Supreme Court No. _____
Court of Appeals No. 31672-6-III

90556-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DAVID P. BOLTON,

Defendant/Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner, David P. Bolton, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Commissioner's Ruling filed March 25, 2014, affirming his conviction and sentence. A copy of the Commissioner's Ruling is attached as Appendix A. A copy of the Court's order denying the Motion to Modify Commissioner's Ruling, dated June 12, 2014, is attached as Appendix B. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW.

1. Was Mr. Bolton denied his constitutional right to a unanimous jury verdict where the State relied on two criminal acts as a basis for conviction on a single count and a *Petrich* instruction on jury unanimity was not given?

2. Should the directive to pay legal financial obligations based on a finding of current or future ability to pay be stricken from the Judgment and Sentence as clearly erroneous, where the finding is not supported in the record? Did the trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took Mr. Bolton' financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

IV. STATEMENT OF THE CASE.

Mr. Bolton was charged and convicted by a jury of custodial assault for assaulting Gary Ford, a staff member of Coyote Ridge Correctional Center. CP 19, 36-37. In closing argument the State argued in pertinent part:

> I'd submit to you that Mr. Bolton assaulted Mr. Ford, not just once that day on July 18th, 2012, but he assaulted him twice. The first time was when Mr. Ford had him sit down in the office or rolled into the office and Mr. Bolton stood up and frightened Mr. Ford, thinking that this was going to be an assault where Mr. Bolton potentially would jump over his desk and start a fight. The second assault was when Mr. Bolton told Mr. Ford that, "Not giving you my ID," and told Mr. Ford to come get it. . . . as he tried to get it, he took a swing at Mr. Ford . . .

RP 71.

Mr. Ford's testimony was consistent with the State's closing argument as quoted above. RP 34-38. The jury was not given an instruction on jury unanimity. CP 20-35.

The sentencing court imposed discretionary costs of $1013.72 and mandatory costs of $700[1], for a total Legal Financial Obligation (LFO) of $1713.72. CP 8. The Judgment and Sentence contained the following language:

> ¶ 2.5 Legal Financial Obligations/Restitution. The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A753.

[1] $500 Victim Assessment and $200 criminal filing fee. CP 8.

CP 7.

Mr. Bolton asked the Court to consider waiving the discretionary costs. He stated he suffered from a medical condition, would be over 60 years old by his release date, and already owed over $5000 in previously imposed LFO's. RP 92. The Court did not waive the costs and made no further inquiry into Mr. Bolton' financial resources and the nature of the burden that payment of LFOs would impose on him. RP 91-92. The court ordered Mr. Bolton to pay at least $100 per month commencing immediately. CP 9.

This appeal followed. CP 2-3.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)), and involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)). Specifically, the decision of the Court of Appeals conflicts with U.S. Const. amend. 6 and Wash. Const. art. 1, § 22., *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992), and *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011).

1. Mr. Bolton was denied his constitutional right to a unanimous jury verdict because the State relied on two criminal acts on a single count as a basis for conviction and a *Petrich* instruction on jury unanimity was not given.

"When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The State may, in its discretion, elect the act upon which it will rely for conviction. *Id.* Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. *Id.* When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement. *Id.* The failure to follow one of the above options violates the defendant's State constitutional right to a unanimous jury verdict and his United States constitutional right to a jury trial. *State v. Beasley*, 126 Wn.App. 670, 682, 109 P.3d 849 (2005), citing *State v. Badda*, 63 Wn.2d 176, 182, 385 P.2d 859 (1963); U.S. Const. amend. 6; Wash. Const. art. 1, § 22.

An alleged *Petrich* error may be raised for the first time on appeal. *State v. Watkins*, 136 Wash. App. 240, 244, 148 P.3d 1112 (2006); *State v. Holland*, 77 Wn.App. 420, 424, 891 P.2d 49, rev. denied, 127 Wn.2d 1008, 898 P.2d 308

(1995). When determining whether a unanimity instruction is required, the court must answer three inquiries: (1) what must be proved under the statute? (2) what does the evidence disclose? and (3) does the evidence disclose more than one violation? *State v. Russell*, 69 Wn.App. 237, 249, 848 P.2d 743 (1993).

Here, the State presented evidence of two different acts by Mr. Bolton that it argued constituted a custodial assault. RP 34-38, 71. The jury was not given a *Petrich* instruction on jury unanimity. CP 20-35. As in the cases cited above, there is no way to assure that all members of the jury were relying on the same act when voting to convict Mr. Bolton. Therefore, since there was no assurance that the jury verdict was unanimous, the verdict must be reversed.

The Court of Appeals Commissioner concluded in her ruling that this error cannot be raised for the first time on appeal because it is not a manifest constitutional error and consequently not reviewable. Commissioner's Ruling pp 4-7. This assertion is contrary to established judicial precedent on this subject. See *State v. Holland,* 77 Wn. App. 420, 891 P.2d 49, *review denied,* 127 Wn.2d 1008, 898 P.2d 308 (1995). There is no requirement that a defendant except to the trial court's instruction to preserve this issue on appeal. "Although he did not except to the court's instructions, the right to a unanimous verdict is a fundamental constitutional right and may, therefore, be raised for the first time on appeal." *Holland,* 77 Wn. App. at 424 (citing *State v. Gitchel,* 41 Wn. App. 820, 821–22,

706 P.2d 1091, *review denied,* 105 Wn.2d 1003 (1985)). "Included in the constitutional requirement of jury unanimity is the requirement that the jury unanimously agree on the act underlying each charge." *Id.* (citing *State v. Petrich,* 101 Wn.2d 566, 572, 683 P.2d 173 (1984)). Therefore, the Commissioner's conclusion is clearly in error and this Court should consider the issue.

2. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.[2]

Mr. Bolton did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Calvin,* __Wn. App. __, 302 P.3d 509, 521 fn 2 (2013), citing *State v. Ford,* 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

a. The directive to pay must be stricken. There is insufficient evidence to support the trial court's finding that Mr. Bolton has the present and future ability to pay legal financial obligations, and the directive to pay must be stricken. Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon,* 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry,* 118 Wn.2d 911, 915-16,

[2] This issue is now pending before the Washington Supreme Court in *State v. Blazina,* No. 89028-5, consolidated with *State v. Paige-Colter,* No. 89109-5. The cases were scheduled for oral argument February 11, 2014.

829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia,* 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). "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." *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915-16.

Here, there is insufficient evidence to support the trial court's finding that Mr. Bolton has the present and future ability to pay legal financial obligations as stated in paragraph 2.5 of the Judgment and Sentence. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin,* 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Bolton' financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's finding that he has the present or future ability to pay LFOs. In fact Mr. Bolton asked the Court to consider waiving the discretionary costs because of his financial situation. He stated he suffered from a medical condition, would be over 60 years old by his release date, and already owed over $5000 in previously imposed LFO's. RP 92. The Court did not waive the costs and made no further inquiry into Mr. Bolton' financial resources and the nature of the burden that payment of LFOs would impose on him. RP 91-92. Instead, the court ordered Mr. Bolton to pay at least $100 per month commencing immediately. CP 9. Therefore, the finding that he has the present or future ability to pay LFOs is simply not supported in the record. Since it is clearly erroneous, the directive must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

This remedy of striking the unsupported finding is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. *State v. Lohr*, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); *State v. Schelin*, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority

holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of "fixing" it with the taking of new evidence. *Cf. State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, recon. denied, rev. denied, 116 Wn.2d 1026 (1991); *Lohr* (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

The Court of Appeals Commissioner cited the boilerplate language in the judgment and sentence and summarily concluded that the superior court took into account Mr. Bolton' financial resources and the nature of the burden of imposing LFOs on him. Commissioner's Ruling p. 8. But the mere presence of a boilerplate finding does not mean the finding is supported in the record. Where the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *State v. Calvin,* __Wn. App. __, 302 P.3d 509, 521-22 (2013).

Contrary to the Commissioner's conclusion, the record contains no evidence to support the trial court's finding that Mr. Bolton has the present or future ability to pay LFOs.

b. The imposition of discretionary costs of $1013.72 must also be stricken. Since the record does not reveal that the trial court took Mr. Bolton' financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the judgment and sentence.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin,* 63 Wn. App. at 312. The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. *Id.*

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. But,

> 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.

RCW 10.01.160(3). It is well-established that this provision does not require the trial court to enter formal, specific findings. See *Curry*, 118 Wn.2d at 916. Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. *Bertrand*, 165 Wn. App. at 404. Where the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *Calvin,* 302 P.3d at 521-22.

Here, after supposedly considering Mr. Bolton' "present and future ability to pay legal financial obligations", the court imposed discretionary costs of $1013.72. However, the record reveals no balancing by the court of Mr. Bolton' financial resources and the nature of the burden that payment of LFOs would impose on him. RP 91-92.

In sum, the record reveals that the trial court did not take Mr. Bolton' particular financial resources and his ability (or not) to pay into account as required by RCW 10.01.160(3). The finding of ability to pay is unsupported by the record and clearly erroneous. Further, the court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay *and* the imposition

of the discretionary costs. *Calvin,* 302 P.3d at 522; *Bertrand*, 165 Wn. App. at 405.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted July 13, 2014,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on July 13, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the petition for review:

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The Court of Appeals

of the

State of Washington

Division III

STATE OF WASHINGTON,	)	No. 31672-6-III
	)	
Respondent,	)	
	)	
v.	)	COMMISSIONER'S RULING
	)	
DAVID PAUL BOLTON,	)	
	)	
Appellant.	)	
	)	

David Paul Bolton appeals the Franklin County Superior Court's May 13, 2013 judgment and sentence that the court entered on a jury verdict that found him guilty of custodial assault. He contends that this Court must reverse his conviction because the State relied upon separate acts of assault, but the court below did not instruct the jury that it had to be unanimous as to which act it found that he had committed. Mr. Bolton also contends that the evidence does not support the superior court's finding that he had the current or future ability to pay legal financial obligations. And, he asserts that the

superior court erred when it imposed a variable term of community custody as part of his sentence.

Mr. Bolton has filed a Statement of Additional Grounds for Review in which he argues that the superior court erred when it excluded other potential jurors during voir dire of juror number 5, who knew the victim in this case and believed him to be a good person. He also contends that his physical disabilities that include type 1 diabetes render him unable to work. And, the court erred when it found he had the present or future ability to pay legal financial obligations.

The State moves on the merits to affirm.

On July 18, 2012, Mr. Bolton, an inmate at Coyote Ridge Correctional Center, asked another inmate to push him in his wheel chair from A-pod to B-pod. Mr. Bolton had missed lunch in A-pod while he was at a medical appointment, and he believed that the officer in A-pod was not moving quickly enough to order a special lunch for him. He apparently thought he would get faster service in B-pod. But inmates had to get permission to move from pod to pod. The correctional unit supervisor, Gary Ford, noticed Mr. Bolton moving to B-pod, and he detained him.

When Mr. Bolton began to complain loudly about the people in A-pod, Officer Ford moved him to a hallway. Officer Ford testified that Mr. Bolton started "going off" on him, so he asked Mr. Bolton to go into his office. There, Mr. Bolton became verbally abusive. He rose from his chair, and remained standing despite Officer Ford request that

he take his seat. When Officer Ford asked for Mr. Bolton's ID, Mr. Bolton told him to come and get it. Officer Ford believed Mr. Bolton intended to assault him. In fact, Mr. Bolton took a swing at him, but Officer Ford was able to duck.

Based on this incident, the State charged Mr. Bolton with custodial assault. In closing argument to the jury at Mr. Bolton's trial, the prosecutor argued that Mr. Bolton placed Officer Ford in the apparent threat of harm when he stood up from his wheel chair *and* when he told Officer Ford to come and get the ID from him. Specifically, the prosecutor argued, as follows:

> I'd submit to you that Mr. Bolton assaulted Mr. Ford, not just once that day on July 18th, 2012, but he assaulted him twice. The first time was when Mr. Ford had him sit down in the office or rolled into the office and Mr. Bolton stood up and frightened Mr. Ford, thinking that this was going to be an assault where Mr. Bolton potentially would jump over his desk and start a fight.
>
> The second assault was when Mr. Bolton told Mr. Ford that, "Not giving you my ID," and told Mr. Ford to come get it. And now Mr. Bolton is claiming, "Well, I'm defending myself because you tried to touch me." Well, that just can't be, because Mr. Ford requested the ID. Mr. Bolton said, "No, come get it." He invited this contact. So there is no, assault by, Mr. Ford. He, Mr. Bolton, asked for this contact, "Come get it."

RP at 71.

At sentencing, the defense asked the Court to waive the discretionary legal financial obligations because Mr. Bolton was not healthy, would be over 60 years old when he was released from prison, and already owed over $5000 in fines. The court declined, finding that Mr. Bolton was an adult and not disabled, who had the present and future ability to pay fines.

The court also imposed 12 months of community custody or such custody for the period of any earned early release, whichever was longer.

First, Mr. Bolton asserts that his conviction cannot stand because the State relied upon distinct acts of assault but did not request a unanimity instruction to advise the jury that it had to be unanimous as to which act it found he committed. *See State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

The State cites the Washington Supreme Court's decision in *State v. Crane*, 116 Wn.2d 315, 330, 804 P.2d 10 (1991), which held that a unanimity instruction is not needed if the acts comprised "continuous conduct." Mr. Bolton distinguishes *Crane* on the basis that the prosecutor here argued in closing that two acts constituted assaults – (1) when he got out of the chair and refused Officer Ford's direction to sit down, and (2) when he told Officer Ford that he would have to come and get his ID if he wanted it, then swung at him. But for that argument, this case would clearly be a single assault based upon continuous conduct. The question then is whether the fact the prosecutor labelled them as two assaults rather than a continuing act of assault, converted this situation into an alternative acts case which required a unanimity instruction.

The error, if any, is one to which defense counsel did not object. Recently, the Washington Supreme Court in *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009), summarized the law with respect to appellate court review of errors not raised below, as follows: An "appellate court may refuse to review any claim of error which was not

raised in the trial court." 167 Wn.2d at 97-98 (quoting RAP 2.5(a); *State v. Lyskoski*, 47 Wn.2d 102, 108, 287 P.2d 114 (1955).). The rule "encourag[es] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *Id.* at 98 (quoting *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988).).

However, an exception to the general rule that a party must preserve his or her assignment of error, exists when the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a). To satisfy the requisites of RAP 2.5(a), the "appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (citing *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).). Stated differently, the appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." *Id.* (citing *Kirkman,* at 926–27.) "If a court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis." *Id.* (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)); *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).)

"Manifest," as used in RAP 2.5(a)(3), "requires a showing of actual prejudice." *Id.* at 99 (citing *Kirkman*, 159 Wn.2d at 935, 155 P.3d 125). Actual prejudice requires a "'plausible showing . . . that the asserted error had practical and identifiable

consequences in the trial of the case.'" *Id.* (citing *Kirkman*, 159 Wn.2d at 935.). A harmless error analysis is appropriate only after the court determines the error is a manifest constitutional error. *Id.* (citing *Scott*, 110 Wn.2d at 688).

To ensure the actual prejudice and harmless error analyses are separate, the court in *O'Hara* stated at 100 that the focus of the actual prejudice analysis must be on whether the error is so obvious on the record that the error warrants appellate review. "It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object." *Id.* at 100. Therefore, "to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *Id.*

O'Hara noted at 100 that "[t]his distinction also comports with the common legal definition of 'manifest error': 'An error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.' Black's Law Dictionary 622 (9th ed.2009). 'Manifest constitutional error' is defined as "[a]n error by the trial court that has an identifiably negative impact on the trial to such a degree that the constitutional rights of a party are compromised." *Id.*

The right to a unanimous jury verdict in a criminal case is a constitutional right. *Petrich,* 101 Wn.2d at 572. But application of the well-settled law that *O'Hara*

summarized, establishes that the error here is not manifest. Nothing in this case suggested the State intended to rely on multiple acts of assault until the prosecutor stated in closing that two assaults occurred here. Without that argument, the case presented a continuous conduct situation which did not require a unanimity instruction. This error was not "plain and undisputable," or one that amounted "to a complete disregard of the controlling law." *O'Hara,* 167 Wn.2d at 100, fn 1 (quoting Black's at 622.). Nor did it have "an identifiably negative impact on the trial to such a degree that the constitutional rights of a party are compromised." *Id.*

Consequently, this Court will not review the alleged error, as the error was not manifest

Second, Mr. Bolton contends the evidence is insufficient to support the finding he has the present or future ability to pay legal financial obligations.

At sentencing, defense counsel had asked the superior court to waive all but the mandatory $500 victim's compensation fund assessment. He argued that "Mr. Bolton is sick. I don't believe - if I remember correctly I believe his release date is 2021? I believe it's 2021. So he's not even due to be released for another seven years now. It's eight years [and Mr. Bolton is 55 years old now]." RP at 92. In these circumstances, counsel asserted "I don't believe the Court would be able to make a finding that he has the ability to make or even a future ability to obtain employment once he is eventually released many years down the road." RP at 92. Mr. Bolton then personally requested the court to

waive the LFOs because he already owed $5000 in victim restitution in a prior conviction.

Nevertheless, the superior court ordered Mr. Bolton to pay discretionary costs of $1,013.72. It found that, in light of the "total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change, . . . [t]hat the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein." CP at 7. It ordered him to pay $100 a month towards the LFOs.

The record must be sufficient for the court on appeal to review whether the superior court "took into account the financial resources of the defendant and the nature of the burden" imposed by LFOs. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012). The record here supports the finding of the superior court. The finding itself states that the superior court took into account Mr. Bolton's resources – specifically, he is an adult and is not disabled. And, the court imposed only $1,013.72 and ordered him to pay $100 a month, a figure that an adult male who is not disabled may reasonably be able to pay if gainfully employed.

The finding is supported.

Third, Mr. Bolton argues that the court did not have the authority to impose a variable term of community custody. The State concedes this error and asks this Court to

remand this cause to the superior court to impose a definite term of 12 months of community custody. This Court has reviewed the record and the law and has determined that the cause should be remanded to the superior court for resentencing to 12 months of community custody. *See State v. Winborne,* 167 Wn. App. 320, 324-25, 273 P.3d 454, *review denied,* 174 Wn.2d 1019 (2012).

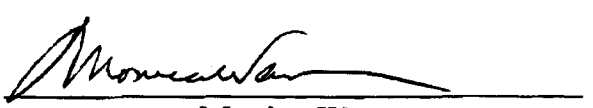
STATEMENT OF ADDITIONAL GROUNDS

This Court has addressed in this ruling the substance of Mr. Bolton's argument that the superior court erred when it imposed LFOs. It has rejected that argument.

Mr. Bolton also argues that voir dire of Juror Number 5 should not have been outside the presence of the other jurors even though this questioning occurred in the courtroom and was open to the public. This Court notes that he has not cited any law, nor is this Court aware of any law, that gives him a right to have all the jurors present for all of voir dire. The superior court believed Juror Number 5's answers might prejudice the other jurors. No error occurred. Accordingly,

IT IS ORDERED, the State's motion on the merits is granted, and Mr. Bolton's sentence is affirmed. The cause is remanded to the superior court for imposition of a definite term of 12 months community custody.

March 25, 2014



Monica Wasson
Commissioner

Renee S. Townsley
Clerk/Administrator

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TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

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March 25, 2014

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CASE # 316726
State of Washington v. David Paul Bolton
FRANKLIN COUNTY SUPERIOR COURT No. 121504333

Counsel:

Enclosed is your copy of the Commissioner's Ruling, which was filed by this Court today.

If objections to the ruling are to be considered (RAP 17.7), they must be made by way of a Motion to Modify filed in this Court within 30 days from the date of this ruling (**April 24, 2014**). Please file the original with one copy; serve a copy upon the opposing attorney and file proof of such service with this office.

If a motion to modify is not timely filed, appellate review is terminated.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jcs
Encl.

c: Honorable Salvador Mendoza, Jr., Superior Court Judge
E-Mail

c: David P. Bolton
#626915
1313 N. 13th Avenue
Walla Walla, WA 99362

No. 31672-6-III

RULING FACT SHEET
CRIMINAL CASES ONLY

Case Name: *State v. Bolton* Case Number: 31672-6-III

1. TRIAL COURT INFORMATION:

   A. SUPERIOR COURT: Franklin County B. DISTRICT COURT:

   Judge Signing:
   Date Filed:

2. COURT OF APPEALS INFORMATION:
   Disposition (Check only 1)

   (x) Decided on Merits
   ( ) Dismissed
   ( ) Other
   ( ) Remand
   ( ) Review Not Accepted
   ( ) Transferred

3. SUPERIOR COURT INFORMATION (IF THIS IS A CRIMINAL CASE, CHECK ONE)

IS FURTHER ACTION REQUIRED BY THE SUPERIOR COURT?

(x) YES
( ) NO

Commissioner's Initials

GASCH LAW OFFICE

July 13, 2014 - 1:41 PM

Transmittal Letter

Document Uploaded:	316726-Appendix A PFR.pdf
Case Name:	State v. David Bolton
Court of Appeals Case Number:	31672-6
Party Respresented:	appellant
Is This a Personal Restraint Petition?	☐ Yes ☑ No
	Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: Appendix A to petition for review

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to Appeals@co.franklin.wa.us.

Sender Name: David N Gasch - Email: gaschlaw@msn.com

Renee S. Townsley
Clerk/Administrator

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June 12, 2014

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CASE # 316726
State of Washington v. David Paul Bolton
FRANKLIN COUNTY SUPERIOR COURT No. 121504333

Counsel:

Enclosed is a copy of the Order Denying Motion to Modify the Commissioner's Ruling of March 25, 2014.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.4(a). A party seeking discretionary review must file a Petition for Review in the Court of Appeals within 30 days after this Court's Order Denying Motion to Modify (may be filed by electronic facsimile transmission). Please serve a copy upon the opposing party and provide proof of such service.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:cl
Enc.
c: David P. Bolton
#626915
1313 N. 13th Ave.
Walla Walla, WA 99362

FILED
JUNE 12, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID PAUL BOLTON, Appellant.	)	No. 31672-6-III ORDER DENYING MOTION TO MODIFY

THE COURT has considered appellant's motion to modify the Commissioner's Ruling of March 25, 2014, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to modify is hereby denied.

DATED: June 12, 2014.

PANEL: Judges Siddoway, Korsmo, Lawrence-Berrey.

FOR THE COURT:

LAUREL H. SIDDOWAY, Chief Judge

GASCH LAW OFFICE

July 13, 2014 - 1:43 PM

Transmittal Letter

Document Uploaded:	316726-Appendix B PFR.pdf
Case Name:	State v. David Bolton
Court of Appeals Case Number:	31672-6
Party Respresented:	appellant
Is This a Personal Restraint Petition?	☐ Yes ☑ No
	Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: Appendix B to petition for review

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to Appeals@co.franklin.wa.us.

Sender Name: David N Gasch - Email: gaschlaw@msn.com