73292-7

NO. 73292-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY PARIS,

Appellant.

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Washington's pattern jury instruction on reasonable doubt is unconstitutional.

2. If appellate costs become an issue in this appeal, this court should exercise its discretion and decline to impose them given that Paris is indigent and has no ability to pay them.

Issues Pertaining to Assignments of Error

1. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists," misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to Paris to provide a reason for why reasonable doubt exists?

2. Under this court's current approach to appellate costs, any objection to such costs must be made prior to a decision on the merits and before the prevailing party is even known. Therefore, in the event this court erroneously affirms Paris's conviction, should this court exercise discretion in the decision terminating review by declining to impose appellate costs of Paris based on his indigence?

B. STATEMENT OF THE CASE

The State charged Gregory Paris with attempted indecent liberties. CP 1-2.

The case proceeded to trial, where the jury was given the following instruction:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> 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 or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 17 (Instruction No. 3).

The jury found Paris guilty of attempted indecent liberties. CP 29; 6RP[1] 2-5. The trial court sentenced Paris to 340 days with full credit for time served, releasing him the same day. CP 33; 7RP 11.

Paris timely appeals. CP 42. The trial court appointed appellate counsel and ordered that the costs associated with appellate review to be

[1] The verbatim reports of proceedings are referenced as follows: 1RP—February 18, 2015; 2RP—February 19, 2015; 3RP—February 23, 24, and 25, 2015; 4RP—March 2, 2015; 5RP—March 3, 2015; 6RP—March 4, 2015; 7RP—March 20, 2015.

"prepared at public expense." Supp. CP ____ (sub no. 129, order authorizing appeal in forma pauperis).

C. ARGUMENT

1. THE JURY INSTRUCTION THAT TELLS JURORS "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS" UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

Paris's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 17. This instruction, based on WPIC 4.01,[2] is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Not only must jurors have a reasonable doubt, they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions.

Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to fill-in-the-blank arguments that Washington courts have invalidated in

[2] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same exact thing.

WPIC 4.01 violates dues process and the jury-trial guarantee. U.S. CONST. amends. VI, XIV; CONST. art. I, §§ 3, 22. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence

Jury instructions must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar. See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction allowed jury to find actual imminent harm was necessary for self defense, resulting in court's determination that jury could have applied erroneous self defense standard), overruled in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217

P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying on grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (discussing different between use of "should" and use of word indicating "must" regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

The error in WPIC 4.01 is obvious to any English speaker. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of "presume" to determine how jury may have interpreted instruction); Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of "common" to ascertain the jury's likely understanding of the word in instruction).

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'") (quoting United States v. Johnson, 343 F.2d 5, 6, n.1 (2d Cir. 1965)).

Thus, an instruction defining reasonable doubt as "a doubt based on reason" would be proper. WPIC 4.01 does not do that, however. WPIC 4.01 requires "a reason" for the doubt, which is different than a doubt based on reason.

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01, means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to definitions employing the term

"reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington's pattern instruction on reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. It instead explicitly requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option. Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a

reason to doubt, shifting the burden and undermining the presumption of innocence.

The beyond-a-reasonable-doubt standard enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363. The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Bennett, 161 Wn.2d at 316. The "doubt for which a reason exists" language in WPIC 4.01 does just that by directing jurors they must have a reason to acquit rather than a doubt based on reason.

In prosecutorial misconduct cases, appellate courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. As discussed above, fill-in-the-blank arguments "improper impl[y] that the jury must be able to articulate its reasonable doubt" and "subtly shift[] the burden to the defense." Emery, 174 Wn.2d at 760; accord Walker, 164 Wn. App. at 731; Johnson, 158 Wn. App. at 682; Venegas, 155 Wn. App. at 523-24 & n.16; Anderson, 153 Wn. App. at 431. These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at

759. Simply put, "a jury need do nothing to find a defendant not guilty." Emery, 174 Wn.2d at 759.

These improper burden shifting arguments are not the mere product of prosecutorial malfeasance, however. The offensive arguments did not originate in a vacuum but sprang directly from WPIC 4.01's language. In Anderson, for instance, the prosecutor recited WPIC 4.01 before arguing, "in order to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. at 424. In Johnson, likewise, the prosecutor told jurors "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. at 682.

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable

doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same hazard?

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). An ambiguous instruction that permits erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity—which Paris does not concede—that is not the correct standard for measuring the adequacy of jury instructions. Courts have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist unless and until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." Dana, 73 Wn.2d at 537. WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and

the fact that legal professionals have been misled by the instruction in this manner, compels this conclusion.

Recently, in Kalebaugh, the Washington Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." 183 Wn.2d at 585. This conclusion is sound:

> Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction "a reasonable doubt is such a doubt as the jury are able to give reason for" 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 which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case").

b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01

In Bennett, the Washington Supreme Court directed trial courts to give WPIC 4.01, at least "until a better instruction is approved." 161 Wn.2d at 318. In Emery, the court contrasted the "proper description" of reasonable doubt as a "doubt for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. Emery, 174 Wn.2d at 759. In Kalebaugh, the court similarly contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt for which a reason can be given.'" 183 Wn.2d at 585. The Kalebaugh court concluded the trial court's erroneous instruction—"a doubt for which a reason can be given"—was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." Id.

The court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for

their doubt. The plain language of WPIC 4.01 requires this articulation. No Washington court has ever explained how this is not so.

Kalebaugh provided no answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case. In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued the doubt "for which a reason exists" language in WPIC 4.01 misstates the reasonable doubt standard. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord In re Electric Lightwave, Inc. 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control.

c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given

Forty years ago, Division Two addressed an argument that "'[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists' (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt,

in order to acquit." State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instruction). Thompson brushed aside the articulation argument in one sentence, stating "the particular phrase, when read in the context of the entire instruction 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." Thompson, 13 Wn. App. at 5.

Thompson's cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors" but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959), and

State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959). Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addressed the "doubt for which a reason exists" language in the instruction, so it was not at issue.

The Thompson court observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following language: "It should be a doubt for which a good reason exists,—a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering." Harras, 25 Wash. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State, 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894).[3] However, this

[3] The relevant portion of the note cited by Harras is appended to this brief.

note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[4]

So our supreme court in Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason to be given for the doubt. And then Thompson upheld the doubt "for which a reason exists" instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01's doubt "for which a reason exists" language means a doubt for which a reason can be given. This is a serious problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The Kalebaugh court explicitly held, moreover, that it was a manifest constitutional error to instruct the jury that reasonable doubt is "a doubt for which a reason can be given." Kalebaugh, 183 Wn.2d at 584-85.

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[4] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt, gentlemen, 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, 255-59, 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.").

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), sheds further light on this dilemma. Harsted took exception to the instruction, "The expression, 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. The court explained the meaning of reasonable doubt:

> [I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. 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. In support of its holding that there was nothing wrong with the challenged language, the Harsted court cited a number of out-of-state cases upholding instructions defining a reasonable doubt as a doubt for which a reason can be given. Id. at 164. Among them was Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." While the Harsted court noted some courts had disapproved of similar language, it was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. 66 Wash. at 165.

We now arrive at the genesis of the problem. More than 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a

doubt for which a reason exists means a doubt for which a reason can be given. This revelation annihilates any argument that there is a real difference between a doubt "for which a reason exists" in WPIC 4.01 and being able to give a reason for why doubt exists. Our supreme court found no such distinction in Harsted and Harras.

This problem has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Harras and Harsted explicitly contradict Emery's and Kalebaugh's condemnation. The law has evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains stuck in the past, outpaced by this court's modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable different between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. This repugnant requirement distorts the reasonable doubt standard to the detriment of the accused.

d. This structural error requires reversal

Defense counsel did not object to the instruction at issue here. See 5RP 29-39 (discussion regarding exceptions or objections to jury instructions). However, the error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). 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).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. The trial court's use

of WPIC 4.01 was structural error and requires reversal of Paris's conviction and a new trial.

2. THIS COURT SHOULD EXERCISE DISCRETION NOT TO IMPOSE APPELLATE COSTS AND SO STATE IN ITS DECISION TERMINATING REVIEW

In the event the State erroneously substantially prevails in this appeal, this court should exercise discretion and decline to impose appellate costs. This court should state as much in its decision terminating review.[5]

a. The trial court informed Paris prior to appeal that appellate costs, including the cost of an appellate defender, would be provided at public expense, but this was untrue

Because he was indigent, the trial court appointed appellate counsel and provided preparation of the appellate record "at public expense." Supp. CP ____ (sub no. 129, order of indigency). Any reasonable person reading this order would believe (1) Paris was entitled to an attorney to represent him and the preparation of an appellate record at public expense and (2) "at public expense" meant Paris would pay nothing due to his indigency, win or

[5] This court's commissioners have refused to exercise any discretion with regard to appellate costs when the issue is raised in a post-decision objection to cost bill. In so refusing, they have referenced RAP 14.2, which reads in part, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." In State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000), the court stated, albeit in dictum, RAP 14.2 "appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision." If this is so, the only mechanism available to avoid the imposition of appellate costs is assigning contingent error to the imposition of appellate costs to enable this court to direct that costs not be imposed in its decision terminating review.

lose. Any imposition of appellate costs would convert this indigency order into a falsehood. This alone is a sound reason for this court to exercise discretion and deny appellate costs.

b. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their cases undermines the attorney-client relationship and creates a perverse conflict of interest

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not win the day in the Court of Appeals, their clients will have to pay, at minimum, thousands of dollars in appellate costs. In this manner, appellate defenders become more than just their clients' lawyers, but also their financial planners. Indeed, appellate defenders must hedge the strength of their arguments against the vast sums of money their clients will owe and advise their clients accordingly. This undermines attorneys' fundamental role in advancing all issues of arguable merit on their clients' behalf and thereby undermines the relationship between attorney and client.

Not only do appellate defenders have to explain to clients they will face substantial appellate costs if their arguments are unsuccessful, they also have to explain that the Office of Public Defense gets most of the money. Many clients immediately see the perverse incentive this creates: the Office of Public Defense, through which all appellate defenders represent their

clients, collects money only when the appellate defender is unsuccessful. This is readily viewed as a conflict of interest and undermines the appearance of fairness of the appellate cost scheme. The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys when they lose. Franz Kafka himself would strain to imagine such a design. This court should exercise its discretion and deny costs in this case.

c. County prosecutors seek costs to punish the exercise of constitutional rights

County prosecutors have no real interest in imposing costs. They recover only a small amount of ordered appellate costs. Given the small sum, the county prosecutors' real purpose in filing cost bills is to punish those who exercise their rights to counsel and to appeal under article I, section 22 of the state constitution. This court should deny costs in this case.

d. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this court should accordingly exercise its discretion to deny appellate costs in the cases of indigent appellants

The Blazina court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. 182 Wn.2d at 836-37. 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." Id. at 836. This, in turn, "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. 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclus.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASH. STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

While the Blazina court addressed trial court LFOs, the "problematic consequences" of trial court LFOs are every bit as problematic in the context of appellate costs. The appellate cost bill, which generally totals thousands of dollars, imposes a debt for not prevailing on appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). This debt results in the same compounding of interest and prolonged retention of court jurisdiction. Appellate costs negatively impact indigent persons' ability to move on with their lives in precisely the same ways the Blazina court identified.

Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise

that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also stated, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839.

This court receives orders of indigency "as part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added). "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). If this court errs by affirming, this court should nonetheless embrace and soundly exercise its discretion by denying the award of any appellate costs in its decision terminating review in light of the serious concerns recognized in Blazina.

e. Imposing costs on indigent persons without assessing whether they have the ability to pay does not rationally serve a legitimate state interest and accordingly violates substantive due process

Both the state and federal constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV; CONST. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218-19. Deprivations of life, liberty, or property must be substantively reasonable and are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

The level of scrutiny applied to a substantive due process challenge depends on the nature of the right at issue. Johnson v. Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, courts apply rational basis scrutiny. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. Id. Although this is a deferential standard, it is not meaningless. Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (cautioning rational basis standard "is not a toothless one").

The vast majority of the money awarded in an appellate cost bill is earmarked for indigent defense funding and goes to the Office of Public Defense. Although funding the Office of Public Defense is a legitimate state interest, the imposition of costs on appellants who cannot pay them does not rationally serve this interest.[6]

As the Washington Supreme Court recently recognized, "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. Imposing appellate costs under RCW 10.73.160 and RAP 14.2 on indigent persons who cannot pay them fails to further any state interest. There is no rational basis for appellate courts to impose this debt upon indigent persons who lack the ability to pay.

Likely intending to avoid such a result, the legislature expressly granted discretion to deny a request to impose costs on indigent litigants:

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[6] It is by no means clear that the appellate cost system produces a net positive balance in the state's coffers. It is likely that enforcement efforts—if fairly quantified to include the time that trial and appellate lawyers, clerks, commissioners, and judges spend on these issues—would exceed the limited sums extracted from indigent persons.

"The court of appeals, supreme court, and superior courts may require an adult or a juvenile convicted of an offense or the parents of another person legally obligated to support a juvenile offender to pay appellate costs." RCW 10.73.160(1) (emphasis added). "The authority is permissive as the statute specifically indicates." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). No rational legislation would expressly grant discretion to courts that refuse to exercise it. Washington courts must, at minimum, require an ability-to-pay determination *before* imposing costs to comport with the due process clauses.

The state also has a substantial interest in reducing recidivism and promoting postconviction rehabilitation and reentry into society. Blazina, 182 Wn.2d at 836-37. As discussed, appellate costs immediately begin accruing interest at 12 percent, making this reentry unduly onerous, if not impossible, to achieve. See id.; RCW 10.82.090(1). This important state interest cuts directly against the discretionless imposition of appellate costs.

When applied to indigent persons who do not have the ability or likely future ability to pay, as here, the imposition of appellate costs under title 14 RAP and RCW 10.73.160 does not rationally relate to the state's interest in funding indigent defense programs. In the unlikely event the issue arises, Paris asks this court to conclude, in its decision terminating review,

that any imposition of appellate costs without a preimposition determination of his ability to pay would violate his substantive due process rights.

f. Alternatively, this court should require superior court fact-finding to determine Paris's ability to pay

In the event his court wishes to impose appellate costs, it should first require a fair preimposition fact-finding hearing to determine whether Paris can pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. If it erroneously affirms and is inclined to impose appellate costs, this court should first direct the superior court to allow Paris to litigate his ability to pay before appellate costs are imposed.

If the State is able to overcome the presumption of continued indigence and support a factual finding that Paris has the ability to pay, the superior court could then fairly exercise its discretion to impose appellate costs depending on Paris's actual and documented ability to pay.[7]

Blazina signals that the time has come for Washington courts and prosecutors to stop punishing the poor for their poverty. Paris asks that this court deny all appellate costs or at least require the trial court on remand to conduct a fair fact-finding hearing to determine his actual ability to pay appellate costs.

[7] It is unlikely the superior court would impose discretionary appellate costs given that it declined to impose any discretionary trial costs. CP 32; 7RP 11.

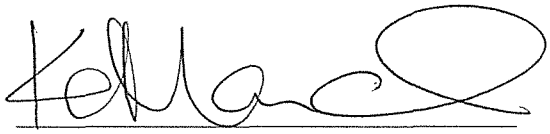
D. CONCLUSION

The defective reasonable doubt instruction given in Paris's trial is structural error, requiring reversal and a new trial.

DATED this 30th day of November, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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