the jury, not the unanimity of the jury's verdict.

While the defendant frames the issue as concerning juror unanimity, the issue is actually concerning the adequacy of the polling of the jury. The trial judge conducted the polling and skipped over Juror number 6, but there is no question that the jury was unanimous. RP at 149-50. The jury was instructed that "each of you must agree for you to return a verdict," and, "If you unanimously agree on a verdict, you must fill in the blank provided in the verdict form" CP 35-36. The jurors are

presumed to follow the instructions absent evidence to the contrary. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). All the eleven jurors who were polled individually stated that the jury’s verdict as a whole was “guilty.” There is no reason to believe these eleven answered untruthfully. There is also no reason to believe that Juror number 6, who was not individually polled, was actually a “not guilty” vote.

The issue is whether, if the jury is properly instructed that it must be unanimous, and if the trial judge in polling the jury asks 11 jurors if the guilty verdict is their own verdict and the verdict of the jury, but inadvertently skips over one juror, must the verdict be reversed?

- 2. The adequacy of the polling procedure cannot be raised for the first time on appeal.**
 - a) Standard for review and discussion of whether the defendant meets this standard**

The defendant at trial could have objected to the trial court’s failure to ask Juror number 6 the questions, “Is this your verdict” and, “Is this the verdict of the jury.” This Court need not review the defendant’s claim of error under RAP 2.5 (a)(3) because it is not a manifest error affecting a constitutional right.

To establish a manifest error affecting a constitutional right under RAP 2.5 (a)(3) the defendant must 1) identify the constitutional error and 2) show that it actually affected his or her rights at trial. The defendant

must make a plausible showing that an alleged error affected his rights at trial and resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial. RAP 2.5 (a)(3) serves a gatekeeping function that will bar review of a claimed constitutional error to which no objection was made unless the record shows there is a fairly strong likelihood that serious constitutional error occurred. *Lamar*, 180 Wn.2d at 583.

Courts do not assume an alleged error is of constitutional magnitude.

We look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error. In instances where the allegation is that the defendant's due process rights were violated because he or she was denied a fair trial, the court will look at the defendant's allegation of a constitutional violation, and the facts alleged by the defendant, to determine whether if true, the defendant's constitutional right to a fair trial has been violated.

State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). "It is not the role of an appellate court on direct appeal to address claims . . . where the prosecutor or trial counsel could have been justified in their actions or failure to object." *Id.* at 100.

In this case, neither above element is met. Polling each individual juror is not a constitutional right. *State v. Barnett*, 104 Wn. App. 191, 16 P.3d 74 (2001) approved a procedure where the trial judge asked the jury

as a group if they agreed with each verdict as signed by the presiding juror. The *Barnett* court stated that CrR 6.13 (a)(3) required nothing more. *Id.* at 200. There is also no plausible showing that the error of skipping Juror number 6 actually affected the verdict. In other words, there is no reason to doubt the 11 jurors who stated that the jury's verdict was guilty, that all 12 jurors did not follow the instruction that they had to be unanimous, or that Juror number 6 would have voted "not guilty."

b) Defendant's citations are distinguishable and cases suggest polling procedure issues cannot be raised for the first time on appeal.

The defendant cites *Lamar* for support that he did not have to raise the issue in the trial court. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). However, *Lamar* dealt with a trial court replacing an alternate juror during deliberations and instructing the other jurors they should bring the alternate "up to speed" on the deliberations that had already occurred and go from there. *Id.* at 580-81.

The *Lamar* court held that this was a manifest error affecting a constitutional right. After the alternate juror was seated, the jury was not instructed to begin deliberations anew, but to deliberate together only on whatever issued remained. *Id.* at 585. Thus, the alternate juror had no opportunity to offer his views or persuade his fellow jurors if he felt they

were wrong. *Id.* at 587. Further, the reconstituted jury was not correctly instructed to start deliberations over. *Id.* For these reasons, the *Lamar* court found that the issue could be raised for the first time on appeal, and reversed the conviction.

The defendant also cites *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) in support of his position that he need not object. However, the relevant portion of *Badda* dealt with the trial court's failure to instruct the jury that it must be unanimous. While there was a clerk's minute indicating that each individual juror was polled, there was no record of what questions were asked of the jurors and what their answers were. *Id.* at 182. Because there were multiple defendants and multiple charges, the *Badda* court was not certain the verdict was unanimous. *Id.* at 193.

Both cases are distinguishable from this case. Unlike *Lamar*, there was no incorrect instruction following the seating an alternative juror. There was no possibility that all 12 jurors did not have the opportunity to deliberate. Unlike *Badda*, the jury was instructed that they had to be unanimous.

While there are not many cases addressing whether jury polling issues can be raised for the first time on appeal, some indicate that the objection must be made at the trial court. In *State v. St. Peter*, 1 Wn. App. 2d 961, 962-963, 408 P.3d 361 (2018), the defendant argued that the trial

court did not specifically instruct the jury that they could only discuss the case when all twelve jurors were assembled together and that a jury poll could have revealed a non-unanimous verdict. The court held the claimed error was not preserved. Likewise, in *State v. Strine*, 176 Wn.2d 742, 749-51, 293 P.3d 1177 (2013), the court held that a defense attorney's failure to object to the trial judge's polling of a jury was not a manifest error affecting the defendant's constitutional rights.

3. Even if the issue can be raised for the first time on appeal, the error is harmless.

If there is a constitutional error, it is presumed to be prejudicial and the State bears the burden of showing that it was harmless beyond a reasonable doubt. *Lamar*, 180 Wn.2d at 588. Could the jury have ignored the instruction that it must be unanimous? Could the 11 jurors who were polled all answered falsely by stating that the jury as a whole returned a verdict of guilty? If Juror number 6 was secretly a "not guilty" vote, could anyone have predicted that the trial judge would fail to call on her? The answer is obvious, at least to the State. While the trial judge erred by skipping Juror number 6, considering the polling of the 11 jurors, the instruction that the jury had to be unanimous, the acquiescence to the guilty verdict by Juror number 6 and the overwhelming evidence of guilty, the only reasonable conclusion is that the jury was unanimous.

C. State’s response to the defendant’s argument number three: “This Court should strike non-mandatory LFOs imposed upon an indigent person who suffers from mental health conditions.”

Under RCW 9.94A.777, the court must determine that a defendant who “suffers from a mental health condition” has the means to pay legal financial obligations other than the victim penalty assessment and restitution. A defendant

suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant’s enrollment in a public assistance program, a record of involuntary hospitalization or by competent expert evaluation

Id.

There is no evidence that the defendant “suffers from a mental health condition” as defined. There was no evidence that the defendant qualifies for public assistance or that he has been hospitalized involuntarily. No expert testified that he had a mental condition. The only evidence is from the defendant himself who said had PTSD. RP at 108-09. But the defendant did not claim that the PTSD prevented him from gainful employment.

In this case, the trial court only imposed the \$100 felony DNA collection fee and the \$200 filing fee in addition to the victim assessment. CP 44. Although only \$300 is at issue, the defendant did not come close to

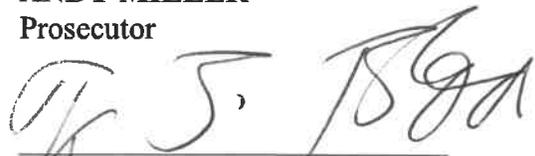
proving he suffered from a mental condition and the LFOs should be affirmed.

IV. CONCLUSION

The conviction and the fines imposed should be affirmed.

RESPECTFULLY SUBMITTED on August 13, 2018.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "T. J. Bloor", is written over a horizontal line.

Terry J. Bloor, Deputy
Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

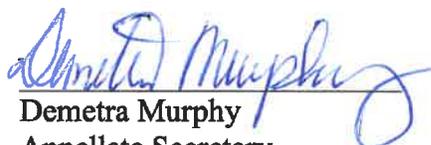
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Nancy Collins
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101-3647

E-mail service by agreement
was made to the following
parties:
wapofficeemail@washapp.org

Signed at Kennewick, Washington on August 13, 2018.


Demetra Murphy
Appellate Secretary

APPENDICES

Appendix A – WPIC 94.10

Appendix B – RCW 9.94A.777

Appendix A

WPIC 94.10

THOMSON REUTERS
WESTLAW Washington Criminal Jury Instructions

[Home Table of Contents](#)

WPIC94.10 Attempting to Elude a Police Vehicle—Reasonable Belief that Pursuer Is Not a Police Of... Washington Practice Series TM

Washington Pattern Jury Instructions--Criminal
 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 94.10 (4th Ed)

Washington Practice Series TM
 Washington Pattern Jury Instructions--Criminal
 October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part XI. Crimes Involving Operation of Motor Vehicles
 WPIC CHAPTER 94. Attempting to Elude a Police Vehicle

WPIC 94.10 Attempting to Elude a Police Vehicle—Reasonable Belief that Pursuer Is Not a Police Officer—Defense

It is a defense to a charge of attempting to elude a police vehicle that a reasonable person would not have believed that the signal to stop was given by a police officer and that the defendant's driving after the signal to stop was reasonable under the circumstances.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [on this charge].

NOTE ON USE

Use this instruction with WPIC 94.02 (Attempting to Elude a Police Vehicle—Elements). Use this instruction only when there is evidence to support it.

COMMENT

RCW 46.61.024(2). This defense has been characterized by the Legislature as an "affirmative defense" and was added when the Legislature changed the requirement that the police vehicle be "appropriately marked" to merely being one equipped with lights and sirens. See Comment to WPIC 94.02. The statute requires this defense to be proved by a preponderance of the evidence. RCW 46.61.024(2); *State v. Flora*, 160 Wn.App. 549, 555, 249 P.3d 188 (2011). As a specific statutory defense it may replace the general statutory defense of duress contained in RCW 9A.16.060.

Right of defendant to forgo an affirmative defense. This instruction should be given if requested by the defendant and supported by the evidence. The defense of "reasonable belief that pursuer is not a police officer" is an affirmative defense to be raised by the defendant. A court should not instruct the jury on an affirmative defense over the objection of the defendant. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975); *State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013) (a defendant's constitutional right to control his or her defense prohibits the giving of instructions concerning defenses over the defendant's objections); *State v. Coristine*, 177 Wn.2d 370, 376, 300 P.3d 400 (2013). For additional discussion, see WPIC 14.00 (Defenses—Introduction). [Current as of December 2015.]

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Appendix B

RCW 9.94A.777

RCW 9.94A.777

Legal financial obligations—Defendants with mental health conditions.

(1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.

(2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

[2010 c 280 § 6.]

BENTON COUNTY PROSECUTOR'S OFFICE

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