No. 48705-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID RAMIREZ,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

David Ramirez's defense at trial was involuntary intoxication. He asserted he was not guilty of possessing methamphetamine or assaulting an emergency room nurse because he was hallucinating at the time the crimes allegedly occurred. Despite eliciting this testimony from Mr. Ramirez at trial, and arguing these facts to the jury, Mr. Ramirez's counsel requested the jury be instructed only as to voluntary intoxication.

Voluntary intoxication was not legally a defense to the charges against Mr. Ramirez and was incongruous with the facts presented at trial. The instructions, as advocated for by defense counsel, suggested to the jury that it should disregard Mr. Ramirez's defense of involuntary intoxication. Because defense counsel's performance was deficient and prejudiced Mr. Ramirez, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. Mr. Ramirez was denied his right to the effective assistance of counsel under the Sixth Amendment and article I, section 22.

2. There was insufficient evidence for the jury's finding that Mr. Ramirez demonstrated or displayed an egregious lack of remorse.

3. The trial court failed to perform an individualized inquiry of Mr. Ramirez's circumstances before imposing $2,300 in discretionary legal financial obligations.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment and article I, section 22, guarantee a person accused of a crime the right to the effective assistance of counsel. A new trial is required where counsel's performance at trial was deficient and there is a reasonable probability that, but for the inadequate performance, the result at trial would have been different. Is reversal required where Mr. Ramirez's sole defense at trial was involuntary intoxication but defense counsel asked the jury be instructed on voluntary intoxication instead?

2. A jury is required to find any facts supporting an aggravating circumstance beyond a reasonable doubt. This Court has upheld a jury's finding that the defendant displayed an egregious lack of remorse where the accused relished in killing another human being. Where Mr. Ramirez sought medical attention for hallucinations, touched a nurse's breast, and then expressed his belief that the nurses invited or appreciated his advances, did the State fail to present sufficient evidence for this aggravating factor?

3. A trial court must consider a defendant's individual circumstances before imposing discretionary legal financial obligations at sentencing. Where the trial court made a general statement that Mr. Ramirez could earn money, but the evidence suggested Mr. Ramirez had spent considerable time in confinement, struggled with drug addiction throughout his life, and had a limited work history, should this Court remand the case for consideration of Mr. Ramirez's resources and the nature of the burden the legal financial obligations would impose upon him as required by RCW 10.01.160(3)?

D. STATEMENT OF THE CASE

David Ramirez had a disagreement with his wife and went to a bar. 2 RP 256-67. He had a few drinks with people he met at the bar, who then invited him to a party. 2 RP 257. Shortly after arriving at the party, Mr. Ramirez was offered a drink and began hallucinating. 2 RP 258-59. He saw snakes and became fearful of the cats in the home. 2 RP 260. He was extremely embarrassed, but also terrified he was going to die. 2 RP 260. A woman drove him to the emergency room. 2 RP 260.

At the hospital, Mr. Ramirez informed the registration receptionist that he was hallucinating. 1 RP 127. The triage nurse led

Mr. Ramirez into an examination room, introduced herself, and offered him a hospital gown. 1 RP 134-35. As she turned toward Mr. Ramirez to give him the gown, he reached out and silently grabbed her right breast. 1 RP 135. However, he immediately let go and backed away from the nurse, moving to the other side of the room. 1 RP 136. The police were contacted and Mr. Ramirez was moved to an examination room reserved for psychiatric patients. 1 RP 137, 151.

When an emergency room technician attempted to draw Mr. Ramirez's blood, Mr. Ramirez told him that based on the way the nurses were dressed, he believed they wanted to have sex with him. 1 RP 147. The technician believed Mr. Ramirez was masturbating while in the bed. 1 RP 149. He also observed that Mr. Ramirez appeared to be under the influence of drugs. 1 RP 152. He noted that Mr. Ramirez was sweating profusely and mumbling to himself. 1 RP 152.

When a security guard arrived, Mr. Ramirez was shouting profanities and yelling that he was "not gay." 1 RP 161. He told the security guard that the nurses should be grateful to be groped. 1 RP 163. When told he had been masturbating, Mr. Ramirez expressed surprise, asking the guard, "was I masturbating?" 2 RP 283.

The physician who treated Mr. Ramirez observed that Mr. Ramirez seemed agitated and was speaking quickly. 2 RP 217. Mr. Ramirez's heart rate and blood pressure were high and he continued to complain of hallucinations. 2 RP 218. Mr. Ramirez told the doctor that he wanted to have sex with a nurse. 2 RP 218.

After the police arrived, a substance that later tested positive for methamphetamine was found in Mr. Ramirez's wallet. 1 RP 192; 2 RP 246.

The State charged Mr. Ramirez with third degree assault with sexual motivation and possession of methamphetamine. CP 1-2. It also alleged three additional aggravating circumstances: (1) Mr. Ramirez demonstrated or displayed an egregious lack of remorse; (2) his prior unscored misdemeanor history resulted in a presumptive sentence that was clearly too lenient; and (3) he had committed multiple current offenses and his high offender score resulted in one of the current offenses going unpunished. CP 25.

Mr. Ramirez's defense at trial was that he was experiencing hallucinations as a result of a substance he had consumed involuntarily at the party he attended with strangers. 2 RP 259-60, 264. Although Mr. Ramirez's attorney relied on these facts to argue for acquittal, he

did not request the jury be instructed as to involuntary intoxication. 2 RP 329. Instead, he successfully argued for the jury to be instructed on voluntary intoxication after this instruction was proposed by the State. 2 RP 239-40, 293-94.

The jury found Mr. Ramirez guilty of the possession and assault charges and found he committed the assault with sexual motivation and had displayed an egregious lack of remorse. CP 63-66. The trial court sentenced Mr. Ramirez to a consecutive sentence totaling 84 months, based on the judge's finding that the unscored misdemeanor history resulted in a presumptive sentence that was clearly too lenient and that his high offender score resulted in the possession charge going unpunished. CP 90.

E. ARGUMENT

1. Mr. Ramirez was denied the effective assistance of counsel when his attorney requested a voluntary intoxication instruction that conflicted with the defense's theory of the case.

a. Mr. Ramirez had the constitutionally protected right to the effective assistance of counsel.

A person accused of a crime has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI;[1] Const. art. I, § 22;[2] *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Khan*, 184 Wn.2d 679, 688, 363 P.3d 577 (2015). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (*quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

> An accused's right to be represented by counsel is a fundamental component of our criminal justice

[1] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defence."

[2] Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel…"

> system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms" (*quoting Strickland*, 466 U.S. at 688)). While an attorney's decisions are treated with deference, his actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

If there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Khan*, 129 Wn.2d at 688. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law [and is] reviewed *de novo*." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

b. Defense counsel's performance was deficient.

i. *Mr. Ramirez's defense at trial was that he was not criminally responsible for his actions because he had been drugged against his will.*

Mr. Ramirez was charged with third degree assault by battery with sexual motivation and possession of methamphetamine. CP 1-2, 5. His sole defense to these charges at trial was that he was experiencing hallucinations at the time he allegedly grabbed the nurse's breast and was in possession of the drug. 1 RP 124 (opening argument discussing hallucinations); 2 RP 259-60, 264 (Mr. Ramirez's testimony

about the hallucinations); 2 RP 329 (relying on the hallucinations in closing argument to argue for acquittal).

The evidence presented by the defense indicated Mr. Ramirez had involuntarily ingested the drug that produced the hallucinations. Mr. Ramirez testified he had a disagreement with his wife on the day preceding the incident and went to a bar. 2 RP 256-57. He had approximately three to four beers before leaving the bar at 2:00 a.m. with people he had just met that night. 2 RP 257-58. Not long after arriving at the home of one of these people, he was given what he believed to be a beer and he started experiencing hallucinations. 2 RP 258-59. One of the women at the house then dropped him off at the hospital. 2 RP 260.

Involuntary intoxication is a complete defense to a crime. *State v. Mriglot*, 88 Wn.2d 573, 575, 564 P.2d 784 (1977); *State v. Stacy*, 181 Wn. App. 553, 570, 326 P.3d 136 (2014). A defendant may argue for acquittal based on the fact that his involuntary intoxication put him in such a state of mind that he did not "know the nature and quality of his act or know that his act [was] wrong." *Mriglot*, 88 Wn.2d at 575. "[O]nce a defendant has shown that the degree of his involuntary intoxication meets the appropriate insanity test, his criminal capacity is

vitiated and the jury never reaches the issue of specific intent." *Mriglot*, 88 Wn.2d at 576. The burden is on the defendant to prove the defense of involuntary intoxication by a preponderance of the evidence. *State v. Deer*, 175 Wn.2d 725, 736, 287 P.3d 539 (2012).

Despite the fact that involuntary intoxication was Mr. Ramirez's sole defense at trial, defense counsel failed to assert this theory to the jury and requested the jury be instructed on voluntary intoxication instead.

ii. *Defense counsel initially rejected pursuing a diminished capacity defense to the charges against Mr. Ramirez.*

Prior to trial, the State asked to clarify on the record that Mr. Ramirez was not pursuing a diminished capacity defense. 1 RP 19. Diminished capacity is an appropriate defense when a defendant argues voluntary intoxication impaired his ability to form the requisite level of intent. *State v. Thomas*, 123 Wn. App. 771, 776, 98 P.3d 1258 (2004). It may be asserted only "when either specific intent or knowledge is an element of the crime charged."[3] *Id.* at 779. In such cases, the jury may

[3] Traditionally, the rule was that evidence of diminished capacity could negate specific intent but not general intent. *State v. Atsbeha*, 142 Wn.2d 904, 919, 16 P.3d 626 (2001). However, RCW 9A.08.010 replaced the concepts of specific and general intent with four levels of culpability: intent, knowledge, recklessness, and criminal negligence. *Id.*; *State v. Allen*, 101 Wn.2d 355, 359, 678 P.2d 798 (1984).

consider evidence of diminished capacity to determine whether the accused had the capacity to form the requisite mental state. *Id.*; *see also State v. Marchi*, 158 Wn. App. 823, 834, 243 P.3d 556 (2010) (explaining that the defense of diminished capacity is treated as a rule of evidence, which permits the defense to introduce evidence relevant to the individual's subjective state of mind).

Addressing the assault charge, defense counsel explained that while Mr. Ramirez might take the stand and testify about the hallucinations he experienced at the hospital, the defense was not asserting a diminished capacity defense because Mr. Ramirez had been charged with "a crime of intent." 1 RP 20. While defense counsel's explanation was vague, he was correct to consider the nature of the crime when considering how to defend against the charges at trial.

This Court has defined assault by battery as "an unlawful touching with criminal intent." *State v. Keend*, 140 Wn. App. 858, 866-67, 166 P.3d 1268 (2007) (quoting *State v. Russell*, 69 Wn. App. 237, 246, 848 P.2d 743, *review denied*, 122 Wn.2d 1003, 859 P.2d 603 (1993)). It requires the mens rea of intent, but not the specific intent to accomplish some further result. *Id.* at 866. "[A]ssault by battery simply requires intent to do the physical act constituting assault." *Id.* at

867. Similarly, possession of a controlled substance is a strict liability crime. *Deer*, 175 Wn.2d at 735. Because neither of the crimes alleged by the State required specific intent or knowledge, defense counsel properly considered, and rejected, raising diminished capacity due to involuntary intoxication as a defense. *Thomas*, 123 Wn. App. at 776.

iii. *Despite explicitly rejecting a diminished capacity defense, counsel later advocated for the voluntary intoxication instruction proposed by the State.*

Despite the fact the defense made it clear it would not be pursuing a diminished capacity defense, and the evidence at trial supported only an involuntary intoxication defense, the State proposed a voluntary intoxication instruction. 2 RP 239. In response to questioning by the court the State explained, "[w]ell I assumed that the defendant would ask for it, but if he doesn't want it, I don't think it's necessary." 2 RP 239. The court then engaged in the following exchange with defense counsel:

> [Defense counsel]: I don't have any objection to it.
>
> THE COURT: Well, that's not what I'm hearing. What she was saying is that if the defendant doesn't want it, then she doesn't think it needs to be given.
>
> [Prosecutor]: If he is submitting – if he is saying that he wants the instruction, then I will submit it.

[Defense counsel]: That's fine with us.

THE COURT: Do you want it or not?

[Defense counsel]: Yes.

2 RP 239-40.

However, before closing arguments, the State asked to be heard on the voluntary intoxication instruction again. 2 RP 292. The deputy prosecuting attorney asked to withdraw the instruction, based on her understanding that the instruction was only appropriate where voluntary intoxication had been asserted as a defense. 2 RP 292-93. Defense counsel argued that the State should not be permitted to withdraw the instruction after proposing it and that, in any event, Mr. Ramirez had testified to voluntarily drinking beer that night. 2 RP 293.

The State responded, and the court agreed, that there had been no evidence presented that the beers voluntarily consumed by Mr. Ramirez caused his hallucinations. 2 RP 294. Thus, the instruction was inappropriate. 2 RP 294. However, despite this finding by the court, it acceded to defense counsel's wishes after the deputy prosecuting attorney acknowledged the State would not be harmed by the instruction. 2 RP 293-94.

The State was correct in moving to withdraw the instruction. Indeed, as the deputy prosecuting attorney pointed out, the "Note on Use" immediately following the pattern jury instruction stated the instruction should not be used in cases where involuntary intoxication was claimed. 11 Wash. Prac., Pattern Jury Inst. Crim. WPIC 18.10 (4th ed. 2016). If nothing else, this should have alerted defense counsel to his error.

Defense counsel proposed an unwitting possession instruction as to the possession charge, which the Court granted. 2 RP 290-91. At no point did defense counsel request that the jury be instructed as the defense of involuntary intoxication.

iv. *Defense counsel's advocacy for an improper instruction, and failure to request the appropriate instruction, constituted deficient performance.*

While a legitimate trial tactic cannot serve as the basis for a claim of ineffective assistance of counsel, the attorney's trial strategy must be based on reasoned decision-making. *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007). This Court has found that a failure to request an instruction on a possible defense, which is not based upon reasoned decision-making, constitutes ineffective assistance of counsel. *Id.*

In *Hubert*, the defendant was charged with second degree rape after he allegedly went into an acquaintance's bedroom and began having sex with her while she slept. *Id.* at 927. According to the defendant, the complaining witness was awake and initially receptive to his advances. *Id.* at 929. Despite the defendant's testimony to this effect, defense counsel failed to raise or argue the "reasonable belief" defense. *Id.* This Court held the attorney's failure to advance the defense presented at trial was "plainly deficient performance." *Id.* at 930.

In *Hubert*, it was apparent the trial attorney's failure was not a strategic decision because the attorney specifically attested he was unfamiliar with the statutory defense at the time of the trial. *Id.* at 929. However, this Court reached the same result in *State v. Powell* without a declaration from defense counsel. 150 Wn. App. 139, 155, 206 P.3d 703 (2009). In *Powell*, the defense attorney's presentation to the jury suggested he was aware of the "reasonable belief" defense. *Id.* Yet he failed to request an instruction despite the fact the evidence supported this defense, counsel had effectively argued this defense to the jury, and an instruction would have been consistent with the defendant's theory of the case. *Id.*

Here, Mr. Ramirez's defense at trial was involuntary intoxication. 2 RP 259-60, 264, 329. Defense counsel recognized this was the defense, elicited testimony from Mr. Ramirez about the fact Mr. Ramirez had involuntarily ingested a hallucinogen, and relied on these hallucinations in arguing for acquittal. 2 RP 259-60, 264, 329. Yet, just as in *Hubert* and *Powell*, defense counsel failed to request the jury be instructed on the defense's theory. Even worse, the trial attorney then requested an improper voluntary intoxication instruction over the State's objection. 2 RP 239-40. This instruction only served to undermine Mr. Ramirez's defense at trial, informing the jury:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

CP 55.

The language of the voluntary intoxication instruction, combined with the lack of any instruction on involuntary intoxication, suggested to the jury that it should disregard Mr. Ramirez's defense at trial. Defense counsel argued during closing argument that the jury should acquit because assault by battery was a general intent crime, but that the hallucinations negated his intent. 2 RP 329. However, the jury

instructions specifically stated voluntary intoxication did not make the act any less criminal, and the jury was instructed the only intent at issue for the battery charge was the intent "when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 49, 55. In addition, presenting evidence that Mr. Ramirez was involuntarily intoxicated while relying on a voluntary intoxication instruction signaled to the jury that involuntary intoxication was not a defense to the crime at all.

This, of course, was incorrect, as involuntary intoxication, unlike voluntary intoxication, was a complete defense to the crime. *Mriglot*, 88 Wn.2d at 576; *Cf. State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987) (discussing the fact that voluntary intoxication merely negates intent and the burden is always on the State to prove the individual acted with the necessary culpable mental state). Despite the fact the defense's theory at trial was that Mr. Ramirez was involuntarily intoxicated, defense counsel failed to advance this defense at trial and further undermined the defense by requesting the wrong instruction. Defense counsel's performance was deficient.

c. Trial counsel's deficient performance prejudiced Mr. Ramirez.

Where there is a reasonable possibility that but for counsel's inadequate performance, the result would have been different, reversal is required. *Khan*, 129 Wn.2d at 688. In *Hubert*, this Court reversed because it determined the "the jury had no way to understand the legal significance of the evidence" supporting the defense's theory at trial. *Hubert*, 138 Wn. App. at 932. Similar to in *Hubert*, defense counsel failed to provide the jury with the information it needed to acquit, based on the defense presented by Mr. Ramirez. If the jury believed that Mr. Ramirez was involuntary intoxicated that night, it had no instructions on what to do with that information. In addition, the instructions that were provided to the jury suggested that it should disregard any claim of involuntary intoxication, rather than identify it as a complete defense to the crime.

Under these circumstances, there is a reasonable possibility the result at trial would have been different if not for counsel's deficient performance. This Court should reverse.

2. The State presented insufficient evidence to support the jury's finding that Mr. Ramirez demonstrated an "egregious lack of remorse."

The State alleged the aggravating fact at trial that Mr. Ramirez "demonstrated or displayed an egregious lack of remorse" based upon statements the State claimed he made after allegedly assaulting the nurse. CP 25. The jury returned a special interrogatory in the affirmative, and this finding authorized the trial court to impose an exceptional sentence.[4] RCW 9.94A.535(3)(q).

A jury is required to find any facts supporting an aggravating circumstance beyond a reasonable doubt. *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); U.S. Const. amends. VI, XIV. "A jury's finding by special interrogatory is reviewed under the sufficiency of the evidence standard." *Id.* This Court must determine whether, evaluating the evidence in the light most favorable to the State, any rational jury could have found the defendant displayed an egregious lack of remorse beyond a reasonable doubt. *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

[4] The court did not rely on this aggravating factor to impose the exceptional sentence against Mr. Ramirez. CP 81, 90. Nonetheless, the issue remains that the jury found this aggravating circumstance in the absence of sufficient evidence.

The language of RCW 9.94A.535(3)(q) was designed to codify the existing common law, but "egregious lack of remorse" has not been defined by our courts and is not defined within the statute. Laws of 2005, ch. 142, § 23. However, this Court has held that "[t]he mundane lack of remorse found in run-of-the-mill criminals is not sufficient to aggravate an offense." *State v. Garibay*, 67 Wn. App. 773, 781, 841 P.2d 49 (1992) (*abrogated on other grounds by State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996)). Any alleged lack of remorse must be "aggravated or egregious." *Id.*

In the absence of a statutory definition, a term must be given its plain and ordinary meaning ascertained from a standard dictionary. *State v. Zigan*, 166 Wn. App. 597, 602, 270 P.3d 625 (2012). "Egregious" is defined as conspicuously, especially, or flagrantly bad.[5]

This Court's prior decisions illuminate what it has found to be conspicuously, especially, or fragrantly bad behavior, as opposed to merely a demonstration of a lack of remorse. For example, it found a defendant's conduct demonstrated an "egregious" lack of remorse where he intentionally ran into a woman on a motorcycle, killing her

[5] http://www.merriam-webster.com/dictionary/egregious (last accessed October 18, 2016).

instantly, and then laughed with officers at the scene and asked the woman's husband if he was "ready to bleed?" *Zigan*, 166 Wn. App. at 602. This Court also found an "egregious" lack of remorse where the defendant joked with her husband's killer about the sounds her husband made as he was dying. *State v. Wood*, 57 Wn. App. 792, 795, 790 P.2d 220 (1990); *see also State v. Erickson*, 108 Wn. App. 732, 739-40, 33 P.3d 85 (2001) (egregious lack of remorse where the defendant bragged and laughed about the murder and told police he felt no remorse). In each instance, the accused expressed pleasure or enjoyment in the victim's death.

In stark contrast, the evidence presented by the State in this case was that after Mr. Ramirez allegedly touched the nurse, he told an emergency room technician that based on the way the "nurses dressed, they wanted to have sex with him." 1 RP 147. A security officer at the hospital also testified that Mr. Ramirez stated: "Look at her butt. They are glad I groped her. They should be thankful. They should be thanking me." 1 RP 163. He later expressed to a physician he wanted to have sex with a nurse. 2 RP 218.

While his comments were inappropriate, Mr. Ramirez had come to the emergency room for assistance because he was having

hallucinations. 1 RP 127. The registration receptionist at the emergency room testified that Mr. Ramirez was a "little slow." 1 RP 127. The nurse testified Mr. Ramirez touched her briefly and then immediately backed away from her, to the other side of the room. 1 RP 135. Mr. Ramirez's subsequent comments were not directed at the nurse he assaulted, and his comments primarily demonstrated confusion about the nurses' interest in him, rather than an egregious lack of remorse.

Mr. Ramirez's actions did not rise to the level present in cases where this Court has found an egregious lack of remorse, such as *Zigan* or *Wood*. This Court should reverse the jury's finding under RCW 9.94A.535(3)(q) for insufficient evidence.

3. The legal financial obligations imposed against Mr. Ramirez should be stricken and the case remanded because the court failed to consider Mr. Ramirez's resources and the nature of the burden the fees and costs would impose as required by RCW 10.01.160(3).

Under RCW 10.01.160(3), a court may order a defendant to pay legal financial obligations (LFOs), but it "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." In determining the amount of financial obligations, "the court shall take account of the financial resources of the defendant and the nature of the

burden that payment of costs will impose." RCW 10.01.160(3). At sentencing, the trial court ordered Mr. Ramirez to pay a total of $2,900 in legal financial obligations, which included discretionary costs of $2,100 for his court appointed attorney and $200 in court costs. CP 83.

In *State v. Blazina*, our supreme court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. 182 Wn.2d 827, 836, 344 P.3d 680 (2015). Unpaid costs from a criminal conviction increase recidivism for indigent offenders because they "accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time"; an impoverished person is far more likely to accumulate astronomical interest than a wealthy person who can pay the costs in a timely manner; and "legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs," which may "have serious negative consequences on employment, on housing, and on finances." *Id.* (internal citations omitted). "LFO debt also impacts credit ratings, making it more difficult to find secure housing." *Id.* (citing 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 (2008), at 43).

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." *Id.* 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.*

The trial court failed to conduct an individual analysis of Mr. Ramirez's circumstances before imposing these discretionary financial obligations. The trial court stated, "I'm ordering – finding that he has the ability to earn money and make small payments on his financial obligations." 2 RP 375. It ordered Mr. Ramirez pay $25 per month but offered no explanation for why it believed Mr. Ramirez had the ability to earn enough money to afford $2,900 in LFOs. 2 RP 376.

The evidence did not support the trial court's vague conclusion. The trial court sentenced Mr. Ramirez to an exceptional sentence of 84 months of incarceration and the evidence before the court did not suggest Mr. Ramirez would be able to find employment upon his

release from prison. CP 81. Mr. Ramirez had recently been released from the Special Commitment Center and had just begun integrating back into the community when the allegations were made against him in this case. 2 RP 368-69. He had found a job with a church and, because he did not have a driver's license, a friend was driving him back and forth to work. 2 RP 360. He had also opened a back account for the first time in his life and was just learning how to use a cell phone. 2 RP 360.

As the State acknowledged, Mr. Ramirez's problems seemed to stem from his drug addiction, which had caused him to repeatedly return to prison throughout his life. 2 RP 369. The fact that he had briefly held a job at a church, relying on a friend's kindness for transportation, did not suggest he had the ability to earn the money required to pay $2,900 in LFOs.

Mr. Ramirez's counsel did not object to the imposition of the LFOs, and even requested the court impose a greater amount in attorney's fees than the court initially suggested. 2 RP 375. However, following *Blazina*, this Court has repeatedly exercised its discretion to consider the imposition of LFOs, even where trial counsel has failed to object, because of the "pernicious consequences of 'broken LFO

systems' on indigent defendants." *State v. Tedder*, 194 Wn. App. 753, 757, 378 P.3d 246 (2016) (quoting *Blazina*, 182 Wn.2d at 835); *see also State v. Cardenas-Flores*, 194 Wn. App. 496, 521, 374 P.3d 1217 (2016).

This Court should remand for resentencing and require the sentencing court to engage in an adequate inquiry of Mr. Ramirez's ability to pay discretionary LFOs. *Cardenas-Flores*, 194 Wn. App. at 521. In addition, in light of the evidence presented to the trial court, this Court should waive any costs requested on appeal. *Id.* at 521-22; *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).

F. CONCLUSION

This Court should reverse Mr. Ramirez's convictions because he was denied his constitutional right to the effective assistance of counsel. In addition, the State presented insufficient evidence that Mr. Ramirez demonstrated or displayed an egregious lack of remorse, requiring reversal of that finding. Finally, this Court should exercise its discretion to remand Mr. Ramirez's case to the trial court for consideration of whether he can pay the legal financial obligations imposed at sentencing, and should waive any requested costs on appeal.

DATED this 20th day of October, 2016.

Respectfully submitted,

Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 48705-5-II
v.	)	
	)	
DAVID RAMIREZ,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARA BEIGH, DPA [appeals@lewiscountywa.gov] LEWIS COUNTY PROSECUTING ATTORNEY 345 W MAIN ST FL 2 CHEHALIS, WA 98532	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
[X] DAVID RAMIREZ 954222 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF OCTOBER, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
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Phone (206) 587-2711
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WASHINGTON APPELLATE PROJECT

October 20, 2016 - 3:56 PM

Transmittal Letter

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Case Name: STATE V. DAVID RAMIREZ
Court of Appeals Case Number: 48705-5

Is this a Personal Restraint Petition? Yes ■ No

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Statement of Arrangements

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Statement of Additional Authorities

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