No. 33575-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES COLE

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR AND ISSUES

1. The State presented insufficient evidence to convict Mr. Cole of bail jumping on count two, where the State alleged he failed to appear "on or about October 15, 2014," and Mr. Cole appeared in court on October 16, 2014.

2. The trial court erred in sustaining the State's relevancy objection to Mr. Cole's proffered evidence of his many timely appearances in court to support his claim on count two that he did not knowingly fail to appear and his claim on count three that uncontrollable circumstances prevented his appearance.

3. During closing arguments, the prosecutor committed misconduct by arguing facts not in evidence, and the trial court erred in prohibiting Mr. Cole from explaining that "beyond a reasonable doubt" is a higher standard of proof than the standards applied in civil cases.

4. Cumulative error deprived Mr. Cole of a fair trial.

5. RCW 69.50.4013 violates the due process clauses of the Fourteenth Amendment and article I, section 3, both facially and as applied, because it permits the State to convict a person of a felony drug crime without proving a culpable mental state.

6. RCW 9A.76.170 violates the due process clauses of the Fourteenth Amendment and article I, section 3, both facially and as

applied, because it permits the State to convict a person of felony bail jumping without proving a culpable mental state.

7. In the absence of substantial evidence, the trial court erred in finding that Mr. Cole has the ability to pay $1,850 in legal financial obligations, where Mr. Cole qualifies for court-appointed counsel, is indigent under the standards of GR 34, buys his clothes from Goodwill, and makes money by selling firewood while living out of his car.

B. STATEMENT OF THE CASE

Charles Cole is a military veteran who was honorably discharged after serving in the Gulf War. RP 219. He lives on Badger Mountain, and recovers timber to make money. RP 220-21. He sells the wood in Chelan, Wenatchee, and Leavenworth, and lives out of his truck when doing so. RP 221. Although he is 47 years old, he had never been convicted of a felony prior to this case. CP 54-55.

On June 23, 2014, Mr. Cole was working in Wenatchee. RP 221. He took a shower at an acquaintance's home, then walked toward Goodwill, where he was planning to meet his wife. RP 222-23. Police Officer Brian Miller saw Mr. Cole and stopped him because there was a misdemeanor warrant for his arrest. CP 1; RP 108-09. After arresting Mr. Cole, Officer Miller searched him and also searched a pair of shorts he was carrying. RP 110. Inside the shorts, Officer Miller found a glass pipe

with some residue that was later determined to be methamphetamine. RP 111-13, 140-43.

There was such a small quantity of drugs in the pipe that the forensic scientist had to "scrape" it out in order to test it and could not "get a weight" on it even though the lab has very sensitive scales. RP 143-47. The State nevertheless charged Mr. Cole with felony drug possession in violation of RCW 69.50.4013(1). CP 2-3.

Although frequent travel to Wenatchee was cumbersome for him, Mr. Cole dutifully attended numerous court hearings. Supp. CP __ - __ (sub#s 122, 120, 114, 112, 110, 108, 107, 101, 93, 91, 86, 83, 77, 70, 52, 35, 33, 28, 25, 24, 17, 11, 4) (minutes show Mr. Cole appeared in court on 23 different dates before trial began). Mr. Cole missed only two dates: October 15, 2014, and December 1, 2014. RP 160, 190. He explained that he thought a subsequent notice of hearing for October 16, 2014, replaced the earlier notice of an October 15 hearing. RP 227-28; exs. 8, 21. His lawyer confirmed that Mr. Cole was indeed in the courthouse on October 16, and was confused about why his hearing on that date had been stricken from the calendar. RP 205-06, 218, 230-31. Mr. Cole appeared in court for another hearing on October 20, 2014. RP 197, 208, 232; ex. 23.

As to the December 1, 2014 hearing, Mr. Cole explained that his car slid off the road when he was on his way down the mountain. RP 232-33, 245. He contacted his lawyer shortly after the accident, and he appeared in court on December 3, 2014, which was the next available court date. RP 210, 233.

Despite the fact that Mr. Cole attended 23 pretrial hearings and explained why he missed two dates, the State moved to amend the information to add two counts of felony bail jumping. CP 4-5, 15-20, 27-29. Mr. Cole's attorney withdrew, and new attorney was appointed to represent him. RP 2-3.

At trial, Mr. Cole testified that the shorts he was carrying on June 23, 2014 were not his, and that he did not know there was a pipe inside them. RP 222-25. Officer Miller, in contrast, testified that Mr. Cole "admitted" to him that the pipe was his during a brief conversation following arrest. RP 114. Mr. Cole's attorney told the jury that it should believe Mr. Cole's account, but that even if they believed the pipe belonged to Mr. Cole, Mr. Cole did not know there were *drugs* in the pipe and therefore he was not guilty of drug possession. RP 308-13.

The jury was not instructed that the State had to prove knowing possession beyond a reasonable doubt. CP 39. Instead, the court

instructed the jury that Mr. Cole bore the burden of proving "unwitting possession" by a preponderance of the evidence. CP 42.

With respect to the bail jumping charges, Mr. Cole sought to introduce evidence of the 23 times he appeared in court for pretrial hearings, to support his defense that he did not knowingly and intentionally fail to appear on the two dates he missed. RP 234-35. The State objected on relevancy grounds, and the court sustained the objection. RP 234-35.

With respect to the charge on count two, Mr. Cole explained to the jury that he thought the notice for the October 16 hearing replaced the earlier notice of hearing for October 15, and he did not know he had to appear on both dates. Mr. Cole's former attorney testified and confirmed that Mr. Cole appeared in court on October 16, 2014. RP 205. Witnesses for both the State and the defense testified that Mr. Cole appeared in court yet again on October 20, 2014. RP 197, 208, 232; ex. 23. The prosecutor told the jury that none of this mattered, and that Mr. Cole was guilty because he failed to appear on October 15. RP 296, 326.

With respect to the bail jumping charge on count three, Mr. Cole testified that he was in a car accident on the way down from the mountain on December 1. RP 232-33. His former lawyer confirmed that this is what Mr. Cole told him as well, and that Mr. Cole appeared on the next

available court date, which was December 3. RP 210, 245. The prosecutor told the jurors that Mr. Cole was not credible, and that they should not believe he was in an accident. RP 319-20.

Because the proffered evidence had been excluded, defense counsel was unable to tell the jurors that they should believe Mr. Cole because he was a trustworthy person who appeared in court on 23 other occasions. The jury was instructed that Mr. Cole bore the burden of proving "uncontrollable circumstances" prevented his appearance on December 1. CP 47. The prosecutor told the jury that even if Mr. Cole was in an accident, he could not avail himself of this defense because he recklessly contributed to the accident by living in the mountains without using chains or studded tires. RP 299-300. The prosecutor made this argument despite the fact that no evidence had been presented that Mr. Cole's truck was not properly equipped for winter driving. RP 105-247.

During the defense closing argument, Mr. Cole's attorney tried to explain the presumption of innocence and the heavy burden the State bore to prove each charge beyond a reasonable doubt. Counsel started to compare that burden with the civil burdens of preponderance of the evidence and clear and convincing evidence – a comparison that he, like most defense lawyers, had made to juries countless times. But the prosecutor objected and the court sustained the objection, disallowing

counsel from emphasizing the relatively high standard of proof that applied to the case. RP 306-08.

The jury convicted Mr. Cole on all three counts. RP 135-37. At sentencing, the court imposed $1,850 in legal financial obligations. CP 59. The court justified this order with the single statement: "You previously testified that you work, collecting firewood, and have a job selling that and so the court believes that in fact you can make payments on these financial obligations and have this paid off over time." RP 347.

Mr. Cole appeals. CP 67-81.

C. ARGUMENT

1. The State presented insufficient evidence to prove bail jumping as charged in count two beyond a reasonable doubt.

a. Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The beyond a reasonable doubt standard is designed to impress "upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970) . It

"symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Id.*

A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318; *State v. Vasquez*, 178 Wn. 2d 1, 6, 309 P.3d 318 (2013).

b. <u>The State presented insufficient evidence to prove that Mr. Cole failed to appear on or about October 15, 2014, as required to support a conviction on count two</u>.

The State charged Mr. Cole with bail jumping on count two, alleging:

> On or about the 15th day of October, 2014, in Chelan County, State of Washington, the defendant did then and there unlawfully and feloniously, after having been charged in the above cause number with unlawful possession of a controlled substance: methamphetamine, a class C felony, and after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before the Chelan County Superior Court, a court of the State of Washington, did fail to appear as required; contrary to the form of the statute RCW 9A.76.170(1) and (3)(c) in such cases made and provided

and against the peace and dignity of the State of Washington.

CP 28.

Consistent with the information, the "to convict" instruction listed the following elements that the State was required to prove beyond a reasonable doubt:

(1) That on or about the 15th day of October, 2014, the defendant failed to appear before a court;

(2) That the defendant was charged with possession of a controlled substance-methamphetamine;

(3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and

(4) That any of these acts occurred in the State of Washington.

CP 44.

"[E]lements in the 'to convict' instruction not objected to become the 'law of the case' which the State must prove beyond a reasonable doubt to prevail." *State v. Hickman,* 135 Wn.2d 97, 99, 954 P.2d 900 (1998). Thus, the State was required to prove that Mr. Cole did not appear in court "on or about" October 15th. CP 44. This the State failed to prove, as there is no dispute that Mr. Cole appeared in court on October 16, which is "on or about" October 15. RP 205-06, 218, 227-31; *see State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996) (holding that June 4 was "on or about" May 31 for purposes of a sufficiency of the evidence

challenge). Because the State failed to prove that Mr. Cole did not appear in court on or about October 15, reversal is required. *Hickman*, 135 Wn.2d at 103.

c. The remedy is reversal of the conviction on count two, and remand for dismissal of the charge with prejudice.

"Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *Hickman*, 135 Wn.2d at 103 (quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Mr. Cole accordingly asks this Court to reverse the conviction on count two, and remand for dismissal of the charge with prejudice.

2. Mr. Cole was deprived of a fair trial because the court improperly excluded relevant evidence and limited his closing argument, and the State committed misconduct in closing argument.

a. The trial court erred in sustaining the State's relevancy objection to Mr. Cole's proffered evidence of the many times he appeared for court hearings.

"All relevant evidence is admissible," unless prohibited by other rules. ER 402. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would

be without the evidence." ER 401. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn. 2d 612, 621, 41 P.3d 1189 (2002).

In light of the above rules, there is no question that the trial court erred in sustaining the State's relevancy objection to Mr. Cole's proffered evidence. Mr. Cole sought to introduce evidence of the 23 times he had been to court as ordered, to show that he did not knowingly or intentionally fail to appear on October 15 and December 1. RP 234. The trial court, however, excluded this critical testimony:

> [DEFENSE COUNSEL]: This case has been pending for almost a year. How many times have you been to court on this case?
>
> [PROSECUTOR]: Objection, relevance.
>
> [DEFENSE COUNSEL]: Well, it is relevant because it goes to whether or not he had knowledge and intentionally missed a court date or whether or not he wasn't able to make it to court on December 1st.
>
> THE COURT: The objection is sustained.

RP 234. This ruling was error, because "when a defendant asserts that certain conduct is accidental, evidence of prior []conduct is *highly* relevant as it will tend to support or rebut such a claim. *State v. Olsen*, 175 Wn. App. 269, 282, 309 P.3d 518 (2013) (endorsing admission of prior

misconduct to show knowledge and intent and to rebut claim of mistake or accident) (emphasis in original).

Furthermore, credibility was a key issue at trial on all three counts. Mr. Cole testified that (1) he did not knowingly possess drugs; (2) he thought the October 16 court date was in lieu of, not in addition to, the October 15 court date; and (3) he slid off the road when driving down the mountain for the December 1 court hearing. The prosecutor repeatedly told the jury that it should not believe Mr. Cole because Mr. Cole was not credible:

> So what's more reasonable to believe? Fully, fairly, carefully considering all the evidence and the credibility. You folks, you're here. We talked a lot about this in voir dire. Are you comfortable weighing someone's credibility, someone's honesty, someone's trustworthiness? Are you comfortable weighing that? Does Mr. Cole's story makes sense?

RP 302; *see also* RP 303-04. Although the prosecutor exhorted the jury to evaluate Mr. Cole's "trustworthiness," RP 302, he objected to Mr. Cole's attempt to present evidence of his trustworthiness. RP 234. The fact that trustworthiness was such a hotly contested issue demonstrates that the court's exclusion of the evidence was both erroneous and prejudicial. *See City of Seattle v. Personeus*, 63 Wn. App. 461, 465, 819 P.2d 821 (1991) (reversing for erroneous exclusion of evidence and explaining that such error is not harmless unless, within reasonable probabilities, the error did

not affect the result of the trial). This court should accordingly reverse the convictions and remand for a new trial.[1]

b. The trial court erred in sustaining the State's objection to Mr. Cole's discussion of relative burdens of proof in closing argument.

Not only did the court wrongly sustain the State's relevancy objection to Mr. Cole's proffered evidence, it also wrongly sustained the State's objection to his closing argument.

Mr. Cole emphasized to the jury that the State bore the burden of proving the elements of the crimes beyond a reasonable doubt. RP 306-07. Defense counsel began to explain the fact that the beyond a reasonable doubt standard is "the highest standard of proof that we have in the law." RP 307. But when counsel correctly described the preponderance standard as "more likely than not," the prosecutor inexplicably objected. RP 307. The court momentarily overruled the objection, but the prosecutor immediately objected again when defense counsel then moved on to explain the "clear and convincing standard." RP 307-08.

> [DEFENSE COUNSEL]: And so that's preponderance of the evidence. The next level of proof that we have in the law is called clear and convincing proof.

[1] If this Court agrees with Mr. Cole's first argument, count two must be dismissed and retrial is permitted only on the other counts.

> [PROSECUTOR]: Objection, Your Honor. Argument is outside of the instructions. There's been - - I know where this argument is going. I've heard it before. I don't think it's proper argument to make in a criminal matter, Your Honor.
>
> [DEFENSE COUNSEL]: And I've made this argument probably in every jury trial I've had for the last eight years.
>
> THE COURT: That objection is sustained.

RP 307-08.

The trial court erred in sustaining the prosecutor's objection to Mr. Cole's proper closing argument. Closing argument is the "last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). Thus, defense counsel must be afforded "the utmost freedom in the argument of the case." *State v. Perez-Cervantes*, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000). Certainly, he must be permitted to make accurate statements of law. *Cf. State v. Thorgerson*, 172 Wn.2d 438, 454, 258 P.3d 43 (2011) (holding prosecutor's closing argument discussing burden of proof was proper, "particularly given the latitude that a prosecutor has in arguing from the evidence during closing argument.").

The court itself tells jurors about the different standards of proof applicable to civil and criminal cases. *See* Washington Practice Series,

Washington Pattern Jury Instructions – Criminal, Appendix A. Jurors' Handbook to Washington Courts. The Jurors' Handbook describes the "kinds of cases" jurors may sit on, and emphasizes the "BURDEN OF PROOF" applicable to each. *Id.* at 4-5 (all-caps in original). The handbook reads:

> In most civil cases the plaintiff's burden is to prove the case by a PREPONDERANCE OF THE EVIDENCE, that is, that the plaintiff's version of what happened in the case is more probably true than not true.

Id. at 5 (all-caps in original). The handbook contrasts this burden with that applicable in a criminal case:

> The plaintiff's burden of proof is greater in a criminal case than in a civil case. In each criminal case you hear the judge will tell you all the elements of the crime that the plaintiff must prove; the plaintiff must prove each of these elements BEYOND A REASONABLE DOUBT before the defendant can be found guilty.

Id. (all-caps in original).

Mr. Cole was simply attempting to convey the same legally correct information to the jury in closing argument. The trial court erred in sustaining the State's objection to this proper argument.

c. <u>The prosecutor committed misconduct in closing argument by arguing facts not in evidence</u>.

The prosecutor, in contrast, made improper statements during closing argument. He argued that Mr. Cole could not avail himself of the

"uncontrollable circumstances" defense with respect to the December 1st accident because he "recklessly contribute[d] to it." RP 300. He said:

> Let's think about Badger Mountain and living on a mountain in December. Let's think about that. You're living on top of a mountain and it's winter. Do you need to take steps to live on a mountain? If you live on a mountain, do you need to know how to live on a mountain? Do you need to know that between November 1st and March 31st, you might want to put some studs on your car if you live on a mountain and you know what a mountain is, you know that the weather on top of a mountain might actually be worse than weather down in the valley, that if you have a court hearing, maybe you should get some chains on your car, maybe you should work on your car, maybe get your car prepped.

RP 300. The prosecutor said all of this despite the fact that there was no evidence that Mr. Cole's truck was not properly equipped for winter. RP 315-16.

It is well-settled that "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Accordingly, this Court should reverse the conviction on count three and remand for a new trial. *See id.*

d. Cumulative error deprived Mr. Cole of a fair trial, requiring reversal and remand for a new trial.

Mr. Cole submits that each error discussed above was independently prejudicial. However, regardless of whether any of these

errors in isolation would warrant reversal, they certainly do in the aggregate. "Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 522, 228 P.3d 813 (2010).

Here, Mr. Cole was denied his right to a fair trial by the combination of the improper evidentiary ruling, prosecutorial misconduct, and erroneous limitation on defense closing argument. Mr. Cole's defense was that he is a trustworthy person who did not knowingly or intentionally commit any crime. But the trial court excluded the key evidence of his trustworthiness (the fact that he dutifully attended 23 court hearings despite being poor and living far away), and the prosecutor capitalized on the exclusion of this relevant evidence by urging the jury to find that Mr. Cole was not trustworthy. The prosecutor then compounded the problem by wrongly claiming that Mr. Cole did not properly maintain his vehicle, and the court did not permit defense counsel to emphasize the relatively high burden of proof the State bore. Under all of these circumstances, Mr. Cole did not receive a fair trial, and this Court should remand for a new trial on all charges.

3. The statutes at issue violate due process, both facially and as applied, because they permit the State obtain felony convictions without proving a culpable mental state.

As noted, Mr. Cole's defense on all three counts was the absence of a culpable mental state: He did not knowingly possess drugs and did not intentionally miss court. But unlike in the typical criminal case, the State was not required to prove Mr. Cole's culpability for either crime. Rather, Mr. Cole was required to prove "unwitting possession" for count one and "uncontrollable circumstances" on count three. This burden-shifting violated Mr. Cole's right to due process under the Fourteenth Amendment and article I, section 3. U.S. Const. amend. XIV; Const. art. I, § 3.

a. Both statutes at issue require the defendant to prove the absence of a culpable mental state, rather than requiring the State to prove blameworthiness beyond a reasonable doubt.

The drug-possession statute provides, in relevant part:

> (1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.
>
> (2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

RCW 69.50.4013. The Supreme Court has construed the language of this statute to impose strict liability. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004). In other words, the State need not prove knowledge or intent to obtain a conviction. *See id.* Instead, the defendant bears the burden of proving "unwitting possession" by a preponderance of the evidence. *Id.* at 533.

Similarly, although the bail-jumping statute requires the State to prove the defendant had knowledge of his court date, it does not require the prosecution to prove the accused knowingly or intentionally missed his hearing. The statute provides:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1). If the defendant did not intentionally fail to appear, he must prove "uncontrollable circumstances" by a preponderance of the evidence:

> (3) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or

> surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.170(2); *see also State v. Fredrick*, 123 Wn. App. 347, 353-54, 97 P.3d 47 (2004); WPIC 19.16.[2]

b. The statutes violate due process because they create a presumption of guilt and relieve the State of its burden of proof.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt. *Winship*, 397 U.S. at 364.

Although the legislature has broad authority to define crimes, "due process places some limits on its exercise." *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957).

> As Holmes wrote in The Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.'

[2] The legislature has defined "uncontrollable circumstances" as "an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts." RCW 9A.76.010(4).

Id. at 229.

In *Lambert*, the Supreme Court addressed an ordinance that required felons living in Los Angeles to register. The Court held the law was invalid because it criminalized the failure to register without requiring the government to prove knowledge or willfulness. *Lambert*, 355 U.S. at 227-28. As is true of the statutes at issue in Mr. Cole's case, the law on its face did not require proof of a culpable mens rea, and the state courts had not read such an element into the ordinance. *Id.* at 227. The Court held that the registration provisions of the municipal code violated the Due Process Clause of the Fourteenth Amendment. *Id.*

To be sure, the Court in *Lambert* relied in part on the fact that the conduct at issue in that case (the failure to register) was "wholly passive." *Id.* at 228. But the same could be said of a failure to appear in court and the unwitting possession of drugs. In any event, the broader problem at issue in *Lambert* certainly exists here. These statutes presume the defendant has a culpable mental state and require him to prove otherwise to maintain his liberty. They run afoul of the Due Process Clause because they undermine the presumption of innocence – a presumption which "is the bedrock upon which our criminal justice system stands." *See State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

The federal courts' treatment of a Florida statute is instructive. *See Shelton v. Secretary, Dept. of Corrections*, 802 F.Supp.2d 1289, 1293 (M.D. Fla. 2011) ("*Shelton I*") *rev'd on other grounds*, 691 F.3d 1348 (11th Cir. 2012) ("*Shelton II*"). Florida, like all other states *except* Washington, requires the State to prove knowing possession beyond a reasonable doubt in a prosecution under the Uniform Controlled Substances Act. *Shelton II*, 691 F.3d at 1350-51; *State v. Adkins*, 96 So.3d 412, 425 (Fla. 2012) (Pariente, J., concurring in result); *Shelton I*, 802 F. Supp.2d at 1295 & n.4. But in 2002, the Florida legislature amended the statute such that the State no longer had to prove the defendant was aware of the *nature* of the substance he possessed. *Shelton II*, 691 F.3d at 1350. Instead, lack of knowledge of the illicit nature of the substance became an affirmative defense. *See id.*

A defendant convicted under this provision filed a petition for habeas corpus in federal district court, arguing that the statutory amendment violated due process. The district court agreed, and struck down the statute as unconstitutional. *Shelton I*, 802 F.Supp.2d at 1293. Like the U.S. Supreme Court in *Lambert*, the federal district court in *Shelton* acknowledged that legislatures have broad authority to define the elements of crimes. *Id.* at 1297-98. But this authority is "not without severe constraints and constitutional safeguards." *Id.* at 1298. In

particular, strict liability crimes are disfavored and subject to close constitutional scrutiny:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Id. at 1297 (quoting *Morisette v. United States*, 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952)).

In reviewing Supreme Court cases, the federal district court concluded that legislatures have more leeway to remove a mens rea from criminal statutes if the penalty is minimal, the stigma associated with conviction is insignificant, or the type of conduct purportedly regulated is related to the "public welfare." *Shelton I,* 802 F.Supp.2d at 1300. But because the controlled substances statute at issue imposed heavy penalties, resulted in burdensome collateral consequences, and regulated "inherently innocent" conduct, it did not pass constitutional muster. *Id.* at 1301-06. The same must be said of RCW 69.50.4013 and RCW 9A.76.170.

The State of Florida appealed the decision in *Shelton,* and the Eleventh Circuit reversed. However, the circuit court did not reach the merits of the constitutional claim in *Shelton,* instead reversing the district court on procedural grounds. *Shelton II*, 691 F.3d at 1355 ("To be clear,

this Court expresses no view on the underlying constitutional question, as we limit our analysis to AEDPA's narrow inquiry."). The court noted that after the district court issued its ruling, the Florida Supreme Court addressed the same issue in *Adkins*, and upheld the statute as constitutional. *Id.* at 1350. Both the Eleventh Circuit and the Florida Supreme Court emphasized that the legislature did *not* eliminate the knowledge requirement altogether, and implied that retaining the general knowledge requirement was critical to the statute's surviving the due process challenge. *Shelton II*, 691 F.3d at 1350-51 & 1354-55; *Adkins*, 96 So.3d at 422 (plurality); *id.* at 425 (Pariente, J., concurring in result). As the deciding justice in *Adkins* explained:

> Significantly, the State still bears the burden of proving a defendant's knowledge of presence [of drugs] in order to establish a defendant's actual or constructive possession of the controlled substance. Therefore, I agree that the statute does not punish strictly an unknowing possession or delivery, thereby saving the Act from being unconstitutionally applied to defendants where knowledge of the *presence* of the substance is unknown.

Adkins, 96 So.3d at 425 (Pariente, J., concurring in result) (internal citations omitted).

The Washington statute does not have the same saving grace. It eliminates the mens rea requirement altogether, and criminalizes unknowing possession of drugs unless the *defendant* proves he is innocent.

The statute is facially unconstitutional under the above caselaw, and it is unconstitutional as applied to Mr. Cole – who was forced to prove his innocence by a preponderance of the evidence in order to prevail.

The bail-jumping statute suffers the same infirmity, as it punishes an innocent failure to appear in court unless the defendant proves his absence was unintentional. As applied in this case, Mr. Cole was forced to prove "uncontrollable circumstances" by a preponderance of the evidence, and, as with the drug charge, he was unable to meet his burden to prove the innocence that should have been presumed.

The bail-jumping statute violates due process for the additional reason that it shifts the burden of proof on the *actus reus.* All crimes, including strict liability crimes, have a voluntariness component to the *actus reus* which the State must prove beyond a reasonable doubt. *State v. Eaton*, 168 Wn.2d 476, 481, 229 P.3d 704 (2010); *see also State v. Utter*, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). Requiring a defendant to prove "uncontrollable circumstances" runs counter to this requirement.

In *Eaton*, the Court vacated a drug-zone sentence enhancement because the State failed to prove beyond a reasonable doubt that the defendant took some voluntary action to place himself in the zone. *See Eaton*, 168 Wn.2d at 484-85. Instead, the police arrested Eaton and drove him to the prohibited zone. *See id.* Here, the State was not required to

prove beyond a reasonable doubt that Mr. Cole committed a voluntary act (or omission) on December 1, 2014; instead, Mr. Cole was required to prove an involuntary act. Because the affirmative defense negates an element of the crime, it violates due process to place the burden of proving the defense upon Mr. Cole. *See State v. W.R., Jr.*, 181 Wn.2d 757, 762-63, 336 P.3d 1134 (2014) (forcing defendant to prove affirmative defense of consent in a rape case violates due process because consent negates the element of forcible compulsion).

In sum, Mr. Cole asks this Court to hold that the convictions on all three counts violate due process, and to remand for a new trial at which the jury will be instructed on the State's burden to prove knowing possession and intentional failure to appear beyond a reasonable doubt.

4. The legal financial obligations should be stricken because Mr. Cole lacks the ability to pay.

a. Substantial evidence does not support a finding of ability to pay.

The sentencing court imposed $1,850 in legal financial obligations. CP 59. The court justified this order with the single statement: "You previously testified that you work, collecting firewood, and have a job selling that and so the court believes that in fact you can make payments on these financial obligations and have this paid off over time." RP 347.

This finding is not supported by substantial evidence. *See State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)) (A trial court's findings of fact must be supported by substantial evidence). Mr. Cole is indigent and qualified for court-appointed counsel both at trial and on appeal. Supp. CP ___ (sub 140) (Order of Indigency); Supp. CP ___ (sub 5-99) (Indigency Screen Form). He testified that he bought his clothes at Goodwill, and that he lives out of his truck when selling firewood in town. RP 220-23. He relies on food stamps to eat. Sub 5-99.

This case stands in contrast to others in which this Court has affirmed the imposition of costs. In *Richardson*, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, this Court affirmed the imposition of costs because the Presentence Report "establishe[d] a factual basis for the defendant's future ability to pay." *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991). But unlike the defendant in *Richardson*, Mr. Cole is not employed – instead he gathers and sells firewood to survive. And unlike in *Baldwin*, the record in this case indicated a *lack* of ability to pay. Thus,

the trial court's finding is not supported by substantial evidence, and should be stricken.

b. The imposition of LFO's on an impoverished defendant is improper under the relevant statutes and court rules, and violates principles of due process and equal protection.

Because the record clearly shows that Mr. Cole is impoverished, the imposition of legal financial obligations is unlawful. The legislature has mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3).

There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." *Id.* at 837. All of these problems lead to increased recidivism. *Blazina*, 182

Wn.2d at 837. Thus, imposing LFOs on a poor defendant only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State may argue that the court properly imposed a subset of these costs without regard to Mr. Cole's poverty, because the statutes in question use the word "shall" or "must." *See* RCW 7.68.035 ($500 penalty assessment "shall be imposed"); RCW 36.18.020(h) (convicted criminal defendants "shall be liable" for a $200 fee); RCW 43.43.7541 (every felony sentence "must include" a $100 DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which, as explained above, requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court *may not*

reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn. 2d 706, 355 P.3d 1093, 1096-97 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[3]

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is

[3] The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that 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."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). Indeed, when listing the LFOs imposed on the two defendants at issue, the court cited the Victim Penalty Assessment, DNA fee, and criminal filing fee. *Id.* at 831 (discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition cots). *See id.* If the Court were limiting its holding to a minority of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

Indeed, it does not appear that the Supreme Court has ever held that the DNA fee and "criminal filing fee" are exempt from the ability-to-

pay inquiry. And although Division Two so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 *with Blazina,* 182 Wn.2d at 830-39.

It would be particularly problematic to require Mr. Cole to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants.[4] This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover, supra*, at 1096 ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because "the error, if permitted to stand, would create inconsistent sentences for the same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties); *and see* RCW 9.94A.010 (3) (stating that a sentence should "[b]e

[4] This Court can take judicial notice of the fact that King County courts never impose this cost on indigent defendants. In the alternative, Mr. Cole would be happy to provide the Court with representative judgments from King County.

commensurate with the punishment imposed on others committing similar offenses").

GR 34, which was adopted at the end of 2010, also supports Mr. Cole's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay $50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Id.* at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading "would also allow

trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." *Id.* at 529. Given Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply here. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection

problems also arise from the arbitrarily disparate handling of the "criminal filing fee" across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that "principles of due process or equal protection" guided the court's analysis and recognizing that failure to require waiver of fees for indigent litigants "could lead to inconsistent results and disparate treatment of similarly situated individuals"). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating costs as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could

not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and impose LFOs only on those who have the ability to pay.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because "incarceration would result only if failure to pay was willful" and not due to indigence. *Id.* at 241. Unfortunately, this assumption was not borne out. Significant studies post-dating *Blank* found that indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. *See* Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay).[5] In other words, the risk of unconstitutional

[5] Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Cole concedes that the government has a legitimate interest in collecting costs and fees. But imposing costs and fees on impoverished people like Mr. Cole is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

In sum, because the record demonstrates Mr. Cole's extreme indigence, this Court should reverse and remand with instructions to strike all legal financial obligations.

D. CONCLUSION

Mr. Cole asks this Court to reverse and remand for dismissal of the conviction on count two and for retrial of the charges on counts one and three. In the alternative, all legal financial obligations should be stricken from the judgment.

Respectfully submitted this 19th day of November, 2015.

/s Lila J. Silverstein
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, CHARLES COLE, Appellant.	)))))))))	NO. 33575-5-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF NOVEMBER, 2015.

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