SUPREME COURT NO. 93294-8

COURT OF APPEALS NO. 32974-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LARRY BELT,

Petitioner.

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

The Honorable Evan Sperline, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Larry Belt, the appellant below, requests review of the Court of Appeals decision in State v. Belt, 2016 WL 2874188, No. 32974-7-III (May 17, 2016).

B. ISSUES PRESENTED FOR REVIEW

1. WPIC 4.01[1] requires jurors to articulate a reason for having reasonable doubt. Does this articulation requirement undermine the presumption of innocence and shift the burden of proof to the accused?

2. Notwithstanding this court's recent decisions in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and State v. Duncan, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 1696698 (Apr. 28, 2016), the Court of Appeals refused to exercise discretion to review the trial court's imposition of legal financial obligations (LFOs). Should this court grant review and remand for resentencing with proper consideration of Belt's ability to pay LFOs?

3. Was trial counsel constitutionally ineffective for failing to object to the imposition of discretionary LFOs at sentencing?

C. STATEMENT OF THE CASE

The State charged Belt with two counts of first degree assault, including deadly weapon enhancements on each, for altercations at an

[1] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

Ephrata tavern. CP 22-24. According to tavern owner Jeannette Johnson, Belt threatened to cut her throat and chased her around the bar with a knife. 1RP[2] 42, 45-49. Johnson's husband, Greg Thompson, testified that when he arrived at the tavern, Belt threatened to "fuck [him] up" and charged at him, precipitating a fist fight. 1RP 100-05. Thompson testified Belt threatened to cut his throat and started actually cutting his throat, but Thompson managed to grab the knife with his fingers and pull it away. 1RP 106. Thompson stated two men showed up who subdued Belt and got the knife away from him. 1RP 109.

Belt testified he acted in self defense, stating that when he was speaking with Johnson at the bar, Thompson arrived with two other men and said, "what the fuck are you doing with my old lady." 1RP 300-01. When Belt responded, "it's none of your fucking business," Thompson told Belt to "shut the fuck up," pulled a knife out of his pocket, and came at Belt. 1RP 302. A struggle ensued. 1RP 303-04, 306-07. Based on this evidence, the trial court instructed the jury on self defense. CP 45-46; 1RP 377-79.

The trial court also gave the pattern reasonable doubt instruction, which read, in part, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 39; 1RP 373.

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[2] Consistent with the briefing below, Belt refers to the verbatim reports of proceedings as follows: 1RP—December 10, 11, and 12, 2014; 2RP—December 16, 2014.

The jury found Belt guilty of both counts of first degree assault and returned a special verdict finding Belt was armed with a deadly weapon when he committed the assaults. CP 50-51; 1RP 450-52.

The trial court imposed a 264-month sentence, consisting of two consecutive 108-month standard range sentences and two consecutive 24-month deadly weapon enhancements. CP 57; 2RP 13-14. The trial court imposed $750 in discretionary LFOs without inquiring into Belt's ability to pay. CP 56, 59, 2RP 14. The trial court also imposed a victim assessment of $500, $200 in court costs, a DNA collection fee of $100, and $4,656.85 in restitution. CP 59-60; 2RP 14.

Belt appealed. CP 71-72. He argued that the pattern jury instruction on reasonable doubt contains an unconstitutional articulation requirement. Br. of Appellant at 5-15. Belt also argued that the trial court exceeded its sentencing authority when it failed to consider Belt's ability to pay before imposing LFOs and that Belt's trial counsel was ineffective for failing to object to the imposition of discretionary LFOs. Br. of Appellant at 15-21.

The Court of Appeals rejected Belt's claims, holding that his challenge to the reasonable doubt instruction and LFOs were not adequately preserved for appellate review. Belt, slip op. at 8-11, 13-16. The Court of Appeals also determined Belt could not demonstrate that the LFOs

prejudiced him and therefore also rejected his ineffective assistance of counsel claim. Id. at 16-17.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WPIC 4.01 DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

The pattern jury instruction requires the jury or the defense articulate "a reason" for having reasonable doubt. This articulation requirement distorts the reasonable doubt standard, undermines the presumption of innocence, and shifts the burden of proof to the accused. Because it presents a significant constitutional question that has not been directly addressed by this court, and because it implicates jury instructions given in every criminal trial in Washington, this court should grant review under RAP 13.4(b)(3) and (4).

Jury instructions must be manifestly clear and not misleading to the ordinary mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). The error in WPIC 4:01 is readily apparent to the ordinary mind: having a "reasonable doubt" is not, as a matter of plain English, the same as having "a reason" to doubt. WPIC 4.01's use of the words "a reason" clearly indicates that reasonable doubt must be capable of explanation or justification.

Prosecutors have several times argued that juries must be able to articulate a reason for reasonable doubt, demonstrating that the reasonable doubt standard is not manifestly clear to legally trained professionals, let alone jurors. E.g., State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Indeed, the prosecutors in Johnson and Anderson recited WPIC 4.01's text before making their improper fill-in-the-blank arguments. Johnson, 158 Wn. App. at 682; Anderson, 153 Wn. App. at 424. It makes no sense to condemn articulation arguments from prosecutors but continue giving the very jury instruction that gave rise to these improper arguments. Because the Court of Appeals decision conflicts with these cases and cases requiring jury instructions to be manifestly clear, review is appropriate under RAP 13.4(b)(1) and (2).

Review is also appropriate because this court's own precedent is in serious disarray. In State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015), this court determined that the instruction "a doubt for which a reason can be given" was error, but that WPIC 4.01's "a doubt for which a reason exists" was not. This holding directly conflicts with this court's precedent

that equated "for which a reason can be given" and "for which a reason exists."

In State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901), this court found no error in the instruction, "It should be a doubt for which a good reason exists." This court maintained the "great weight of authority" supported this instruction, citing the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss. 1894). This note, which is attached as Appendix B, cites cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[3]

In State v. Harsted, 66 Wash. 158, 162, 119 P. 24 (1911), the defendant objected to the instruction, "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." This court opined, "As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given." Id. at 162-63. This court relied on out-of-state cases, including Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899), which stated, "A doubt cannot be reasonable unless a reason therefor

[3] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt . . . is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious sensible doubt, such as you could give a good reason for."); Vann v. State, 9 S. E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 256, 36 P. 573 (1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

exists, and, if such reason exists, it can be given." This court was "impressed" with this view and therefore felt "constrained" to uphold the instruction. Harsted, 66 Wash. at 165.

Harras and Harsted viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason must be given for the doubt. This view directly conflicts with Kalebaugh and Emery, which strongly reject any requirement that jurors must be able to articulate a reason for having reasonable doubt. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 760.

It is time for a Washington court to seriously confront the problematic articulation language in WPIC 4.01.[4] There is no meaningful difference between WPIC 4.01's doubt "for which a reason exists" and a doubt "for which a reason can be given." Both require articulation, and articulation of reasonable doubt undermines the presumption of innocence and shifts the burden of proof to the accused. Because this court's and the Court of Appeals' decisions are in disarray on the significant constitutional issue of properly defining reasonable doubt in every criminal jury trial, Belt's arguments merit review under all four of the RAP 13.4(b) criteria.

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[4] The Court of Appeals determined Belt failed to preserve this issue for appellate review without addressing Belt's claim that failure to adequately instruct the jury on reasonable doubt is structural error under Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 125 L. Ed. 2d 182 (1993). See Br. of Appellant at 15. Contrary to the Court of Appeals decision, this court his held that structural errors qualify as manifest constitutional errors for RAP 2.5(a)(3) purposes. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

2. REVIEW SHOULD BE ACCEPTED BECAUSE THE COURT OF APPEALS' REFUSAL TO CONSIDER BELT'S CHALLENGE TO LEGAL FINANCIAL OBLIGATIONS CONTRAVENES THIS COURT'S DECISIONS IN BLAZINA AND DUNCAN

The Court of Appeals paid lip service to Blazina, recognizing that the trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before imposing LFOs. Belt, slip op. at 12 (quoting Blazina, 182 Wn.2d at 830). The Court of Appeals also acknowledged that the trial judge must do more than sign a judgment and sentence containing boilerplate language. Id. at 12 (quoting Blazina, 182 Wn.2d at 838). Yet the Court of Appeals refused to review Belt's claim because of a single reference in the record that Belt was currently "able-bodied" and "[b]ecause the administrative cost of conducting a new hearing is high compared to the relatively small discretionary LFO award . . . ." Id. at 15.

The Court of Appeals' refusal to consider Belt's challenge to discretionary LFOs conflicts with this court's repeated recognition that discretionary LFOs impose "significant burdens on offenders and our community, including 'increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.'" Duncan, 2016 WL 1696698, at *2 (quoting Blazina, 182 Wn.2d at 835-37). Review is therefore warranted under RAP 13.4(b)(1) and (4).

This court has also recently reaffirmed that a "constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements." Duncan, 2016 WL 1696698, at *2. These requirements include that "'[r]epayment may only be ordered if the defendant is or will be able to pay,'" "'[t]he financial resources of the defendant must be taken into account,'" and "[a] repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end.'" Id. (internal quotation marks omitted) (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992) (quoting State v. Eisenman, 62 Wn. App. 640, 644 n.10, 810 P.2d 55, 817 P.2d 867 (1991) (citing State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976)))). These specific constitutional requirements are codified in RCW 10.01.160(3), which mandates that the sentencing judge "consider the defendant's individual financial circumstances and make individualized inquiry into the defendant's current and future ability to pay." Blazina, 182 Wn.2d at 837. Despite having the benefit of Duncan and a record before it indicating that constitutional requirements were not satisfied, the Court of Appeals nonetheless refused to consider Belt's challenge to appellate costs. This refusal warrants review under RAP 13.4(b)(1), (3), and (4), and "[c]onsistent with . . . Blazina and . . . other cases decided since then, . . . remand to the

trial court for resentencing with proper consideration of [Belt]'s ability to pay LFOs." Duncan, 2016 WL 1696698, at *3 (collecting cases).

The Court of Appeals decision that $750 in discretionary LFOs is not a significant enough amount to justify the administrative burden of remand also ignores and contradicts Blazina's recognition of the pernicious effects of compounding interest. LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Blazina, 182 Wn.2d at 836. This "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. "The court's long-term involvement in defendant's lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. at 837.

This court's concerns regarding the accrual of interest are implicated here. CP 61 ("The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments."). Given that interest will accrue on the $750 over the course of Belt's 22-year sentence, the Court of Appeals' characterization of the discretionary LFOs as "a small discretionary LFO" of "only $750.00" is erroneous. Belt, slip op. at 15. Its decision simply fails to

recognize the compounding accrual of interest this court found alarming in Blazina. And this lengthy interest accrual period is especially concerning here because Belt must first pay off the entire $4,656.85 in restitution before any payment will be applied to discretionary LFOs. See RCW 9.94A.760(1) ("Upon receipt of an offender's monthly payment, restitution shall be paid prior to any payments of other monetary obligations. After restitution is satisfied, the county clerk shall distribute the payment proportionally among all other fines, costs, and assessments imposed, unless otherwise ordered by the court."). Because the Court of Appeals failed to account for accruing interest or Belt's other debts, including restitution, its decision is at odds with Blazina, warranting review under RAP 13.4(b)(1). See Blazina, 182 Wn.2d at 838 ("[T]he court must also consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.").

Finally, the Court of Appeals' reliance on a single reference in the record to Belt being "able-bodied" is dubious. See Belt, slip op. at 15. While being an able-bodied 53-year-old is not irrelevant to the ability-to-pay inquiry, the Court of Appeals overlooked that Belt faces 22 years in prison. See 2RP 6 (defense counsel asking court to consider Belt is 53 years old). Belt will be in his 70s when he is released. Belt's present physical ability does not excuse courts from considering Belt's individual circumstances and

thereby "arriv[ing] at an LFO order appropriate to the individual defendant's circumstances." Blazina, 182 Wn.2d at 835. And, being able-bodied does not necessarily mean that a person can obtain employment with a criminal record and significant outstanding LFOs to pay. As this court recognized in Blazina, "background checks will show an active record in superior court for individuals who have not fully paid their LFOs" and this active record "can have serious negative consequences on employment, on housing, and on finances." Blazina, 182 Wn.2d at 837 (emphasis added). Being able bodied alone is not a valid predictor of ability to pay discretionary LFOs. Only by ignoring Belt's individual circumstances was the Court of Appeals able to depend so heavily on a single statement in the record regarding Belt's physical ability. The Court of Appeals decision thus conflicts with several aspects of the Blazina decision, necessitating review under RAP 13.4(b)(1).

3. THIS COURT SHOULD ACCEPT REVIEW BECAUSE BELT'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS

Every accused person has the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). On review, courts determine whether the right is violated

by considering whether (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Ineffective assistance of counsel claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have differed if the representation had been adequate. Id. at 705-06.

Counsel's failure to object to discretionary LFOs fell below the standard expected for effective representation, and the Court of Appeals did not indicate otherwise. See Belt, slip op. at 16-17. There was no reasonable strategy for not requesting the trial court to comply with the requirements of RCW 10.01.160(3). E.g., State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has duty to know relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel rendered deficient performance for failing to recognize and cite appropriate case law). Counsel here simply failed to object. This neglect constituted deficient performance.

Counsel's failure to object to discretionary LFOs was also prejudicial. As discussed, there are numerous hardships that result from LFOs. See Blazina, 182 Wn.2d at 835-37. Even without any debt, those

with criminal convictions have difficulty securing stable housing and employment. Id. Furthermore, in any hearing to remit LFOs, Belt will bear the burden of proving manifest hardship, and he will have to do so without the assistance of counsel. RCW 10.01.160(4); State. v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

In sum, Blazina demonstrates there is no strategic reason for failing to object to the imposition of discretionary LFOs. Belt incurs no conceivable benefit from these LFOs. Given his indigency, restitution debt, and his advanced age when he exits prison, there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered Belt's current and future ability to pay. Belt's constitutional right to effective assistance of counsel was violated. This court should therefore accept review under RAP 13.4(b)(3).

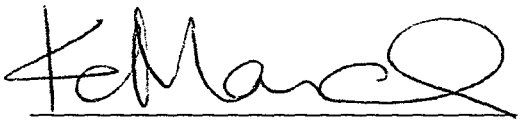
E. CONCLUSION

Because he satisfies all RAP 13.4(b) review criteria, Belt asks that this petition be granted.

DATED this 16th day of June, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

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May 17, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 32974-7-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
LARRY JAMES BELT,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — A jury convicted Larry James Belt of two counts of first degree assault. Mr. Belt argues on appeal: (1) the jury instruction that defines "reasonable doubt" as a doubt "for which a reason exists" requires articulation of the reason, and is therefore unconstitutional, (2) the trial court erred when it imposed discretionary legal financial obligations (LFOs) without conducting an individualized inquiry into his ability to pay, and (3) he received ineffective assistance of counsel when his attorney failed to object to the imposition of LFOs. Mr. Belt argues in his statement of additional grounds for review (SAG) that certain witnesses perjured themselves, and prosecutorial misconduct occurred when the prosecutor asked a leading question that

caused a witness to change his answer. We disagree with Mr. Belt's contentions and affirm.

FACTS

On January 3, 2014, Larry Belt entered Wendy's Steakhouse and Lounge in Ephrata, Washington. The restaurant's owner, Jeanette Johnson, was working alone. Mr. Belt asked Ms. Johnson to use her cell phone so he could call his ex-wife. After his third call to his ex-wife, Mr. Belt became visibly upset. According to Ms. Johnson, Mr. Belt "turned around and he looked at me and he reached inside of his jean jacket and he pulled out this huge knife." Report of Proceedings (RP) (Dec. 10, 2014) at 41. Ms. Johnson used her phone to call her husband who was at a nearby house. She then called 911, and Mr. Belt "just went nuts." RP (Dec. 10, 2014) at 46. According to Ms. Johnson, Mr. Belt chased her around the bar while she was on the phone with 911. Eventually, Ms. Johnson was able to escape to a restaurant next door.

Greg Thompson, Ms. Johnson's husband, entered the bar shortly thereafter and got into a physical altercation with Mr. Belt. Mr. Belt lacerated Mr. Thompson's stomach, neck, and various fingers. The State charged Mr. Belt with two counts of first degree assault, both with special allegations that he was armed with a deadly weapon other than a firearm.

At Mr. Belt's trial, Ms. Johnson testified that during her encounter with Mr. Belt, he put a knife to his own throat and stated: "I'm going to go cut [my ex-wife's] fucking throat, and then I'm going to cut your fucking throat." RP (Dec. 10, 2014) at 42. Ms. Johnson further testified that when Mr. Belt then pointed the knife toward her she called Mr. Thompson for help. Ms. Johnson believed Mr. Belt would become more agitated if she called 911. During cross-examination, Ms. Johnson testified that Mr. Thompson was approximately three to four minutes away when she called him. Mr. Belt attempted to run to the other side of the bar with the knife, and Ms. Johnson testified: "I had the phone and I'm calling 911 as I'm running up the other end of the bar trying to keep the bar between him and I." RP (Dec. 10, 2014) at 47. Ms. Johnson testified that Mr. Belt chased her around the bar and that she was on the telephone with 911 the entire time, although she hung up once and had to call back. According to Ms. Johnson, she was able to escape and she ran to AJ's Eatz and Drinkz (AJ's) next door.

Mr. Thompson testified that he was watching television when Ms. Johnson called him, and it took him about two minutes to get to Wendy's. According to Mr. Thompson, when he arrived at Wendy's his wife no longer was there, and Mr. Belt was walking around the bar acting like he was looking for someone or something. Mr. Thompson testified that Mr. Belt walked briskly toward him and said "I'm going to fuck you up."

RP (Dec. 10, 2014) at 100. Once Mr. Belt approached Mr. Thompson, Mr. Thompson punched Mr. Belt. Mr. Thompson testified he did not see anything in Mr. Belt's hands. Mr. Thompson knocked Mr. Belt down, but Mr. Belt got up, threw a barstool at him, and then hit him in the right eye. Mr. Thompson testified that he tripped over a bar stool, and then Mr. Belt got on top of him and said "I'm going to cut your fucking throat." RP (Dec. 10, 2014) at 106. According to Mr. Thompson, Mr. Belt began to cut his throat with a steak knife, but he was able to grab the knife, cutting his fingers in the process.

Todd Godfrey and Jared Torgeson were in AJ's when Ms. Johnson came in. Ms. Johnson testified that she told people at AJ's that someone was in her bar and had threatened her with a knife; although, she could not remember if she said someone had been stabbed. Mr. Godfrey and Mr. Torgeson went to Wendy's Steakhouse to see if anyone needed help.

The State, questioning Mr. Thompson, asked:

> Q. —the two guys showed up?
>
> Okay. When those two guys showed up, what did they do?
>
> A. Basically, they saw that—I believe they saw that I had the knife. I was pretty tired then. And, you know, we had been kind of doing this for quite some time, and I was exhausted. And so I was just hanging on.
>
> Q. Okay.

> A. And they basically took him and I think they took the knife away from him and put him on the floor and held him down until the cops got there.
>
> Q. All right. I just want to be clear. I thought you said earlier during this answer that you had a knife or is that inaccurate?
>
> A. I never had a knife. I had a hold of the knife, the hand with the knife on it.

RP (Dec. 10, 2014) at 109. Mr. Torgeson and Mr. Godfrey testified they saw Mr. Thompson and Mr. Belt struggling over a knife in Wendy's, and they wrestled the knife away from Mr. Belt. When the police arrived, Mr. Torgeson and Mr. Godfrey were subduing Mr. Belt. Ms. Johnson testified that when she went back to Wendy's, she was on the phone with 911, and she saw Mr. Belt handcuffed on the ground and Mr. Thompson sitting on a barstool bleeding.

Mr. Belt's version of events differed from the other witnesses. Mr. Belt testified he did not have a knife when he went into Wendy's and he did not threaten to harm Ms. Johnson or anyone else. According to Mr. Belt, he was talking to Ms. Johnson when Mr. Thompson entered the bar with two other men and confronted Mr. Belt by stating, "What the fuck are you doing with my old lady?" RP (Dec. 11, 2014) at 301. According to Mr. Belt, he stabbed Mr. Thompson with a steak knife from the bar after Mr. Thompson charged him with a knife. Mr. Belt's closing statement questioned Ms. Johnson's and

Mr. Thompson's version of events, and generally argued that Mr. Belt acted in self-defense.

Jury instruction 3 defined "reasonable doubt" as follows:

> A reasonable doubt is one for which *a reason exists* and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence. If, from such a consideration, you have an abiding belief in the truth of a charge, you are satisfied beyond a reasonable doubt as to that charge.

Clerk's Papers (CP) at 39 (emphasis added). The first sentence in this definition is identical to language contained in Washington Pattern Jury Instruction 4.01. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). Mr. Belt's defense counsel did not object to jury instruction 3.

On December 12, 2014, the jury found Mr. Belt guilty of both counts of first degree assault, along with finding that he was armed with a deadly weapon other than a firearm when he committed both offenses. On December 16, 2014, the trial court sentenced Mr. Belt to 264 months' confinement.

The trial court also imposed the following LFOs: a $500.00 victim assessment fee, a $200.00 criminal filing fee, a $100.00 deoxyribonucleic acid (DNA) collection fee, $750.00 in fees for a court-appointed attorney, and $4,656.85 in restitution. The

judgment and sentence contains the following boilerplate LFO language: "The court has considered the total amount owing, the defendant's 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." CP at 56. During the sentencing hearing, defense counsel stated that the 53-year-old Mr. Belt was "able-bodied," but had some medical conditions. RP (Dec. 16, 2014) at 6. The trial court did not conduct an individualized inquiry into Mr. Belt's current or future ability to pay LFOs on the record, nor did defense counsel object to the LFOs. During the sentencing hearing, the trial court also granted Mr. Belt's order of indigency for purposes of appeal. In Mr. Belt's declaration accompanying his motion for indigency, he indicated that he had no real property, no personal property other than effects, no debts, no income from any sources, and no money to contribute toward the expense of the appeal.

Mr. Belt timely appealed.

ANALYSIS

1. *Constitutionality of the reasonable doubt instruction*

Mr. Belt first contends that jury instruction 3, which defined "reasonable doubt" as a doubt "for which a reason exists," was constitutionally deficient because it required the jury to articulate a reason for having a reasonable doubt. Relying on *State v. Emery*, 174

Wn.2d 741, 760, 278 P.3d 653 (2012), Mr. Belt also argues instruction 3 resembles the improper "fill in the blank" prosecutorial closing arguments.

There is a "fundamental constitutional due process requirement that the State bear the burden of proving every element of a crime beyond a reasonable doubt." *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015); *accord State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). The State must prove the defendant committed the crime beyond a reasonable doubt because "[t]he presumption of innocence 'is the bedrock upon which the criminal justice system stands.'" *Kalebaugh*, 183 Wn.2d at 584 (quoting *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)). A "'reasonable doubt, at a minimum, is one based upon reason.'" *Bennett*, 161 Wn.2d at 311 (internal quotation marks omitted) (quoting *Victor v. Nebraska*, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)). However, "the law does not require that a reason be given for a juror's doubt." *Kalebaugh*, 183 Wn.2d at 585. "Although no specific wording is required, jury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof." *Bennett*, 161 Wn.2d at 307. This court reviews jury instruction challenges de novo, in the context of the instructions as a whole. *Id.*

The State responds that Mr. Belt did not object to the alleged error below, and the error is not a manifest error of constitutional magnitude under RAP 2.5(a)(3).

Specifically, the State argues that "the alleged error here is not manifest because the jury instruction complies with clear, binding precedent, and the trial court could not correct it." Br. of Resp't at 4.

"An established rule of appellate review in Washington is that a party generally waives the right to appeal an error unless there is an objection at trial." *Kalebaugh*, 183 Wn.2d at 583; *see* RAP 2.5(a). This rule "encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality." *Kalebaugh*, 183 Wn.2d at 583. In the context of jury instructions, CrR 6.15(c) provides that "[t]he court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions." However, RAP 2.5(a)(3) allows an appellant to raise an unpreserved "manifest error affecting a constitutional right" for the first time on appeal. In order to meet the criteria of RAP 2.5(a)(3), (1) the error must be "truly of a constitutional magnitude," and (2) the appellant must demonstrate that the alleged error is "manifest." *Kalebaugh*, 183 Wn.2d at 583.

Jury instructions that allegedly misstate reasonable doubt implicate a defendant's due process interests and are, therefore, of constitutional magnitude. *See id.* at 584. An error is "manifest" under RAP 2.5(a)(3) if the appellant shows actual prejudice from the

record. *Kalebaugh*, 183 Wn.2d at 584. "'To demonstrate actual prejudice, there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" *Id.* (alteration in original) (internal quotations marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99). In turn, "'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.* (quoting *O'Hara*, 167 Wn.2d at 100).

Here, the relevant portion of jury instruction 3 mirrors WPIC 4.01 and provides that "[a] reasonable doubt is one for which a reason exists." CP at 39. Mr. Belt's opening brief concedes that the Washington Supreme Court has directed trial courts to use WPIC 4.01 to instruct juries on the definition of reasonable doubt. *See* Br. of Appellant at 8; *see also Bennett*, 161 Wn.2d at 318 ("Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt."); *accord State v. Castillo*, 150 Wn. App. 466, 468-69, 475, 208 P.3d 1201 (2009) (failure to use WPIC 4.01 is reversible error). Since trial courts are instructed to use WPIC 4.01, the alleged constitutional error based on such jury instruction is not "manifest" under RAP 2.5(a)(3). *See State v. Guzman Nunez*, 160 Wn. App. 150, 163, 248 P.3d 103 (2011) (asserted error not

"manifest" when "[t]he instruction used conformed, in material respects, to the pattern concluding instruction"), *aff'd in part by*, 174 Wn.2d 707, 285 P.3d 21 (2012).

Moreover, Mr. Belt's claimed manifest constitutional error is not even an *actual* error. Read in context, WPIC 4.01 "does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." *State v. Thompson*, 13 Wn. App. 1, 5, 533 P.2d 395 (1975). Defining a reasonable doubt as one for which "a reason exists" has been declared satisfactory in this jurisdiction for over 100 years. *See Thompson*, 13 Wn. App. at 5; *State v. Tanzymore*, 54 Wn.2d 290, 291, 340 P.2d 178 (1959); *State v. Harras*, 25 Wash. 416, 421, 65 P. 774 (1901). In *Kalebaugh*, the Washington Supreme Court recently reaffirmed that WPIC 4.01 is "the correct legal instruction on reasonable doubt." 183 Wn.2d at 586.

Mr. Belt has not established an actual error, let alone a practical and identifiable error that the trial court could have corrected despite Mr. Belt's failure to object to jury instruction 3. We conclude that jury instruction 3, which defines "reasonable doubt" as "one for which a reason exists," is not unconstitutional.

2. *Unpreserved LFO error*

Whenever a person is convicted, the trial court "may order the payment of a legal financial obligation" as part of the sentence. RCW 9.94A.760(1); *accord* RCW 10.01.160(1). From the date of judgment, LFOs bear interest at a rate of 12 percent per annum. *See* RCW 4.56.110(4); *see also* RCW 19.52.020(1). Under RCW 10.01.160(3), "the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." In other words, "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

Importantly, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *Id.* at 838. "The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Id.* However, neither RCW 10.01.160 nor the Washington Constitution "'requires a trial court to enter formal, specific findings regarding a defendant's ability to pay [discretionary] court costs.'" *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013) (alteration in original) (quoting *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)).

The court's individualized inquiry requires it to "consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. Further, a court may also consider whether a defendant qualifies as indigent under GR 34, which takes into account whether the defendant "receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps," or whether the defendant's "household income falls below 125 percent of the federal poverty guideline." *Blazina*, 182 Wn.2d at 838-39 ("if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs"). "But *Blazina*'s reference to GR 34 does not change the law; it simply gives courts guidance when determining the individual's ability to pay LFOs." *In re Pers. Restraint of Flippo*, 191 Wn. App. 405, 411, 362 P.3d 1011 (2015).

Subject to three exceptions, RAP 2.5(a) provides that an "appellate court may refuse to review any claim of error which was not raised in the trial court." In *Blazina*, the Washington Supreme Court confirmed that an appellate court's discretion under RAP 2.5(a) extends to review of a trial court's imposition of discretionary LFOs. 182 Wn.2d at 830. However, "[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *Id.* at 832.

"While such unpreserved LFO errors do not command review as a matter of right, each appellate court is entitled to 'make its own decision to accept discretionary review.'" *State v. Munoz-Rivera*, 190 Wn. App. 870, 895, 361 P.3d 182 (2015) (quoting *Blazina*, 182 Wn.2d at 835). One approach is to "consider the administrative burden and expense of bringing [a defendant] to a new sentencing hearing and the likelihood that the LFO result would change." *State v. Arredondo*, 190 Wn. App. 512, 538, 360 P.3d 920 (2015) ("An important consideration of this analysis is the dollar amount of discretionary LFOs imposed by the sentencing court."), *review granted*, No. 92389-2 (Wash. Apr. 29, 2016). Another approach would be to remand the issue to the trial court to make an individualized inquiry, as opposed to this court exercising its discretion to review whether the discretionary LFOs were properly imposed. *See Munoz-Rivera*, 190 Wn. App. at 895. A final approach would be to refuse to review or remand the alleged LFO error because the issue was not preserved below. *See State v. Duncan*, 180 Wn. App. 245, 253, 327 P.3d 699 (2014), *aff'd and remanded*, No. 90188-1, 2016 WL 1696698 (Wash. Apr. 28, 2016).

Here, the trial court imposed both mandatory and discretionary LFOs without conducting an individualized inquiry, but Mr. Belt failed to object. The $500.00 victim assessment, $200.00 criminal filing fee, $100.00 DNA collection fee, and $4,656.85 in

restitution apply irrespective of Mr. Belt's ability to pay. *See Lundy*, 176 Wn. App. at 102 ("For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account."). However, the $750.00 in fees for Mr. Belt's court-appointed attorney was a discretionary LFO. *See Munoz-Rivera*, 190 Wn. App. at 894 (court-appointed attorney fees are discretionary). The discretionary LFOs equal only $750.00.

Mr. Belt contends that discretionary LFOs should not have been awarded because he qualified as indigent for purposes of his appeal. But the trial court's determination that Mr. Belt lacks the ability to pay for appellate counsel does not fully answer whether Mr. Belt has the current or future ability to pay a small discretionary LFO.

The State responds that if the matter were remanded, "Mr. Belt would have to be transported to Grant County to appear before the trial court, appointed a new public defender, take court and prosecutor time, and possibly file a new appeal." Br. of Resp't at 9. Although the trial court granted Mr. Belt's motion for indigency for purposes of appeal, his defense counsel referred to him as "able-bodied" during the sentencing hearing. RP (Dec. 16, 2014) at 6. Because the administrative cost of conducting a new hearing is high compared to the relatively small discretionary LFO award, and because Mr. Belt's physical ability to work suggests a remand would not accomplish a different

result, we exercise our discretion to not review this claimed error or to remand this issue for a hearing. *See Arredondo*, 190 Wn. App. at 538.

3. *Ineffective assistance of counsel*

Mr. Belt next argues that by not challenging the imposition of LFOs at sentencing, his trial counsel provided ineffective assistance. A criminal defendant has the right under the Sixth Amendment to the United States Constitution to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either part of the test, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

"There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance." *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). If the attorney's conduct "can

be characterized as legitimate trial strategy or tactics," the conduct cannot be the basis of an ineffective assistance claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To meet the prejudice prong, a defendant must show, "based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *McFarland*, 127 Wn.2d at 337.

Here, Mr. Belt's defense counsel failed to object at the December 16, 2014 sentencing hearing when the trial court imposed the small discretionary LFO without conducting an individualized inquiry into Mr. Belt's ability to pay. As explained above, the record does not indicate that the able-bodied Mr. Belt would be unable to repay the $750 in discretionary LFOs. Because Mr. Belt cannot show prejudice, we conclude that Mr. Belt has not established his claim of ineffective assistance of counsel.

4. *Statement of additional grounds for review*

For SAGs 1, 2, 3, 5, and 6, Mr. Belt asserts that both Ms. Johnson and Mr. Thompson testified falsely and committed perjury. Specifically, Mr. Belt argues that Ms. Johnson falsely testified that (1) she was on the phone with 911 when he was allegedly chasing her around the bar, but the 911 records do not reflect any such call being made, (2) it was only him and her in the bar during the beginning of the ordeal, even though she later told 911 that someone else had been stabbed, and (3) it would only take Mr.

Thompson three to four minutes to get to the bar when Mr. Thompson was coming from approximately 19 blocks away. Mr. Belt also argues that Mr. Thompson perjured himself by first testifying that he had a knife, and then immediately thereafter testifying that only Mr. Belt had a knife.

The fact that inconsequential details from a witness are contradicted or unbelievable does not mean that a jury was required to disbelieve the witness's entire testimony. For instance, (1) the absence of records establishing who Ms. Johnson called that night is inconsequential because the State was not required to establish these facts to convict Mr. Belt, (2) whether a third person was stabbed or not is inconsequential, given that the State only charged Mr. Belt with two counts of assault, and (3) many people cannot estimate distance or time accurately. As for Mr. Thompson's testimony, he testified that he grabbed the blade of the knife in self-defense and suffered cuts to his hands while doing so. It is very likely that Mr. Thompson's testimony—that the two men saw he "had the knife"—meant they saw he had control of the knife. If so, this is consistent with him grabbing the knife by the blade in self-defense. Regardless, these points raised by Mr. Belt in his SAG were all points defense counsel could raise in his closing argument.

This court does not address issues of witness credibility on appeal and instead defers to the jury's measure of witness credibility and resolution of conflicting testimony. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). Because the jury had a full opportunity to consider each witness's testimony, this court does not need to address these issues further.

5. *Prosecutorial misconduct: leading question*

Mr. Belt's remaining SAG contends that the prosecutor asked Mr. Thompson a leading question to change his previous testimony that Mr. Thompson "had the knife." "In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial." *Emery*, 174 Wn.2d at 756. "If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. Here, the following questions and answers occurred between Mr. Thompson and the prosecutor:

> Q. —the two guys showed up?
>
> Okay. When those two guys showed up, what did they do?
>
> A. Basically, they saw that—I believe they saw that I had the knife. I was pretty tired then. And, you know, we had been kind of doing this for quite some time, and I was exhausted. And so I was just hanging on.
>
> Q. Okay.

> A. And they basically took him and I think they took the knife away from him and put him on the floor and held him down until the cops got there.
>
> Q. All right. I just want to be clear. *I thought you said earlier during this answer that you had a knife or is that inaccurate?*
>
> A. I never had a knife. I had a hold of the knife, the hand with the knife on it.

RP (Dec. 10, 2014) at 109 (emphasis added).

A leading question is one that suggests the answer desired. *State v. Scott*, 20 Wn.2d 696, 698-99, 149 P.2d 152 (1944). First, it is debatable whether the question emphasized above is a leading question. The question just as easily suggests a "yes" answer as it suggests a "no" answer. Second, Mr. Thompson's initial answer needed clarification, and it is not prosecutorial misconduct to have a witness clarify an answer. When asked to clarify his testimony, Mr. Thompson explained: "I never had a knife," but rather, "I had hold of the knife, the hand with the knife on it." RP (Dec. 10, 2014) at 109. As mentioned above, this clarification is consistent with Mr. Thompson having control of the knife by grabbing the blade with his hands. It also is consistent with the cuts he suffered to his fingers. We conclude that the question, even if leading, was proper and not prosecutorial misconduct because it allowed Mr. Thompson to clarify his ambiguous testimony.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

I CONCUR:

Fearing, C.J.

SIDDOWAY, J. (concurring) — We construe Larry Belt's pro se "additional grounds 4" as contending that the prosecutor committed prosecutorial misconduct by asking a leading question. Thus construed, I would reject the assignment of error out of hand.

"To prove prosecutorial misconduct, the Defendant must first establish that the question posed by the prosecutor was improper." *State v. Stenson*, 132 Wn.2d 668, 722, 940 P.2d 1239 (1997). ER 611(c) provides that leading questions should not be used on the direct examination of a witness "except as may be necessary to develop the witness' testimony." And leading questions may always be used with a hostile witness, an adverse witness, or a witness identified with an adverse witness. *Id.* The trial court has broad discretion to permit leading questions. *Stevens v. Gordon*, 118 Wn. App. 43, 55, 74 P.3d 653 (2003). So a prosecutor who asks a leading question on direct examination that he or she believes is consistent with these principles is not engaged in misconduct at all.

Here, Mr. Thompson had made a statement ("I believe they saw that I had the knife") that was inconsistent with the remainder of his testimony. Report of Proceedings (Dec. 10, 2014) at 109. The best way to clarify was to draw his attention to the inconsistency and give him a chance to respond. Leading or not, there was nothing

improper about the prosecutor's question. I would not reach the issue of whether it was flagrant, ill intentioned, and incurably prejudicial.

Siddoway, J.

APPENDIX B

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

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N. Y. 503; *Cohen* v. *State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Boulden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jarrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

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State V. Larry Belt

No. 32974-7-III

Certificate of Service

On June 16, 2016 I filed and e-served the petition for review directed to:

Garth Dano
Grant County Prosecuting Attorney
Via Email per agreement
gdano@grantcountywa.gov
kburns@co.grant.wa.us

Re: Larry Belt
Cause No. 32974-7-III, in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

John Sloane
Office Manager
Nielsen, Broman & Koch

06-16-2016
Date
Done in Seattle, Washington