

No. 46363-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**JOHN ANTHONY CHACON, II,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## **I. ISSUES**

- A. Did the information for Counts I and II contain all the essential elements of the crimes charged, Malicious Harassment and Assault in the Fourth Degree?
- B. Can Chacon raise, for the first time on appeal, the alleged error that the trial judge gave an impermissible preliminary instruction that relieved the State of its burden of proof?
- C. Can Chacon challenge the trial courts' imposition of legal financial obligations requiring repayment of attorney fees for the first time on appeal?

## **II. STATEMENT OF THE CASE**

On March 7, 2014, Tessa Alberts, a manager of Santa Lucia Coffee located in Centralia, Washington, was working. RP 23, 54, 65-66. Ms. Alberts identifies herself as black, has dark hair, black features. RP 73. Ms. Alberts was working at the counter, taking orders and making coffee for customers. RP 32. Chacon entered Santa Lucia and went up to the counter and ordered a glass of milk and a biscotti. RP 66, 96. The interaction between Ms. Alberts and Chacon was cordial, they knew of each other outside of Santa Lucia because they had mutual friends although they had not seen each other in years. RP 56, 66, 95-96. Chacon took his milk, in a glass cup, and biscotti and went to the back room, which had a seating area, of the shop. RP 32-33, 66, 98.

Justin Page is the owner of Santa Lucia Coffee. RP 22. Mr. Page knows Chacon because he was a customer of Santa Lucia for about a year around 2010. RP 29. Mr. Chacon became disruptive to other customers at Santa Lucia, intimidating them and spreading his belongings out throughout the café. RP 30, 150-51, 159-60. Mr. Page told Chacon that he had to leave the café and never come back in November 2012. RP 31, 150-51, 159-60. Mr. Page saw Chacon come into Santa Lucia on March 7, 2014. RP 32. Mr. Page followed Chacon to the back of the café and told him, "You know you're not supposed to be here. You're kicked out permanently. You need to leave immediately." RP 33. Chacon told Mr. Page that he would like a to-go cup to put his drink in because he received a drink from Ms. Alberts. RP 34. Mr. Page walked up to get the to-go cup, Chacon followed. RP 34.

Chacon walked back up to the counter. RP 34. When Chacon came back to Ms. Alberts his demeanor had changed. RP 69.

It was aggressive. I was confused. There was a customer, a young lady, standing right at the counter. We were speaking. We were in conversation. And he came and stood right next to her and said something, I don't know what he said, and threw the wadded piece of paper at me.

RP 69-70. Chacon's throw was aggressive and the paper was not meant for Ms. Alberts to catch. RP 71. The piece of paper hit Ms. Alberts in the chest. RP 37, 74. The customers in line were shocked by Chacon's behavior. RP 35.

Ms. Alberts picked up the paper and opened it up. RP 37. Ms. Alberts appeared shocked when she opened up the paper. RP 38. The paper had a photograph of an African American man who was dead, hanging by a noose, after being lynched. RP 38, 75-76; Ex. 1. Ms. Alberts is of African American decent and identifies herself as black, she has dark hair and black features. RP 38, 73. There was no other person of color in the coffee shop at the time of this incident. RP 39, 74. Ms. Alberts was stunned and speechless, she was frightened and trembling, really upset, crying and felt physically sick. RP 39, 79. Ms. Alberts said, "I can't believe that anyone would do this to another human being." RP 39. This incident caused Ms. Alberts to become so fearful for herself and her children that she had a friend come stay with her for a period of time. RP 80.

The State charged Chacon, by second amended information, with Count I: Malicious Harassment, Count II: Assault in the Fourth Degree and Count III: Burglary in the Second Degree.

CP 2-4. Chacon elected to have his case tried to a jury. See RP. Chacon testified at trial. RP 92-127. Chacon explained that he went into Santa Lucia because he was hungry and wanted to get a glass of milk and a biscotti. RP 94. Chacon testified that he had not been previously told that he could not come back to the coffee shop and the reason he had not been at the shop since November 2012 was because he had been in and out of jail. RP 99, 101. Chacon said he had a cordial interaction with Ms. Alberts when she waited on him. RP 96. Chacon explained Mr. Page told him he was not welcome, Chacon asked why and then asked for a to-go cup for his milk. RP 99, 102. Chacon admitted he was upset, he felt Mr. Page was discriminating against him because he was homeless. RP 109. Chacon took a picture out of his pocket that he had taken off the wall at Ace of Spades and tossed it to Ms. Alberts. RP 104-05. Chacon denied intending to threaten Ms. Alberts but also said he wanted to show Ms. Alberts what discrimination looks like. RP 110.

The jury found Chacon guilty as charged. RP 248; CP 35-37. Chacon was sentenced to 13 months in the custody of the department of corrections. CP 43. Chacon timely appeals his conviction. CP 51.

The State will supplement the facts as necessary in its argument section below.

### **III. ARGUMENT**

#### **A. THE INFORMATION WAS CONSTITUTIONALLY SUFFICIENT, AS IT CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSES FOR COUNTS I AND II.**

Chacon argues for the first time on appeal that the information was constitutionally insufficient (and that he thus received inadequate notice of the charge) for Count I: Malicious Harassment and Count II: Assault in Fourth Degree. Brief of Appellant 3-7. Chacon asserts that the information was deficient because it was vague and failed to include critical facts, specifically a named victim for Counts I and II. Brief of Appellant at 6-7. This claim is without merit because the information contained all of the essential elements of the charged offense.

##### **1. Standard Of Review.**

This court reviews challenges regarding the sufficiency of a charging documents de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). The correct standard of review is determined by when the sufficiency challenge is made. *City of Bothell v. Kaiser*, 152 Wn. App. 466, 471, 217 P.3d 339 (2009). A

charging document challenged for the first time on appeal is “liberally construed in favor of validity.” *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

**2. Liberally Construed, The Second Amended Information Contained All The Essential Elements Of Count I: Malicious Harassment And Count II: Assault In The Fourth Degree.**

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a charging document must include all essential elements of a crime to inform a defendant of the charges against him and to allow preparation for the defense. *State v. Phillips*, 98 Wn. App. 936, 939, 991 P.2d 1195 (2000), *citing Kjorsvik*, 117 Wn.2d at 101–02. A charging document is constitutionally sufficient if the information states each statutory element of the crime, even if it is vague as to some other matter significant to the defense. *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). “An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.” *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (citations and quotations omitted). The primary reasons for the essential elements rule is it requires the State to give notice of the nature of the crime the defendant is accused of committing and it allows a defendant to adequately

prepare his or her case. *Zillyette*, 178 Wn.2d at 158-59 (citations and quotations omitted).

When a defendant challenges the sufficiency of a charging document, the standard of review depends on the timing of the challenge. *State v. Ralph*, 85 Wn. App. 82, 84, 930 P.2d 1235 (1997). If a defendant challenges the sufficiency of the information “at or before trial,” the court is to construe the information strictly. *Phillips*, 98 Wn. App. at 940, quoting *State v. Vangerpen*, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). Under this strict construction standard, if a defendant challenges the sufficiency of the information before the State rests and the information omits an essential element of the crime, the court must dismiss the case “without prejudice to the State's ability to re-file the charges.” *Phillips*, 98 Wn. App. at 940, quoting *Ralph*, 85 Wn. App. at 86.

If, however, a defendant moves to dismiss an allegedly insufficient charging document after a point when the State can no longer amend the information, such as when the State has rested its case, the court is to construe the information liberally in favor of validity. *Phillips*, 98 Wn. App. at 942–43. As this Court has noted, these differing standards illustrate the balance between giving defendants sufficient notice to prepare a defense and “discouraging

defendants' 'sandbagging,' the potential practice of remaining silent in the face of a constitutionally defective charging document (in lieu of a timely challenge or request for a bill of particulars, which could result in the State's amending the information to cure the defect such that the trial could proceed)." *State v. Killiona-Garramone*, 166 Wn. App. 16, 23 n.7, 267 P.3d 426 (2011), *citing Kjorsvik*, 117 Wn.2d at 103; *Phillips*, 98 Wn. App. at 940 (*citing* 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.2, at 442 n. 36 (1984)).

In the present case, Chacon did not challenge the sufficiency of the charging document below. See RP. Rather, Chacon has raised this issue for the first time on appeal. Because Chacon did not object to the information's sufficiency below, this Court is to apply the liberal standard set forth in *Kjorsvik* and construe the information in favor of its validity. *Killiona-Garramone*, 166 Wn. App. at 24; *Phillips*, 98 Wn. App. at 942–43. Under this liberal standard of review, the court must decide whether (1) the necessary facts appear in any form, or by fair construction are found, in the charging document; and if so, (2) whether the defendant can show that he or she was nonetheless actually prejudiced by the inartful or

vague language that he or she alleges caused a lack of notice. *Phillips*, 98 Wn. App. at 940, citing *Kjorsvik*, 117 Wn.2d at 105–06.

Chacon argues the second amended information for Counts I and II are deficient for failing to include critical facts, specifically the name the victim. Brief of Appellant 5-7. Chacon further argues that Count I is lacking the name of the victim whose race or color are subject to Chacon's perception. Brief of Appellant 6. Chacon cites to *City of Seattle v. Termain* in his discussion of the necessity of critical facts. Brief of Appellant 5, citing *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). Chacon apparently missed the discussion in *Termain* regarding what class of cases requires the naming of the victim.

It is true that the cases cited by the City hold that the victim's name is not an essential element of a crime. Those cases hold that the victim's identity is not an essential element of the crimes of assault, second degree murder or accepting earnings of a common prostitute. But those crimes involve an act involving another person, but not a specific person as does the violation of a no-contact order. The City is correct that criminal statutes which protect a particular class of persons do not require that the particular victim be named.

*Termain*, 124 Wn. App. at 805, citing *State v. Plano*, 67 Wn. App. 674, 678-80, 838 P.2d 1145 (1992); *State v. Johnston*, 100 Wn.

App. 126, 134, 996 P.2d 629 (2000); *State v. Larson*, 178 Wn. 227, 228-29, 34 P.2d 455 (1934).

The name of the victim in an assault or malicious harassment case is not an essential element nor is a charging document deficient for failing to name the victim. *Id.*; *Plano*, 67 Wn. App. at 678-80. In Chacon's case the second amended information for Count I: Malicious Harassment read:

On or about the 7th day of March, 2014, in the County of Lewis, State of Washington, the above-named defendant, because of his or her perception of a person's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap, did maliciously and intentionally (1) cause physical injury to that person or another person, and/or (3) threaten a specific person or group of persons, and place that person or members of the specific group of persons in reasonable fear of harm to person or property, and made the threat in a context, or under such circumstances, wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to carry out the threat; contrary to the Revised Code of Washington 9A.36.080.

CP 2-3. The second amended information for Count II: Assault in the Fourth Degree read:

On or about March 7, 2014, in the County of Lewis, State of Washington, the above-named defendant did intentionally assault another person; contrary to Revised Code of Washington 9A.36.041(1).

CP 3.

The second amended information contained all the essential elements of the crimes charged. The name of the victim is not required. This is because “[e]ssential elements’ include only those facts that must be proved beyond a reasonable doubt to convict the defendant of the charged crime.” *Zillyette*, 178 Wn.2d at 158 (citations and quotations omitted). Furthermore, this information was sufficient to apprise Chacon of the charge.

A charging document is constitutionally sufficient even if it is vague as to some other matter significant to the defense.<sup>1</sup> *Holt*, 104 Wn.2d at 320. Washington courts distinguish between charging documents that are constitutionally deficient because of the State's failure to allege each essential element of the crime charged and charging documents that are factually vague as to some other significant matter. *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005). The State may correct a vague charging document with a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 686–87, 782 P.2d 552 (1989). Chacon failed to request a bill of particulars at trial, thus, he waived any vagueness challenge. *Leach*, 113 Wn.2d at 687.

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<sup>1</sup> The State is not admitting the charging document is vague, but for the sake of argument is explaining why vagueness is not a fatal flaw in an information.

The second amended information was sufficient to inform Chacon of the charges and included all of the essential elements. CP 2-4. The charging language gave the date of the offense and the required elements. *Id.* The charging language in no way left Chacon to guess at the crime he was alleged to have committed. Further, Chacon has not shown he was prejudiced by the information. He clearly understood the crime charged, he did not request a bill of particulars to clear up any confusion he may have had, and he was able to adequately prepare his case. This Court should therefore affirm Chacon's convictions.

**B. CHACON CANNOT RAISE FOR THE FIRST TIME ON APPEAL THE TRIAL COURT'S ALLEGED IMPERMISSIBLE STATEMENT IN ITS PRELIMINARY INSTRUCTION REGARDING TWO SIDES TO EVERY CASE BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.**

Chacon claims the trial court subtly shifted the burden of proof in its preliminary oral instruction to the jurors prior to commencement of testimony. Brief of Appellant 7-11. Chacon claims that the statement, "there are at least two sides to every case" set up the jury to expect that the defense would put up some type of case, lowering the burden of proof and was particularly egregious because it tainted how the juror's viewed the testimony given. *Id.* Chacon did not object to the trial court's preliminary

instruction below. RP 11-18. The alleged error is not a manifest constitutional error. The error, if one exists, would be constitutional but Chacon does not demonstrate to this Court how the error is manifest. Therefore, Chacon cannot raise this issue for the first time on appeal.

### **1. Standard Of Review**

A claim of a manifest constitutional error is reviewed de novo. *State v. Blancaflor*, 183 Wn. App. 215, 222, 334 P.3d 46 (2014). Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793, 802 (2012).

### **2. Chacon Did Not Object To The Allegedly Erroneous Preliminary Instruction And Fails To Show This Court That The Alleged Error Is A Manifest Constitutional Error.**

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, citing RAP

2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O’Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (citations omitted). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

**a. The preliminary oral instruction to the jurors was not erroneous.**

The State is not agreeing that the preliminary instruction to the prospective jurors was in error. Chacon argues that the

statement, “by definition there are at least two sides to every story” lessened the State’s burden of proof by making the jurors expect to hear the defense, either by witnesses or cross-examination, put on a case. Brief of Appellant 8-11. Chacon cites to no case authority that the added statement in the preliminary instruction shifts the burden. The preliminary instructions to jury prior to the commencement of testimony take up approximately six and a half pages of the transcript. RP 11-18. At the very start the trial judge states,

All right. The first thing that we're going to do is I have some preliminary instructions that I'm going to read to you. So if you would please give me your attention.

First, don't jump to conclusions. By definition there are at least two sides to every case. Listen carefully to all the evidence before starting to draw your conclusions.

RP 11. The trial court takes the next page and instructs the jurors not to have contact with any participant, not to be offended if the participants avoid them, while the case is in progress they cannot discuss it with anyone, including fellow jurors, if they have trouble hearing or seeing let the bailiff know, do not do outside research and that the defendant has entered a plea of not guilty which puts every element of the crime charged at issue. RP 12. They are told it is their duty to determine the facts from the evidence presented, the

defendant is presumed innocent, what is required for reasonable doubt and what is considered evidence. RP 12-13. They are told how the trial will proceed, what to expect and that while the State will be introducing evidence for the juror's consideration and that "the defendant may introduce evidence but is not required to do so." RP 14-15. The jurors are told to keep an open mind, not go to the scene and that they are permitted to take notes. RP 16-17.

In the oral preliminary instruction given by the trial judge was simply conveying the need to keep an open mind and to listen to all of the evidence before drawing any conclusions. RP 11. Stating there are necessarily at least two sides to a case is not an inaccurate description nor does it tell the jurors that they should expect to hear the defendant put on a case. The trial judge told the jurors the correct burden of proof and that Chacon was not required to introduce any evidence. RP 15. There was nothing said during the preliminary oral instruction that shifted the burden, even subtly, upon Chacon. Therefore, the preliminary oral instruction to the jurors was not in error.

**b. If the preliminary oral instruction was erroneous it was not a manifest error.**

While the State maintains throughout its argument that the instruction was not erroneous, *arguendo*, the error alleged by

Chacon, that the preliminary instruction to prospective jurors shifted the burden of proof, is an error of constitutional dimension as it violates the due process clause. *State v. Redwine*, 72 Wn. App. 625, 629, 865 P.2d 552 (1994) (citations omitted). Therefore, the analysis in this case must be focused on whether the alleged error is manifest.

An error is manifest if a defendant can show actual prejudice. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a “plausible showing... that the asserted error had practical and identifiable consequences in the trial of the case.” *O’Hara*, 167 Wn.2d at 99 (internal citations and quotations omitted). Chacon has not satisfied this requirement.

Absent his argument that the preliminary jury instruction was structural error, Chacon fails to argue how this alleged error is manifest. Brief of Appellant 8-11. Chacon argues the jurors viewed the trial through a distorted lens because of this instruction and it also created a lower standard of proof than due process requires. *Id.* 9. This is not an identifiable consequence. Chacon fails to acknowledge that the proper jury instruction defining reasonable doubt was given at the end of day two of the jury trial. RP 168; CP

10. Also, the jury heard from Chacon, as he testified on his own behalf. RP 92-127. The pattern jury instruction for reasonable doubt was included in the Court's Instructions to the Jury and three complete sets of instructions were provided to the jury to use during their deliberations. WPIC 4.01; RP 164; CP 10.

Chacon does not articulate how this alleged erroneous preliminary oral instruction to the jury had a practical and identifiable consequence to his trial. Chacon also fails to acknowledge that this Court has previously held a preliminary oral instruction to the entire venire was not manifest constitutional error because the defendant could not show practical and identifiable consequences of the erroneous reasonable doubt preliminary instruction when the correct instruction was read at the close of evidence. *State v. Kalebaugh*, 179 Wn. App. 414, 422-23, 318 P.3d 288 (2014), *review accepted* 180 Wn.2d 1013 (oral argument September 18, 2014). In *Kalebaugh* the trial court gave a potentially erroneous reasonable doubt definition when it gave preliminary comments to the entire venire. *Kalebaugh*, 179 Wn. App. at 418. This Court stated, "It is not reasonably possible that the trial court's preliminary instruction misled the jury considering that the trial court properly instructed the jury on reasonable doubt in its final oral and

written instructions, which the jury used during deliberations.” *Id.* at 423. This Court also noted that the jury was given three copies of the instructions and were able to review these instructions during deliberations which potentially cured any lingering confusion. *Id.* Therefore, this Court held that it was not a manifest constitutional error that could be raised for the first time on appeal. *Id.* at 424. Similar to *Kalebaugh*, Chacon has not satisfied the requirements to show this Court that the error is manifest and the alleged error is not properly before this Court.

**3. If The Preliminary Instruction Was Erroneous It Does Not Constitute A Structural Error.**

If the preliminary instruction regarding there are at least two sides in every case given to the venire was erroneous, the error did not render the trial unreliable or fundamentally unfair and the error is therefore not a structural error. See *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009). A structural error requires automatic reversal and is not subject to a harmless error analysis. *State v. Mosteller*, 162 Wn. App. 418, 429-30, 254 P.3d 201 (2011), *review denied* 172 Wn.2d 1025 (2011). Structural errors only occur in a limited number of cases and most constitutional errors can be subject to a harmless error analysis. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). “Constitutional

violations that defy harmless-error review “contain a ‘defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” *Mosteller*, 162 Wn. App at 430, citing *Neder*, 527 U.S. at 8. A defective reasonable doubt jury instruction, which used a definition of reasonable doubt that had been previously ruled unconstitutional, has been held to be structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

In the present case the erroneous <sup>2</sup> preliminary oral instruction to the jurors does not render the trial fundamentally unfair or unreliable. *Mosteller*, 162 Wn. App. at 430. This instruction was not given to the jury at the close of evidence and a written copy was not provided to the jury during its deliberations. Further, shortly after the trial judge said the erroneous instruction he spoke of the presumption of innocence and also stated:

The defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt. The State has the burden of proving each element of the crime beyond a reasonable doubt.

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<sup>2</sup> The State is making this argument in the alternative and continues to maintain that the instruction is not erroneous.

RP 13. Then the jury was also told the defendant was not required to put on any evidence and at the close of evidence the jury would be instructed as to the law of the case.

Next the State will introduce evidence. At the conclusion of the State's evidence the defendant may introduce evidence but he is not required to do so. Rebuttal evidence may then be introduced by the State. After all the evidence has been presented I will instruct you on the law and you will then hear closing arguments from the attorneys.

RP 15.

In Arizona a trial court gave a preliminary instruction that stated, “[w]here the crime charged is the sale of a substance, the necessary intent is established by the transfer of any amount of a substance when the accompanying circumstances indicate an intent to sell.” *State v. Sanchez*, 542 P.2d 421, 422, 25 Ariz. App. 228 (1975). The instruction was given after the jury was impanelled but prior to the introduction of testimony or evidence and there was no objection to the instruction. *Sanchez*, 542 P.2d at 422. The trial court gave the correct instruction at the conclusion of the evidence. *Id.* Sanchez argued in his appeal that the preliminary instruction reduced the State’s burden to prove intent because it conveyed a probable cause standard, not a proof beyond a reasonable doubt standard. *Id.* The court stated,

[I]t must be remembered when this particular instruction was given. This occurred immediately after the jury was impaneled and prior to the taking of any evidence. Moreover, it was given in the atmosphere of generally instructing the jury under RULE 18.6(c) Rules of Criminal Procedure, 17 A.R.S., of their general duties, their conduct during the trial informing them of the order of proceedings and the governing elementary legal principles. Assuming under these circumstances that the jury even remembered the specific wording of this instruction at the time they began their deliberations, it is not an incorrect statement of the law.

*Id.* at 422-23.

This Court recognizes that misstatements by prosecutors can be neutralized by a curative instruction. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The same rational reasoning applies to possible misstatements by judges. While the State is not conceding that the preliminary comment was a misstatement of the burden of proof, if this Court recognizes that a curative instruction can neutralize prosecutorial misstatements then the proper jury instructions given at the close of evidence neutralize any misstatement during the preliminary comments by the judge. By giving the proper jury instructions to the jury at the close of evidence and telling the jury that these are the instructions the jury is to use when considering the evidence neutralize any possible

prejudice by the alleged improper statement. See *Belgrade*, 110 Wn.2d at 507; RP 11-18, 164-77.

The appellate court in Arizona understood the importance of the timing of a preliminary comment, or instruction, noting in *Sanchez* that it was important to remember when the particular instruction was given and even commenting, “Assuming under these circumstances that the jury even remembered the specific wording of this instruction by the time they began their deliberations...” *Sanchez*, 542 P.2d at 422-23.

The jury instructions are to be considered in the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). In regards to the preliminary instruction to the jurors this would mean the entire instruction as given, which included the correct statement that Chacon is not required to produce or prove anything and that it is the State’s burden to prove every element of the crime charged beyond a reasonable doubt. 1RP 13, 15. Further, it would necessarily include the jury instructions given at the end of the case, which Chacon does not argue were incorrect. The erroneous instruction in this case is not structural and is therefore subject to the harmless error test.

#### **4. If The Preliminary Instruction Was Erroneous The Error Was Harmless.**

Not every misstatement in a jury instruction will relieve the State of its burden. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). However, “a conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden.” *Brown*, 147 Wn.2d at 339 (citations and internal quotations omitted). A jury instruction that misstates the law is subject to a harmless error analysis. *State v. Hayward*, 152 Wn. App. 632, 646, 217 P.3d 354 (2009) (citations and internal quotations omitted). “In order to hold the error harmless, we [the reviewing court,] must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *Brown*, 147 Wn.2d at 341 (citations and internal quotations omitted).

In the present case the preliminary instruction given to jurors prior to testimony did not affect the jury verdict. The jurors heard two days of testimony, including testimony from Chacon and then were given the jury instructions at the close of the case. RP 92-127, 164-77. Included in those instructions was the standard pattern jury instruction for reasonable doubt. RP 168 (reading CP 10); WPIC 4.01. Nowhere in the jury instructions given to the jurors at the conclusion of Chacon’s case was an erroneous instruction or

misstatement of the law regarding reasonable doubt. See RP 164-77; CP 6-34. Further, the copies of the instructions the jury was given to use during their deliberations contained the correct statement of reasonable doubt and did not shift the State's burden of proof. RP 164, 245-46; CP 6-34.

Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). Chacon argues to this Court that the trial court provided an erroneous instruction which would necessarily mean the jury followed that erroneous instruction. The State argues it is the instructions given to the jury at the close of the case that they follow when they decide the case. These are the instructions that the jury has heard right before they enter into their deliberations, these jury instructions, which are titled, "Courts Instructions to the Jury", are the ones which they have copies of and can reference during their deliberations. RP 164, 245-46; CP 6-34.

The jury's verdict was not tainted by the erroneous preliminary instruction regarding reasonable doubt given to the venire. Absent the erroneous instruction the jury would have reached the same verdict. The correct jury instructions and the

testimony elicited during the trial make the error harmless beyond a reasonable doubt.

**C. CHACON CANNOT RAISE FOR THE FIRST TIME ON APPEAL THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.**

Chacon argues, for the first time on appeal, that the trial court impermissibly assessed the cost of attorney fees without proper findings of his ability to pay. Brief of Appellant 16-21. The alleged error is not a manifest constitutional error and therefore, Chacon cannot raise this issue for the first time on appeal.

Chacon's claim is without merit because it has previously been rejected by Washington courts. As Chacon correctly acknowledges, Washington courts have previously rejected the arguments he raises in the present case. Brief of Appellant 13, *citing e.g., State v. Blank*, 131 Wn.2d. 230, 239, 930 P.2d 1213 (1997). Chacon is thus essentially asking this court to ignore numerous Washington cases on this issue. This Court should decline the issue.

Furthermore, Chacon did not object to the imposition of the legal financial obligations below. See RP 253-67. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this

question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, review denied, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal).

This Court has held that a reviewing court need not address (or allow a defendant to raise) a claim regarding his ability to pay his legal financial obligations for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), citing RAP 2.5. This Court, therefore, should similarly reject Chacon's argument regarding his legal financial obligation in the present case, as Chacon failed to raise this issue below.

## V. CONCLUSION

The second amended information was not deficient and Chacon's post-conviction attack on the information fails. The preliminary instructions to the jury were not in error. Chacon cannot raise, for the first time on appeal, that there was error in the

preliminary instructions to the jury that allegedly shifted the burden of proof. Finally, Chacon cannot attack the imposition of attorney fees for the first time on appeal. This Court should affirm the convictions and sentence.

RESPECTFULLY submitted this 10<sup>th</sup> day of February, 2015.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'JLM', written over a horizontal line.

by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff



# LEWIS COUNTY PROSECUTOR

**February 10, 2015 - 1:23 PM**

## Transmittal Letter

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