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Court of Appeals  
Division I  
State of Washington

NO. 73552-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

SIMON SOLOMON,

Appellant.

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

The Honorable Michael T. Downes, Judge

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BRIEF OF APPELLANT

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JARED B. STEED  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving a flawed reasonable doubt instruction, violating due process and the right to a jury trial.

2. Insufficient evidence supports the unlawful possession of a firearm conviction because the State failed to prove the alleged gun was operable.

3. Insufficient evidence supports the firearm enhancement because the State failed to prove the alleged gun was operable.

4. The trial court erred in denying appellant's motion to dismiss the unlawful possession of a firearm charge and firearm enhancement for insufficient evidence.

Issues Pertaining to Assignments of Error

1. Does the jury instruction defining reasonable doubt as "one for which a reason exists" misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to the accused to provide a reason for why reasonable doubt exists?

2. The State charged appellant with first degree unlawful possession of a firearm, as well as, a firearm enhancement based on his alleged possession of a handgun during an attempted robbery. To prove either unlawful possession of a firearm and/or a firearm enhancement, the State must introduce facts from which the jury may find beyond a

reasonable doubt that the item in question falls under the definition of a “firearm,” that is, a weapon or device from which a projectile may be fired by an explosive such as gunpowder. This requires proof that the weapon or device is operable. Where the alleged handgun was not recovered and the State presented no evidence of any tell-tale characteristics of an operable firearm, such as spent bullets, shell casings, bullet holes, or muzzle flashes, did the State present sufficient evidence that an operable firearm was used in commission of the crimes?

B. STATEMENT OF THE CASE

1. Procedural History.

The Snohomish county prosecutor charged appellant Solomon Simon with one count each of first degree unlawful possession of a firearm and first degree robbery for an incident that occurred on September 30, 2014. The State further alleged that Solomon was on community custody and also armed with a firearm during the robbery. CP 180-81. Solomon’s case was severed from that of his co-defendant, Jal Thareek, before trial began. 5RP<sup>1</sup> 34-35.

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<sup>1</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP – January 22, 2015; 2RP – January 29, 2015; 3RP – February 5, 2015; 4RP – April 10, 2015; 5RP – April 13, 2015; 6RP – April 14, 2015; 7RP – April 15, 2015; 8RP – April 16, 2015; 9RP – April 17, 2015; 10RP – April 20, 2015; 11RP – April 21, 2015; 12RP – April 22, 2015; 13RP – April 23, 2015; 14RP – May 11, 2015; 15RP – May 29, 2015.

A jury found Solomon not guilty of first degree robbery. CP 94; 13RP 3. The jury found Solomon guilty of attempted first degree robbery. CP 93; 13RP 3. The jury also found Solomon guilty of first degree unlawful possession of a firearm. CP 89; 13RP 3. The jury also found Solomon was armed with a firearm during the robbery. CP 92; 13RP 3-4. Solomon stipulated to being on community custody at the time of the alleged attempted robbery. CP 142-43.

The trial court sentenced Solomon to concurrent prison sentences of 56.25 months imprisonment on the attempted first degree robbery and 41 months imprisonment on the unlawful possession of a firearm. The court also imposed a consecutive 36-month firearm enhancement, for a total prison term of 92.25 months. CP 61-72; 15RP 10-11. Solomon timely appeals. CP 1-13.

## 2. Trial Testimony.

In September 2014, Brandon Smith placed an advertisement on Craigslist offering to sell marijuana. 7RP 40, 113-14. Smith spent the summers in eastern Washington growing and harvesting marijuana. 7RP112-13, 118-19. Smith was provided with two pounds of marijuana in exchange for his work. 7RP 131; 8RP 19. Smith was unemployed and sold marijuana to support himself and his family. 7RP 109-11. Smith had

previously posted ads online offering to sell marijuana. 7RP 114-15; 8RP 17.

Smith was contacted in response to the ad on September 26, 2014. 7RP 42-44. Smith told the person he had a quarter of a pound of marijuana for sale. 7RP 58. Initial arrangements Smith made to meet with the person fell through. 7RP 44-46. Smith and the person finally agreed to meet in the parking lot of a Walmart in Tulalip on September 30, 2014. 7RP 46-47. Smith agreed to sell two ounces of marijuana in exchange for \$300. 7RP 57-58, 66.

Smith arrived at Walmart early in order to do some grocery shopping. 7RP 47-48. After Smith finished his shopping, he called the person and asked where they were. The person responded that, "we're coming." Smith explained it was the first indication that more than one person would be arriving to purchase marijuana. 7RP 49-50.

Smith moved his car next to another parked car in a well lit area of the parking lot. 7RP 49-50. A few minutes later, a man came to the passenger side of Smith's car and asked, "is that you?" Smith confirmed he was, and let the person inside the car. 7RP 51. Smith later identified the man as Jal Thareek. 7RP 51, 71.

Thareek closed the car door and almost immediately pulled out a small black revolver. 7RP 52. Smith believed it was a real gun because it

was “glossy” and chrome lined. 7RP 52. Another man Smith later identified as Solomon knocked on the back driver’s side window and asked to be let inside the car. 7RP 52-53, 72. Because the car doors were locked, Solomon moved to the passenger side of the car, and switched seats with Thareek. 7RP 53.

Smith noticed the car keys were no longer in the ignition once Solomon got inside the car. 7RP 54. Smith was then hit in the face with a gun which knocked his glasses off. 7RP 54-55. Solomon told Smith “he was going to blow my brains out.” 7RP 66. Smith described the gun as a black .40 or .45 caliber. 7RP 54. Smith was familiar with firearms and believed the gun was real because he saw rifling and chrome lining in the barrel. 7RP 55. Smith could not tell if the gun was loaded. 7RP 55.

In response, Smith reached for his own gun inside his pocket. 7RP 55. The gun became stuck on Smith’s pocket stitching. 7RP 56. Solomon asked where the marijuana was. Smith turned on a light and showed Solomon two ounces of marijuana in the center console. 7RP 56-57. Smith then shined the light in Solomon’s face, knocked his gun away, and pointed his own gun at Solomon’s chest. 7RP 59. Solomon screamed, “don’t shoot me,” and jumped out of the car. 7RP 59. Smith locked the car doors. 7RP 59.

Solomon banged on the window outside of the car and told Smith to give him the marijuana. 7RP 59. Solomon asked Smith, “do you want to get in a fire fight?” 7RP 59. Thareek broke the rear passenger door handle trying to get inside the car. 7RP 59, 73-74, 103. Smith turned toward Thareek and heard a loud boom and shattering glass. 7RP 60, 74-75, 102, 172. Smith believed Solomon had shot through the car. 7RP 60, 103, 172. Smith was not shot. There was no physical evidence of bullet damage to his car. Smith acknowledged he was not sure whether Solomon had actually shot into the car. 7RP 170-71.

In response, Smith fired a single round from his gun at Solomon. Smith’s gun contained only one bullet. 7RP 60-61, 103, 172. Smith then pointed the gun at Thareek and told him to “get the F out of here.” 7RP 60-61. Solomon and Thareek ran off. 7RP 61, 103.

Other witnesses were in the Walmart parking lot at the time of the incident. 14-year-old, J.R., was getting out of car with her mother, Jeanna Reeves, when she saw two people walking towards a car “yelling at each other.” 6RP 170-72, 191. J.R. could not tell what ethnicity the people were, or whether they were men or women. 6RP 174, 176-77, 180-81. J.R. saw the taller of the two people pull a gun out of their pants. 6RP 172-73, 182. J.R. heard two gunshots spaced apart by a second or two. J.R. heard glass shatter after the first shot. 6RP 175-76.

J.R. told her mother that she saw a man with a gun. 6RP 200-02. Reeves told J.R. to get inside the store. 6RP 215. Reeves heard profanity around an older model SUV. 6RP 210-11, 213. Reeves saw two men standing at the passenger side of the SUV. 2RP 211. She could not tell what ethnicity they were. 6RP 214. Reeves heard three gunshots while her and J.R. were walking toward the store. Reeves heard glass shatter after the second shot. 6RP 216-17. Reeves looked back and saw the men walking with arms close to their bodies. 6RP 217-18. The men did not appear to be in a hurry. 6RP 219.

Dawn and David Sallee were also planning to do shopping at Walmart. 9RP 121-22; 10RP 16. David, an off duty police officer, noticed men running around a car on the north end of the building. 10RP 15-17. David and Dawn heard one loud pop while walking toward the store. 9RP 124-25, 136-37; 10RP 18, 32. Both believed the sound was from fireworks. 9RP 125; 10RP 18, 32. Neither heard any glass shatter. 9RP 138; 10RP 18, 32. Dawn did not see a gun. 9RP 135.

Dawn and David continued watching the men after hearing the pop. 9RP 126; 10RP 20. David saw one of the men grab his stomach and lean over. He assumed the men were laughing or smiling and "goofing around." 10RP 20. David returned to the parking lot after the incident. 9RP 131; 10RP 26, 32. He found no bullet holes, shell casings, or guns.

9RP 133; 10RP 27, 33. David did see broken glass shattered in an outward direction. 10RP 33.

Eleanor Stewart was also at Walmart. She heard what she thought were fireworks. 10RP 172-73. Eleanor saw a heavy set African American man exit a car. She then heard one man say, "shit, shit. Run, run." 10RP 174-75. Eleanor testified that she heard two gunshots. 10RP 175-76. She told police she only heard one gunshot however. 10RP 179.

Gary Stewart was working at Walmart at the time of the incident. 9RP 148. Stewart heard, "maybe a little scuffling," followed by two or three gunshots. 9RP 149-51, 156. He heard glass breaking. 9RP 153, 156. Stewart saw two African American men in the parking lot. 9RP 151. One appeared to put something in his belt. Stewart could not tell what the object was. 9RP 152-53.

After the incident, Smith found his car keys and left the parking lot. 7RP 62. He did not call police. 7RP 143. Smith pulled over to let police responding to the scene pass him. Smith then continued to drive home. 7RP 63, 145, 148. Smith could not find his glasses, phone, or the marijuana after the incident. 7RP 62, 64, 94, 165-66; 8RP 23. Smith never saw Solomon or Thareek reach inside his car. Smith acknowledged he was not certain whether Solomon or Thareek actually took anything from the car. 7RP 166-67.

Danielle Smith, could tell something was wrong with her husband when Smith arrived home. 7RP 65, 151; 8RP 110-11, 134, 191-93. Smith was nervous and upset. 8RP 113. Danielle noticed that the side of Smith's face was slightly red. 8RP 111, 193.

Smith did not initially tell Danielle what happened. 8RP 134. Eventually Smith told Danielle and his father, Darryl Smith, that he thought he shot someone at Walmart. 8RP 120, 203-04. Smith explained that two men tried to rob him at Walmart. 8RP 193. One man pulled a gun on him and hit him in the face with it. 8RP 120-21, 138. Another man got in the car, held a gun to his head, and took the keys out of the ignition. 8RP 196-97. Smith pulled out his own gun in response, heard his window explode, and believed that someone was shooting at him. Smith shot back in response. 8RP 122, 138, 197. Smith did not tell Danielle or Darryl that he was at Walmart to sell marijuana. 8RP 129-32, 194-95, 203-06. No one at the house called 911. 8RP 137-38, 145.

After about 20 minutes at the house, Smith and Danielle drove separately to the Washington State Patrol office. 7RP 67-68, 149-50; 8RP 123-25, 136, 199, 209. One hour and 39 minutes passed between when the incident happened and when Smith finally reported it to police. 10RP 144. In the interim, police had arrived and searched the Walmart parking

lot. Police found no bullets, bullet holes, bullet strikes, shell casings, or guns. 7RP 17-18, 30; 8RP 44, 89-91; 9RP 40-42; 10RP 8, 12-13, 96.

Before going to the police station, Smith deleted text messages from his phone, removed his Craigslist advertisement, and disassembled his gun. 7RP 97, 137-38, 143; 8RP 20; 10RP 153-54, 167. Although Smith spoke with five police officers, he initially failed to tell them about his intent to sell marijuana that night. 7RP 69, 154-56; 9RP 77-79, 113-14, 118. Smith's written statement to police also omitted any mention that he had property taken from him. 7RP 27-29, 31, 162; 9RP 101-02.

Police impounded and searched Smith's car. The front passenger window of the car was broken. 7RP 19; 8RP 48; 9RP 10. Police also found a small amount of marijuana inside the car. 8RP 48; 9RP 25-26. No bullets, bullet holes, bullet strikes, or shell casings were found inside the car. 9RP 25, 31-32, 116. Solomon's fingerprints matched those found on the passenger side rear window, interior car door handle, and underneath the exterior driver's side door handle. 9RP 16, 21-23. Police also found fingerprints matching Thareek. 9RP 20-23. Blood stains on the front passenger door were not tested for DNA. 8RP 49; 9RP 27-28, 32.

After impounding his car, police took Smith to Providence Medical Center where he identified Thareek as one of the alleged robbers. Smith

did not identify Solomon at the hospital. 7RP 71-72; 9RP 81-84. Solomon had arrived at the hospital by car. 8RP 100; 9RP 69; 10RP 83-84. That car was not searched. 10RP 42, 164-66.

Solomon had an injury to his right middle finger a gunshot wound to his left arm. 8RP 99-100, 107; 9RP 44. Solomon's finger injury was consistent with someone having their hand slammed in a car door. 8RP 102. Emergency physician, Anthony Crawford, believed the finger injury was caused by a gunshot however. 8RP 108. Xrays revealed a bullet overlying Solomon's left shoulder blade. 8RP 101. Solomon was eventually taken to Harborview Medical Center for further treatment. 8RP 104-05. He was released from the hospital the next day. 10RP 131.

Police interviewed Thareek and Solomon at the hospital. 9RP 44-45. Solomon told police his name was Jacob Solomon. 9RP 45; 10RP 36. Solomon told police that he had been at a house party in Everett when a fight broke out. 9RP 47, 51. Five or six gunshots were fired. 9RP 51. Solomon was shot when fleeing the party. 9RP 47, 50-51. Solomon explained that he was driven to the hospital by a friend but was unsure where his friend was now. 9RP 51-52. Solomon denied being at the Walmart in Marysville. 9RP 53.

Dave Bilyeu was assigned as the "lead detective," investigating the incident. 10RP 91-93. Bilyeu reviewed Smith's cell phone which

contained several messages sent and received from a telephone number belonging to Thareek. 8RP 149-56, 167-78; 10RP 110.

Bilyeu also reviewed surveillance video from the Walmart parking lot. 6RP 150-51; 10RP 125-27. The video showed people switching places around Smith's car. 10RP 125-27. About five minutes passed between when the people arrived at the car and when a commotion began. 10RP 156, 170. Bilyeu could not determine from the video whether either person outside the car had a gun. 10RP 159. Nor could Bilyeu determine from the video what happened inside the car. 10RP 169. Bilyeu did conclude that only one shot was fired during the incident. 10RP 159-60. The only gun recovered was Smith's. 7RP 97, 143; 9RP 26-27; 10RP 161.

Solomon brought a motion following the State's case-in-chief, to dismiss the unlawful possession of a firearm charge and firearm enhancement allegation for insufficient evidence. Defense counsel argued the State failed to present sufficient evidence that the gun allegedly used by Solomon during the incident was operable. CP 139-41; 10RP 184-85. The state maintained that operability could be inferred from Solomon's threats to use the gun. 10RP 185-87. The trial court denied the motions to dismiss, concluding that the jury could draw "reasonable inferences" from circumstantial evidence to find that the gun was an actual firearm. 10RP 187-91.

C. ARGUMENT

1. THE MANDATORY JURY INSTRUCTION, “A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS,” IS UNCONSTITUTIONAL.

At Solomon’s trial, the court gave the standard reasonable doubt instruction, WPIC 4.01,<sup>2</sup> which reads, in part:

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 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 101 (instruction 4) (emphasis added). This instruction is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement onto reasonable doubt, making 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 the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases.

In order for jury instructions to be sufficient, they must be “readily understood and not misleading to the ordinary mind.” State v. Dana, 73

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<sup>2</sup> 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

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.<sup>3</sup>

With these principles in mind, the flaw in WPIC 4.01 reveals itself with little difficulty. 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. Examination of the meaning of the words “reasonable” and “a reason” shows this to be true.

“Reasonable” means “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.”

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<sup>3</sup> 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 the word “presume” to determine how jury may have interpreted the instruction); State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, making it possible the jury applied the erroneous standard), overruled on other grounds by State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable, 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. But WPIC 4.01 does not do that. Instead, WPIC 4.01 requires "a reason" for the doubt, which is different from a doubt based on reason. "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 doubt based on reason; it requires a doubt that is articulable. This is unconstitutional.

Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires the defense or the jurors to supply a

reason to doubt, shifting the burden and undermining the presumption of innocence. The presumption of innocence “can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve.” State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The WPIC 4.01 language does that in directing jurors they must have a reason to acquit rather than a doubt based on reason.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument “improperly implies that the jury must be able to articulate its reasonable doubt” and “subtly shifts the burden to the defense.” State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Such arguments “misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence,” because “a jury need do nothing to find a defendant not guilty.” Id. at 759.

But the improper fill-in-the-blank arguments did not originate in a vacuum—they sprang directly from WPIC 4.01’s language. In State v. Anderson, for example, the prosecutor recited WPIC 4.01 before making the fill-in-the-blank argument: “A reasonable doubt is one for which a reason exists. That means, 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. 417, 424, 220 P.3d 1273 (2009). The same

occurred in State v. Johnson, where 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. 677, 682, 243 P.3d 936 (2010).

If telling jurors they must articulate a reason for their 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 for their reasonable doubt. If lawyers mistakenly believe WPIC 4.01 requires articulation of doubt, then how can average jurors be expected to avoid the same pitfall?

No appellate court in recent times has directly grappled with the challenged language. The Bennett court directed trial courts to give WPIC 4.01 at least “until a better instruction is approved.” 161 Wn.2d at 318. The Emery 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. 174 Wn.2d at 759.

In State v. 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 578, 584, 355 P.3d 253 (2015). The 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. at 585.

None of the appellants in Bennett, Emery, or Kalebaugh argued the language requiring “a reason” 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. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). 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.

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 right to a jury trial. 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. Though defense counsel did not object to the instruction, structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

WPIC 4.01’s language requires more than just a reasonable doubt to acquit; it also requires an articulable doubt. This undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal of Solomon’s convictions.

2. INSUFFICIENT EVIDENCE SUPPORTS THE UNLAWFUL POSSESSION CONVICTION AND FIREARM ENHANCEMENT BECAUSE THE STATE FAILED TO PROVE THE GUN WAS OPERABLE

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable

to the State, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). This court should hold the State to its burden and hold that the State did not present sufficient evidence to sustain either the unlawful possession of a firearm conviction or the firearm enhancement because the State failed to prove the handgun that was the basis of both charges was operable.

Jury instructions to which neither party objects become the law of the case and delineate the State's proof requirements. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citing State v. Hanes, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)). Neither the State nor Solomon objected to the definitional or to-convict instructions with regard to unlawful possession of a firearm. These instructions became the law of this case.

The unlawful possession of a firearm instruction required each of the following elements to be proved beyond a reasonable doubt:

- (1) That on or about the 30<sup>th</sup> day of September, 2014, the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a serious offense;
- (3) That the possession or control of the firearm occurred in the State of Washington.

CP 116 (instruction 18). “Firearm,” was defined as “a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” CP 118 (instruction 20); RCW 9.41.010(9). Similarly, for purposes of the firearm enhancement, the jury was instructed that “a ‘firearm’ is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” CP 131 (instruction 31); RCW 9.41.010(9); Compare RCW 9A.56.200(1)(a)(ii) (first degree robbery requires proof of an object that “appears to be a firearm or other deadly weapon,” not an operable weapon in fact).

In light of these jury instructions, to convict Solomon of unlawful possession of a firearm or impose a firearm enhancement, the State had the burden of proving that Solomon or an accomplice was armed during commission of the crime with a “firearm,” i.e., “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” RCW 9.41.010(9); State v. Pierce, 155 Wn. App. 701, 714, 230 P.3d 237 (quoting State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Suppl. 2005))). The State must present the jury with sufficient evidence to find a firearm operable under this definition. Recuenco, 163 Wn.2d at 437 (citing State v. Pam, 98 Wn.2d

748, 754-55, 659 P.2d 454 (1983), overruled in part on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)).

In State v. Raleigh, 157 Wn. App. 728, 238 P.3d 1211 (2010), rev. denied, 170 Wn.2d 1029 (2011), the court held the language in Recuenco, that the State is required to show a firearm is operable, was dicta. The Raleigh court ruled a firearm need not be operable during the commission of a crime to constitute a firearm. Id. at 734–35. The language the Raleigh court described as dicta, however, was central to the Court’s holding in Recuenco. See, In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) (dicta is language that is not necessary to the decision in a given case).

The issue in Recuenco was whether the harmless error analysis applies when the State fails to submit a firearm enhancement to the jury. Recuenco, 163 Wash.2d at 433. The Court’s holding in Recuenco, that the error could not be harmless, was predicated in part on its finding that the State failed to show the gun in that case met the definition of a firearm because it failed to show the gun was operable. Recuenco, 163 Wn.2d at 437. The operability language in Recuenco was not dicta.

Here, the State failed to prove that the alleged handgun which was the basis of both the unlawful possession of a firearm count and the firearm enhancement was operable. Although Smith testified that Solomon

threatened him with a gun which he opined was real based on his observation of rifling and chrome lining inside the barrel, the gun was not recovered. 7RP 54-55, 97, 143; 9RP 26-27; 10RP 161. Other evidence of operability was also absent; no bullets, bullet holes, or shell casings were found. 8RP 89-91; 9RP 25, 31-32, 40, 42, 116; 10RP 8, 12-13, 27-28, 33, 96. Smith was not shot and could not tell if the gun was even loaded. 7RP 55, 170-71. Witnesses did not report seeing any muzzle flashes. Moreover, while some trial witnesses reported hearing two or three gunshots, “lead detective”, Bilyeu, concluded that only one shot was fired; that which came from Smith’s gun. 10RP 93, 159-60.

In State v. Pam, the Supreme Court held that, to prove a gun is a “firearm” for purposes of the statute, the State must prove the gun is “deadly in fact.” 98 Wn.2d at 753-55. To prove a firearm is “deadly in fact,” the State must prove the firearm is operable. Id. The Court concluded a rational jury could have a reasonable doubt as to whether the State proved the firearm in question was operable because the weapon fell apart as Pam ran from the scene, police recovered only the wooden forestock of “what appeared to be a shotgun,” and no shots were fired or bullets recovered. Pam, 98 Wn.2d at 754-55.

Shortly after Pam, this Court issued several opinions which concluded that eyewitness testimony describing a “real” gun and

recounting a threat to use it was sufficient to establish the existence of a real, operable gun in fact. In State v. Mathe, the state charged first degree robbery with deadly weapon and firearm special verdicts. 35 Wn. App. 572, 574, 668 P.2d 599 (1983), aff'd, 102 Wn.2d 537, 688 P.2d 859 (1984). The complaining witnesses “described in detail the guns used by Mathe during the robberies.” Mathe, 35 Wn. App. at 581-82. See also State v. Goforth, 33 Wn. App. 405, 410-11, 655 P.2d 714 (1982) (evidence sufficient to support first degree robbery and deadly weapon special verdict where witness described the shotgun in detail, and discussed his experience with such guns), remanded following State v. Pam, 99 Wn.2d 1010 (1983).

Bowman was convicted of 13 various crimes, including first degree rape and first degree robbery, while armed with a deadly weapon and firearm. State v. Bowman, 36 Wn. App. 798, 800-02, 687 P.2d 1273, rev. denied, 101 Wn.2d 1015 (1984). At sentencing, the trial court struck the firearm findings, based on State v. Workman, 900 Wn.2d 443, 453, 584 P.2d 382 (1978). Bowman, 36 Wn. App. at 802.

On appeal, Bowman argued that the evidence was insufficient to support a verdict that he was armed with a “real gun” in fact. This Court agreed that such proof was necessary, but found the evidence sufficient where the complaining witness “described the gun in detail” and testified

that there was no question in her mind that the gun was real. Bowman, 36 Wn. App. at 803.

Bowman relied upon State v. Hentz<sup>4</sup> for the proposition that a threat to shoot a person can prove that the alleged firearm was operable. Bowman, 36 Wn. App. at 803. But Hentz was a 4-justice plurality, with Justice Dore concurring only because Hentz told his cellmate he had used a real gun. Hentz, 99 Wn.2d at 546. Furthermore, Hentz involved a rape prosecution. Unlike unlawful possession of a firearm or a firearm enhancement, the rape statute only requires proof of an object that “appears to be a deadly weapon,” not an operable weapon in fact. RCW 9A.44.040(1)(a).

In State v. Hardy, 37 Wn. App. 463, 467-68, 681 P.2d 852, rev. denied, 102 Wn.2d 1001 (1984), three witnesses “all testified that Hardy was armed with a real firearm”, and that Hardy threatened to “blow your . . . head off.” Hardy, 37 Wn. App. at 467. Hardy concluded that based on this evidence, “no rational trier of fact could have a reasonable doubt as to whether Hardy was in fact armed with an operable gun.” 37 Wn. App. at 468. No other court has cited Hardy for this proposition since, and Hardy should be viewed in its historic context. The Hardy trial occurred before November, 1982 and State v. Pam was decided in February, 1983. The

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<sup>4</sup> 99 Wn.2d 538, 663 P.2d 476 (1983).

Hardy opinion gives no indication that operability was contested below, and the case was tried to an experienced judge, not a jury.

Much more recently, in Pierce, the Court of Appeals held the State failed to present evidence from which a reasonable jury could find the firearm Pierce allegedly used during the commission of certain crimes was operable. During the incident supporting most of Pierce's enhancements, the victims noticed that an intruder, later determined to be Pierce, was holding "what appeared to be" a handgun. Pierce, 155 Wn. App. at 705. The intruder directed the victims to cover their heads and then ransacked and robbed their home. Id.

The State argued it was not required to *produce* the weapon used to support a firearm enhancement. The Court did not disagree. However, the Court observed:

This may be true when there is other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes. Although the evidence is sufficient to prove an element of the offense of robbery or burglary or a deadly weapon enhancement, where proof of operability is not required, the evidence here is insufficient to support the imposition of a firearm sentencing enhancement where proof of operability is required.

Pierce, 155 Wn. App. at 714 n.11 (citing Recuenco, 163 Wn.2d at 437; Pam, 98 Wn.2d at 754-55).

Finding the evidence of operability insufficient, the Court remanded to the superior court with directions that it dismiss the firearm enhancements and resentence Pierce without them. Pierce, 155 Wn. App. at 715.

Solomon's case is more akin to the recent opinion in Pierce, than it is to the line of cases issued by this Court more than 30 years ago. No evidence supported Smith's opinion that the gun was real. The State presented no evidence of any tell-tale characteristics of an operable firearm, such as spent bullets, gunshot wounds, shell casings, bullet holes, or muzzle flashes. Detective Bilyeu's conclusion that only one shot was fired directly refuted witnesses who claimed to hear more than one gunshot. Given the evidence presented, a finding the gun was operable necessarily rests on speculation.

There was insufficient evidence to show the alleged gun was a firearm for purposes of unlawful possession or the firearm enhancement because there was no evidence the gun was operable. The trial court erred in denying Solomon's motion to dismiss the unlawful possession and firearm enhancement charges. Solomon's unlawful possession of a firearm conviction and firearm enhancement should be vacated.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Solomon was entitled to seek review at public expense and therefore appointed appellate counsel at public expense. Supp. CP \_\_\_ (sub no. 80, Order Authorizing The Defendant to Seek Review at Public Expense and Appointing An Attorney on Appeal, dated 6/1/15). If Solomon does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, II, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2016 WL 393719 \*2 (slip op. filed January 27, 2016) (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant’s brief). RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State’s request for costs. State v. Sinclair, II, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2016 WL 393719 \*4 (slip op. filed January 27, 2016).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Solomon’s ability to pay must be determined before

discretionary costs are imposed. Here the trial court made no such finding. “The Rules of Appellate Procedure establish a presumption of continued indigency throughout review[.]” State v. Sinclair, II, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2016 WL 393719 \*7 (slip op. filed January 27, 2016).

Without a basis to determine that Solomon has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

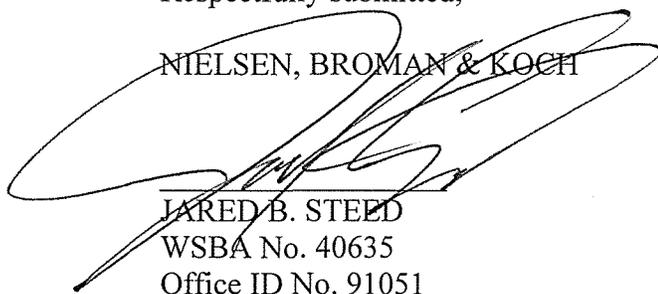
D. CONCLUSION

For the reasons discussed above, this Court should reverse Solomon’s convictions and remand for a new trial. This Court should also exercise its discretion and deny appellate costs.

DATED this 11<sup>th</sup> day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED  
WSBA No. 40635  
Office ID No. 91051  
Attorneys for Appellant

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

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STATE OF WASHINGTON

Respondent,

v.

SIMON SOLOMON,

Appellant.

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COA NO. 73552-7-1

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11<sup>TH</sup> DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SIMON SOLOMON  
DOC NO. 336432  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 11<sup>TH</sup> DAY OF MARCH 2016.

X *Patrick Mayovsky*