

66249-0

66249-0

No. 66249-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MASSIMO MURA,

Appellant.

20110513 11:00:00

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

The Honorable Steven J. Mura

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's jury instructions regarding the crime of unlawful issuance of bank checks were erroneous and constituted manifest constitutional error.

2. The trial court exceeded its statutory authority when it imposed costs in the absence of substantial evidence that Mr. Mura had the ability to pay.

3. The trial court erred in entering Finding 2.5 in the judgment and sentence in the absence of substantial evidence that Mr. Mura had the ability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court's instructions, including those defining the crime of unlawful issuance of bank checks and setting out the elements of the offense, included the confusing term "utter," which is advised not to be used by the Comment to the Washington Pattern Jury instructions. Did manifest constitutional error occur when the court's instructions used this term?

2. A trial court must determine whether a defendant has the means to pay legal financial obligations before imposing these fees and costs. Here, there was no evidence Mr. Mura was able to pay any of the costs and fees yet the trial court determined he had the

present or future ability to pay. Was the trial court's determination clearly erroneous?

3. A trial court violates a defendant's constitutionally protected right to equal protection when it imposes recoupment for court appointed counsel where it fails to determine the ability of the defendant to pay and whether any indigency will be remedied in the near future. The court here imposed recoupment despite evidence of Mr. Mura's inability to pay. Did the trial court violate Mr. Mura's right to equal protection?

C. STATEMENT OF THE CASE

Massimo Mura was charged and convicted by a jury of two counts of Unlawful Issuance of Banks Checks, pursuant to RCW 9A.56.060. CP 37-38, 21. At trial, the court gave jury instructions defining the offense charged as, in part, occurring where a person "makes, draws, utters or delivers" any check. See CP 22-34 (Instructions nos. 4, 5, 6). The evidence at trial indicated that Mr. Mura had paid by check for purchases of a car and electronic devices at, respectively, a car dealership and a store. RP 14, 16, 62-63. At the time the defendant wrote the checks, the accounts upon which the checks were drawn did not have sufficient funds for the purchases. RP 101, 111-14.

At Mr. Mura's sentencing hearing, the trial court, in the judgment and sentence, issued a cost order directing payment of restitution and also ordering payment of victim assessment fees, court costs, fees for his attorney, and a felony DNA collection fee." CP 13-20 (Judgment and sentence, Part IV). However, the trial court had no evidence upon which to base its factual finding, reflected in the judgment and sentence at Part II, ¶ 2.5, that Mr. Mura had an ability to pay costs, a finding that must be made before entering the cost bill order. CP 13-20 (Judgment and sentence, Part II, ¶ 2.5).

Mr. Mura timely appeals. CP 4-12.

D. ARGUMENT

1. **THE TRIAL COURT'S JURY INSTRUCTIONS REGARDING ISSUANCE OF BANK CHECKS WERE ERRONEOUS AND CONFUSING TO A LAY JURY AND CONSTITUTED MANIFEST CONSTITUTIONAL ERROR.**

- a. **The comment to the relevant jury instructions**

indicates that the term "utter" should not be used, or if used, should be defined. Mr. Mura was charged and convicted pursuant to jury instructions setting forth a definition of Unlawful Issuance of

Bank checks tracking RCW 9A.56.060.¹ The definitional instruction, and the two “to-convict” instructions as to each of the two counts, employed the term “utter” or “uttering.” The instruction defining the offense charged described the crime as occurring where a person “makes, draws, utters or delivers” any check, and the “to-convict” instructions stated that the defendant was guilty on the count if, *inter alia*, he knew the account drawn upon did not have sufficient funds at the time of the “uttering.” See CP 22-34 (Instructions nos. 4, 5, 6).

However, the term “utter” is confusing for a lay jury, and the Comment to Washington Pattern Jury Instructions 73.01 and 73.02 make clear that the term should not be used:

It is preferable not to select the legalistic word “utter.”
See discussion in the Note on Use and Comment to

¹ RCW 9A.56.060 states in pertinent part:

Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or other depository, to meet said check or draft, in full upon its presentation, shall be guilty of unlawful issuance of bank check. The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or other depository for the payment of such check or draft, and the uttering or delivery of such check or draft to another person without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud.

RCW 9A.56.060(1).

WPIC 130.01, Forgery – Definition. If it is used, it should be defined.

11A Washington Practice, Washington Pattern Jury Instructions

73.01 (Third. Ed. 2008).

b. The use of the terms “utter” and “uttering” were confusing to the jury and constituted manifest, and reversible, constitutional error. The terms “utter” and “uttering” are understood by attorneys as referring to the writing of a financial instrument such as a check. Black’s Law Dictionary defines “utter” as: “To put or send . . . into circulation; . . . to offer, whether accepted or not, a forged instrument, with the representation, by words or actions, that the same is genuine.” Black’s Law Dictionary (3rd ed. 2006), at 1387.

This confusing language would be of little help to a lay jury, but, in any event, Mr. Mura contends that the use of the term, undefined in any manner, rendered the jury instructions indecipherable to a lay jury. To convict under RCW 9A.56.060 for unlawful issuance of checks, the trier of fact must find the defendant wrote the check with intent to defraud, knowing he had insufficient funds in his account. State v. BenNeth, 34 Wn. App. 600, 606, 663 P.2d 156 (1983). This Court of Appeals has held

that where sufficient evidence supports such charges, the evidence is adequate for guilt even though the defendant testifies that he believed that his account remained open. State v. Schapiro, 28 Wn. App. 860, 862, 868, 626 P.2d 546 (1981).

However, in this case, the defendant testified that he believed at the time he wrote the checks to the two complainant companies, that there would be sufficient funds placed in his account in the near future, using a wire transfer, and that the checks would therefore be legally covered. RP 154, 156.

Mr. Mura recognizes that ordinarily, the failure to further define an element of a crime, beyond listing it in the instructions, is not manifest constitutional error for purposes of raising the issue on appeal. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); RAP 2.5(a). However, jury instructions must “accurately state the law, [must] not mislead the jury, and [must] permit each party to argue its theory of the case.” State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004).

Mr. Mura contends that the degree of confusion presented by the court’s instructions in the present case, effectively misstated the State’s burden of proof, and misled the jury, creating manifest constitutional error. RAP 2.5.

He further contends the error requires reversal, because the use of the confusing term, undefined, prevented him from being acquitted under a theory that there was no “intent to defraud” at the time of the anticipated future payment of the checks from his Industrial Credit Union account.

**2. THE TRIAL COURT EXCEEDED ITS
STATUTORY AUTHORITY AND VIOLATED
MR. MURA’S RIGHT TO EQUAL
PROTECTION IN IMPOSING NON-EXEMPT
COURT COSTS AND ATTORNEY’S FEES IN
LIGHT OF HIS INABILITY TO PAY.**

a. The court may impose court costs and fees only after a finding of an ability to pay. The allowance and recovery of costs is entirely statutory. State v. Nolan, 98 Wn. App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those “expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision.”

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs “unless the defendant is or will be able to pay them.” In making that

determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs. RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

While neither the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs, State v. Curry, 62 Wn. App. 676, 814 P.2d 1252 (1991), affirmed, 118 Wn.2d 911, 829 P.2d 166 (1992), the trial court here purported to make a finding of an ability to pay.²

b. The court's finding that Mr. Mura had the ability to pay was clearly erroneous in light of evidence that he was indigent. The trial court here by virtue of its finding in the form judgment and sentence document imposed both costs and recoupment for attorney's fees following a finding that Mr. Mura had the ability to pay. CP 13-20 (Judgment and sentence, Part II, ¶ 2.5).

² When a trial court acts beyond its statutory sentencing authority, the issue can be heard for the first time on appeal. State v. Moen, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996).

In fact, the evidence before the court showed the exact opposite; Mr. Mura was indigent. His attorney was court-appointed. CP 14. With regard to an order of indigency for appeal, the trial court accordingly later granted an order of indigency and appeal *in forma pauperis*. Supp. CP ____, Sub # 29 (Order of Indigency, 11/22/10). Indeed, the entire State's case indicated Mr. Mura's insolvency, detailed through extensive testimony and documentary evidence through the financial institution witness. See RP 88-122 (testimony of Industrial Credit Union employee Christopher Juchmas). The trial phase proceeded directly to sentencing following verdict. RP 177. There was no evidence at sentencing that the defendant's indigency had ended or was going to end in the future.

The court's determination in Finding 2.5 of the Judgment and Sentence as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). While the trial court is not required to make express findings as to the ability to pay, the court here did, in its use of the form judgment and sentence. The court did not strike Finding 2.5 in the judgment, and as a result, the court here found:

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present, and future ability to pay financial legal obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 13-20 (Judgment and sentence, Finding 2.5 at Part II, ¶ 2.5).

While the court below was not *required* to make an on-the-record finding of an ability to pay, since the court did make an express finding, that finding is before this Court and it is reviewed for whether it was clearly erroneous per Baldwin, *supra*. In light of the evidence that Mr. Mura was indigent and had no ability to pay these costs, nor would he have the ability to pay in the future, the court's Finding 2.5 was clearly erroneous.

c. Imposition of the costs was not mandatory and subject to suspension due to indigency. Only a victim penalty assessment and a DNA fee are mandatory; all other costs, including those ordered in Mr. Mura's case, were discretionary based upon the defendant's indigency. See RCW 9.94A.760(1) ("the court may order the payment of legal financial obligation . . ."); RCW 43.43.690(1) ("the court may suspend payment of all or

part of the [crime laboratory] fee”). Under the plain language of these statutes, the court possessed the discretion to waive these fees. Yet, the court appeared to treat these costs and fees as mandatory.

The “[f]ailure to exercise discretion is an abuse of discretion.” Brunson v. Pierce County, 149 Wn. App. 855, 861, 205 P.3d 963 (2009) (citing State v. Pettitt, 93 Wn.2d 288, 295-96, 609 P.2d 1364 (1980)). The trial court here failed to exercise its discretion and waive the burdensome fees and costs that were non-exempt.

d. The imposition of recoupment for attorney’s fees was erroneous because Mr. Mura did not have a present ability to pay nor was there any indication his indigency would end. The court ordered Mr. Mura to pay \$1,200 in fees for “court appointed attorney.” See CP 13-20. Imposition of these fees where the evidence before the court showed Mr. Mura lacked the ability to pay, and there were no indicators showing this inability would end in the near future, violated Mr. Mura’ right to equal protection.

When imposing recoupment for attorney’s fees, certain factors must be considered or imposition of recoupment violates equal protection, including whether defendant “is or will be able to pay.” State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1977)

(citing Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)). The court must also take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose, and the court cannot require repayment if it appears that there is no likelihood that defendant's indigency will end. Barklind, 87 Wn.2d at 817.

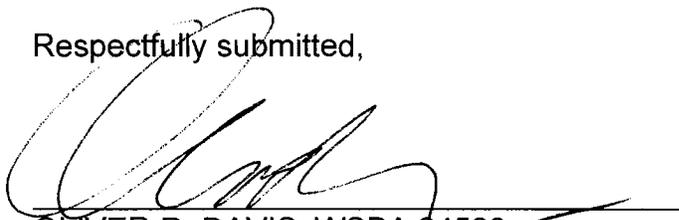
The court's Finding 2.5 in this case was contrary to the undisputed evidence that Mr. Mura had no ability to pay the costs. In addition, while Mr. Mura had no present ability to pay, his ability to earn money was further curtailed by the felony convictions – his first time offenses – for financial crimes which will stigmatize him in the job market and quash any ability he may have had had to remedy his present indigency. Thus, the evidence established Mr. Mura lacked the ability to pay, and there was a complete lack of evidence that this indigency would end at any time in the foreseeable future. The court's imposition of attorney's fees recoupment in the absence of an ability to pay violated Mr. Mura's right to equal protection. Wash. Const. Article I, section 21.

E. CONCLUSION

For the reasons stated, Mr. Mura respectfully requests that
this Court reverse his judgment and sentence.

DATED this 10 day of May, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "O. R. Davis", is written over a horizontal line.

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