

No. 47379-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Charles Paschal,**

Appellant.

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Clark County Superior Court Cause No. 13-1-00502-6

The Honorable Judge Suzan Clark

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE TRIAL COURT SHOULD NOT HAVE ADMITTED ALLEGATIONS OF UNCHARGED DOMESTIC VIOLENCE.**

A criminal conviction may not be based on propensity evidence.

*State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). Erroneous admission of propensity evidence violates ER 402, ER 403, and ER 404(b). It may also violate due process.<sup>1</sup> U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9<sup>th</sup> Cir. 1993).

Evidence of prior uncharged misconduct is presumed inadmissible.

*State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The burden is on the state to overcome this presumption. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The trial court applied the wrong legal standard by erroneously presuming the admissibility of prior misconduct in domestic violence

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<sup>1</sup> Respondent expresses disdain for Mr. Paschal's federal constitutional claim, citing *Gunderson*. But the appellant in *Gunderson* did not raise a constitutional argument; the *Gunderson* court had no reason to consider the question left open by the U.S. Supreme Court in *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

cases. RP 80-82. This error infected the court’s consideration of the evidence. *McCreven*, 170 Wn. App. at 458. In addition, the state has conceded error. Although Respondent attempts to save the trial court’s erroneous ruling with a variety of *post-hoc* rationalizations, this court should reject those efforts.

A. Respondent concedes error.

Respondent concedes that the trial court’s basis for admitting the evidence “may not be sound.” Brief of Respondent, p. 37 (noting that the trial court’s ruling preceded the *Gunderson*<sup>2</sup> decision.) This concession requires reversal for two reasons.

First, although Respondent now—for the first time on appeal—seeks to justify admission on other bases, jurors were specifically instructed to consider the evidence “only for the purposes of assessing Katherine Martin’s credibility and/or assessing her actions.” CP 77. Even if the evidence *could* have been properly admitted for some other limited purpose, the court did not tell jurors about any other purpose. Instead, the court expressly *required* jurors to make a propensity-based inference – ‘Martin must be telling the truth because he’s done this before.’ CP 77.

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<sup>2</sup> *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014).

Second, the record does not actually support Respondent's new arguments. According to Respondent, the prior assault was relevant to show Mr. Paschal's motive to harm Martin, as "evidenced by his insecurity when she showed attention to their children rather than to him." Brief of Respondent, p. 38.

But the prior allegation did not relate to Mr. Paschal's alleged insecurity over her attention to their children. RP 78-83, 238. The incident in fact involved Martin's jealousy of other women. RP 238. This new contrived theory cannot support admission.

Third, Respondent's newly alleged grounds for admission, even if supported by the record, do not apply in this case. Admission of the prior allegations cannot now be justified as "[e]vidence of previous quarrels and ill-feeling." Brief of Respondent, p. 38 (quoting *State v. Hoyer*, 105 Wash. 160, 163, 177 P. 683 (1919)). Admission of such evidence has been upheld in murder cases where "only circumstantial proof of guilt exists." *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995).

This was not a case involving only circumstantial proof of guilt.<sup>3</sup> *Id.* Accordingly, the allegation of prior misconduct was not "of

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<sup>3</sup> *But see State v. Baker*, 162 Wn. App. 468, 474, 259 P.3d 270 (2011), allowing evidence of prior assaults as proof of motive in a non-homicide case. The *Baker* court's statement of facts does not make clear whether or not the defense theory in that case involved an apparent lack of motive. *Id.* Here, instead of claiming lack of motive as part of the defense theory, Mr.

consequence to the action.” *Id.* Furthermore, Respondent’s proposed justification would allow evidence of ‘previous quarrels’ in all domestic violence cases. It would turn ER 404(b) on its head.

Fourth, Respondent’s arguments regarding “fabrication” don’t survive *Gunderson*. See Brief of Respondent, p. 38 (citing *State v. Nelson*, 131 Wn. App. 108, 125 P.3d 1008 (2006)). Prior incidents of domestic violence are irrelevant to establish the complaining witness’s credibility unless s/he “‘gave conflicting statements about [the defendant’s] conduct.’” *Gunderson*, 181 Wn.2d at 924 (quoting *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)) (emphasis and alteration in *Gunderson*). In such cases, the evidence is admissible if it helps “to explain a witness’s otherwise inexplicable recantation or conflicting account of events.” *Gunderson*, 181 Wn.2d at 925.

As Respondent has already conceded, *Gunderson*, which was not available to the trial court, applies here. Brief of Respondent, p. 37. There is no “inexplicable recantation or conflicting account” that could be explained by a prior act of domestic violence. *Id.* To the extent *Nelson* allows such bolstering, it has been overruled by *Gunderson*.

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Paschal repeatedly acknowledged the ongoing conflict, and admitted that he punched Martin five times. RP 706.

Fifth, prior misconduct evidence is not admissible to rebut a claim of self-defense.<sup>4</sup> When used for this purpose, prior misconduct evidence relies on the propensity inference prohibited by ER 404(b): that the defendant assaulted the complaining witness in the past, and so he must have done so on this occasion. *Cf. State v. Kelly*, 102 Wn.2d 188, 198-199, 685 P.2d 564 (1984) (rejecting prior misconduct evidence offered to rebut self-defense claim).

In support of its argument, the state cites only *Thompson*, which Mr. Paschal distinguished in his Opening Brief.<sup>5</sup> Brief of Respondent, p. 38-39 (citing *State v. Thompson*, 47 Wn. App. 1, 12, 733 P.2d 584 (1987)). This court should assume that counsel found no additional authority after diligent search. *See Linth v. Gay*, No. 45250-2-II, 2015 WL 5567050, at \*5 n. 5 (Wash. Ct. App. Sept. 22, 2015). Furthermore, Respondent's failure to address Mr. Paschal's argument regarding *Thompson* should be treated as a concession that *Thompson* does not control. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

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<sup>4</sup> This is so no matter how "ludicrous" the claim in the prosecution's eyes. Brief of Respondent, p. 38.

<sup>5</sup> Appellant's Opening Brief, p. 16 n. 7. *Thompson* involved "a continuing course of provocative conduct during the course of an evening," admissible as part of the *res gestae* and to support an aggressor instruction. *Thompson*, 47 Wn. App. at 11-12.

Sixth, Respondent claims, without citation to any authority, that the evidence “was relevant to show why the victim *only twice* tried to escape... [and] why she wouldn’t employ *obvious tactics* to resist.” Brief of Respondent, p. 39 (emphasis added). Respondent’s unsupported argument insults the jury’s intelligence and underestimates jurors’ compassion. According to Martin, Mr. Paschal beat her bloody, threatened to kill her, and dragged her by her hair when she tried to escape. RP 236-284. Under the state’s theory, the jury did not need evidence of a prior assault to explain why Martin would try “only twice” to escape, or why she might elect not use the “obvious tactic[ ]” of biting his penis when he allegedly forced it into her mouth. Brief of Respondent, p. 39.

Finally, the Court of Appeals should not uphold the trial court’s decision on any *post-hoc* rationale advanced by Respondent. The trial court is in “a better position to weigh the probative value and the unfair prejudice.” *Kappelman v. Lutz*, 141 Wn. App. 580, 587, 170 P.3d 1189 (2007) *aff’d*, 167 Wn.2d 1, 217 P.3d 286 (2009). Here, the judge did not identify a proper purpose for the evidence, and thus did not properly weigh its probative value against the danger of unfair prejudice. *See Gunderson*.

Were this court to identify a new purpose for the evidence, it would not have the benefit of the trial court's vantage point in performing the required balancing. Nor, as Respondent admits, would it have more than "brief" and "adequate" guidance from the trial court's discussion of the improper purpose. Brief of Respondent, p. 36.

B. The error requires reversal.

The evidentiary error requires reversal because there is a reasonable probability that the error affected the outcome.<sup>6</sup> *Slocum*, 333 P.3d at 550. This is especially true because there was conflicting evidence presented at trial. *See e.g. Slocum*, 183 Wn. App. at 457 ("Given this conflicting evidence, we cannot say that the admission of prejudicial evidence [of prior misconduct]... did not materially affect the trial within reasonable probabilities.")

Martin provided an account that was so extreme, some jurors may have doubted it. Hearing about prior allegations of uncharged domestic violence could have influenced those jurors to vote guilty despite initial doubts. In the end, jurors likely believed Mr. Paschal had a propensity to commit domestic violence. *Id.* The court's limiting instruction encouraged the jury to find Martin credible because Mr. Paschal had a propensity toward

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<sup>6</sup> The constitutional error requires reversal because it is presumed prejudicial and the state has not shown harmlessness beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

domestic violence, concluding ‘she must be telling the truth now because he’s hit her before.’ *See* CP 77.

In arguing lack of prejudice, Respondent characterizes Martin’s testimony as “compelling” and Mr. Paschal’s “weak,” and outlines the state’s support for these descriptors. Brief of Respondent, pp. 40-45. In essence, the state *presumes* the error harmless.

But the jury was entitled to disbelieve Martin,<sup>7</sup> no matter how compelling and consistent her testimony: “the trier of the facts... can completely disbelieve certain witnesses.” *Groff v. Dep’t of Labor & Indus.*, 65 Wn.2d 35, 46, 395 P.2d 633 (1964); *see also Ma’ele v. Arrington*, 111 Wn. App. 557, 562, 45 P.3d 557 (2002) (“The jury was entitled to believe Tencer over any of the other witnesses.”)

Without citation to authority, Respondent also suggests that “this court is entitled to evaluate [Mr. Paschal’s] testimony just as it would any other witness.” Brief of Respondent, p. 44. But it is not the function of the appellate court “ ‘to consider the credibility of witnesses and to weigh the evidence.’” *State v. W.R., Jr.*, 181 Wn.2d 757, 770, 336 P.3d 1134 (2014) (quoting *Nissen v. Obde*, 55 Wn.2d 527, 529, 348 P.2d 421 (1960)).

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<sup>7</sup> And other state witnesses.

The court should have excluded the evidence. *Id.* Mr. Paschal's convictions must be reversed and the case remanded for a new trial. *Id.*

**II. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE.**

The court's instructions assumed the truth of a contested fact: the existence of a 2010 incident between the defendant and Katherine Martin. CP 77. This violated Wash. Const. art. IV, § 16. *State v. McDonald*, 70 Wn.2d 328, 330-31, 422 P.2d 838 (1967).

Without citation to authority, Respondent asserts that "the existence of the prior bad act... was not a factual determination to be made by the jury." Brief of Respondent, p. 46. This is an astounding proposition.

In a jury trial, jurors are "the sole and exclusive judge of the evidence." *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Indeed, that is the purpose underlying art. IV, § 16. The trial judge's gatekeeping role does not diminish the jury's role as "sole and exclusive judge of the evidence." *Id.* It was up to the jury to decide the truth of the state's allegations regarding the 2010 incident.

The instruction here "assumes as true" that the previous incident occurred in 2010 between the defendant and Martin. *McDonald*, 70 Wn.2d at 330-31. Prejudice is presumed, and requires reversal "unless the

record affirmatively shows that no prejudice could have resulted.” *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Respondent does not attempt to meet the “affirmatively shows” standard set forth in *Levy*. Brief of Respondent, p. 47. Instead, Respondent rehashes a standard harmless error argument, relying on the “minor role” played by the 2010 incident.

Respondent has failed to meet the *Levy* standard for harmless error in judicial comment cases. The convictions must be reversed and the case remanded for a new trial. *Id.*

**III. MR. PASCHAL WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Paschal rests on the argument set forth in Appellant’s Opening Brief.

**IV. THE CONVICTIONS FOR ASSAULT AND RAPE VIOLATED DOUBLE JEOPARDY.**

A. Respondent applies the wrong legal analysis to the double jeopardy question.

Two convictions violate double jeopardy if the evidence necessary to convict on one offense is sufficient to convict on the other. *In re Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005). The “same evidence” test does not rest on a comparison of the legal elements of each offense. *State v. Hughes*,

166 Wn.2d 675, 684, 212 P.3d 558 (2009).

Respondent's main argument relies primarily on differences in the legal elements, arguing that "the jury was not required to find *any injury* in order to find guilt on the assault count." Brief of Respondent, p. 62 (emphasis in original). This is irrelevant under *Hughes*. Rather than comparing the elements, the court must compare the evidence.<sup>8</sup> *Orange*, 152 Wn.2d at 816.

According to Martin, Mr. Paschal beat her, suffocated her, and strangled her, all while saying that he intended to rape her. RP 245-280. This conduct created the "serious physical injury" elevating the rape to a first-degree charge. RCW 9A.44.040(c).

Respondent also makes a "backwards" argument, pointing out that "the rape was not 'incidental' to the assault." Brief of Respondent, p. 63.<sup>9</sup> Mr. Paschal does not argue that the rape was incidental to the assault; rather, the assault was incidental to the rape. *See* Appellant's Opening Brief, pp. 32-33 (citing *State v. Hudlow*, 36 Wn. App. 630, 632, 676 P.2d 553 (1984)).

The two offenses were based on the same evidence. The assault was incidental to the rape. The crimes should have merged.

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<sup>8</sup> Respondent's discussion of the evidence is also flawed, as outlined below.

<sup>9</sup> *See also* p. 64 ("Paschal did not need to rape Katherine in order to strangle and suffocate her.")

- B. The convictions violated double jeopardy because it was not manifestly apparent to the jury that the state was seeking convictions for different offenses and that each count was based on a separate act.

Respondent's next argument suffers from a misunderstanding of how courts review double jeopardy claims. Where there is a possibility that the jury relied on the same evidence to convict for two charges, reviewing courts apply a very strict standard that favors the defense. *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011).

That is, a double jeopardy violation occurs "if it is not clear that it was '*manifestly apparent*' to the jury that the state [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act." *Mutch*, 171 Wn.2d at 664 (emphasis and alteration in *Mutch*) (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

The required level of clarity can be supplied by "sufficiently distinctive 'to convict' instructions or an instruction that each count must be based on a separate and distinct criminal act." *Mutch*, 171 Wn.2d at 662. In "rare circumstance[s]," double jeopardy violations can be avoided despite deficient jury instructions. *Id.*, at 665.

For example, in *Mutch*, the Information charged five counts, the victim testified to five separate rapes, the court gave five separate "to

convict” instructions, the defense hinged on consent (rather than the number of offenses), the prosecutor argued for one conviction on each count. *Id.* Under these circumstances, the Supreme Court found it “manifestly apparent to the jury that each count represented a separate act.” *Id.*; see also *State v. Wallmuller*, 164 Wn. App. 890, 265 P.3d 940 (2011).<sup>10</sup>

Where a verdict is ambiguous as to whether the jury improperly relied on the same act in returning guilty verdicts on different charges, the reviewing court must resolve the ambiguity in the defendant’s favor. *State v. Kier*, 164 Wn.2d 798, 811-14, 194 P.3d 212 (2008).

The court here did not instruct jurors that a conviction for first-degree assault required the jury to rely on acts separate and distinct from those it relied on to find him guilty of the rape charge.<sup>11</sup> CP 91, 96. Nor did the prosecutor argue that any specific act corresponded to the first-degree assault, separate and distinct from the alleged violence causing the

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<sup>10</sup> In *Wallmuller*, no double jeopardy violation occurred because the state clearly informed the jury in closing which acts corresponded to which charges. *Wallmuller*, 164 Wn. App. at 898-99. This made it “manifestly apparent to the jury that each count represented a separate act.” *Wallmuller*, 164 Wn. App. at 899.

<sup>11</sup> This is in contrast to the two second-degree assault charges submitted to the jury, which both included as an element that jurors had to find the offense occurred “on an occasion separate and distinct from that of Count [4/5].” CP 99, 103.

serious physical injury necessary to establish the first-degree rape.<sup>12</sup> RP 816-831, 851-868. In fact, the prosecutor's argument suggested the opposite. According to the prosecutor, the entire course of conduct comprised the first-degree assault and contributed to the serious physical injury elevating the rape. RP 825-826. Indeed, the prosecutor ultimately conceded that both second-degree assaults merged with the first-degree assault. RP 900.

Without citation to the record, Respondent claims that the assault conviction was based solely on certain conduct that was entirely separate from the rape. Brief of Respondent, pp. 63-64 (outlining evidence). But Respondent does not claim and does not point to any evidence, instructions, or argument making "clear that it was '*manifestly apparent* to the jury that the state [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act." *Mutch*, 171 Wn.2d at 664.

The two convictions violate double jeopardy. *In re Francis*, 170 Wn.2d 517, 525, 242 P.3d 866 (2010). One conviction must be vacated and the case remanded for a new sentencing hearing. *Id.*

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<sup>12</sup> This also contrasts with the arguments made regarding the two second-degree assaults. See RP 819-822.

**V. THE STATE FAILED TO PROVE THAT THE RAPE AND ASSAULT COMPRISED SEPARATE AND DISTINCT CRIMINAL ACTS.**

At sentencing, the party who benefits from a particular finding bears the burden of proof. *See State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). Thus, for example, the state bears the burden of proving the existence of prior convictions. *Id.*

This rule creates an anomaly when it comes to “same criminal conduct” determinations under RCW 9.94A.589(1)(a) and “separate and distinct” determinations for serious violent offenses under RCW 9.94A.589(1)(b). The defendant benefits from the same criminal conduct rule, and thus bears the burden of proving that current or prior offenses comprise the same criminal conduct. *Id.*; RCW 9.94A.589(1)(a).

However, the state benefits from the “separate and distinct” rule of RCW 9.94A.589(1)(b). Under *Graciano*, it should be the state’s burden to prove that two serious violent offenses “aris[e] from separate and distinct criminal conduct.” RCW 9.94A.589(1)(b). In such cases, sentencing is consecutive unless the court elects to impose concurrent terms as an exceptional sentence downward. *State v. Graham*, 181 Wn.2d 878, 887, 337 P.3d 319 (2014).

Both the defense and the prosecution may fail to meet their respective burdens. In such cases, a judge must score multiple serious

violent felonies against each other (because they are not the “same criminal conduct”) while also running the sentences concurrently (because they are not “separate and distinct.”)

Here, the court did not make a finding that the rape and assault were “separate and distinct.” RP 900-926, 928-933; CP 167.

Accordingly, the state failed to meet its burden, and the special provisions of RCW 9.94A.589(1)(b) do not apply. *See Graciano*, 176 Wn.2d at 539.

Respondent asserts that the court’s passing oral reference to “same criminal conduct”<sup>13</sup> qualifies as an affirmative finding that the offenses were “separate and distinct.” Brief of Respondent, p. 65 (citing RP 914). This is incorrect. The defendant’s failure to prove “same criminal conduct” does not relieve the state of its burden to prove the crimes were “separate and distinct.” Respondent confuses a theoretical platonic ideal (where multiple offenses are either one or the other) with the messy world we live in, where a failure of proof can result in a finding that multiple offenses are neither one nor the other.

Furthermore, the evidence does not support a finding that the offenses were “separate and distinct.” As an initial matter, the state did not elect a particular action to constitute the first-degree assault; instead,

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<sup>13</sup> And, presumably, its failure to check the “same criminal “conduct box on the judgment and sentence. CP 168.

the state argued that the entire course of conduct comprised the first-degree assault. Indeed, that is why the prosecution was forced to concede that both second-degree assault charges merged with the first-degree assault. RP 900.

By the same token, the first-degree assault and the first-degree rape (involving serious physical injury) were inextricably intertwined. The two offenses were committed at the same time and place, against the same victim, with the same overall criminal purpose. RCW 9.94A.589(1)(a); *see State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013).

The error requires remand. Although the court remarked that it would impose the same sentence for either offense, this remark was based on a misunderstanding of the overall standard range. The court determined his overall standard range to be 213-283 months. CP 169. This reflects a consecutive term consisting of 93-123 months for the assault charge and 120-160 months for the rape charge. CP 169.

In fact, Mr. Paschal's overall standard range would be lower. The increase in the standard range for the assault charge (to 120-160 months) would be offset by the requirement that the two sentences run concurrently. RCW 9.94A.589. The overall standard range would therefore be 120-160 months, which is considerably less than the 213-283 month period calculated by the court. CP 169.

Because the court miscalculated the standard range, the sentence must be vacated and the case remanded for a new sentencing hearing.

*State v. Parker*, 132 Wn.2d 182, 192-93, 937 P.2d 575 (1997).

**VI. THE TRIAL COURT FAILED TO MAKE AN ADEQUATE INQUIRY INTO MR. PASCHAL'S ABILITY TO PAY DISCRETIONARY LFOs FOLLOWING CONVICTION AND IMPOSITION OF A 30-YEAR SENTENCE.**

A sentencing court must make a particularized inquiry into an offender's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 841, 344 P.3d 680 (2015). The obligation to conduct the required inquiry rests with the court. *Id.*

Because of this, the sentencing court "must do more than sign a judgment and sentence with boilerplate language." *Id.* Instead, the record must reflect the court's individualized inquiry. *Id.* The burden is on the prosecution to show an ability to pay. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014) *review granted*, (Wash. Aug. 5, 2015).

Furthermore, a defendant's silence or a pre-imposition statement regarding employment should not be taken as proof of ability to pay. *Cf. Duncan*, 180 Wn. App. at 250 (noting most offenders' motivation "to portray themselves in a more positive light.") It is only after the court imposes a term of incarceration that an offender can make a meaningful

presentation on likely future ability to pay, since the offense of conviction and the length of incarceration will affect that ability.

Following *Blazina*, the Supreme Court will remand any case in which the record does not reflect an adequate inquiry. *See, e.g., State v. Vansycle*, No. 89766-2, 2015 WL 4660577 (Wash. Aug. 5, 2015).<sup>14</sup>

For all these reasons, the court should vacate the trial court's imposition of discretionary LFOs. The case must be remanded for the trial court to make the individualized inquiry required under *Blazina*.

**VII. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. PASCHAL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

Mr. Paschal rests on the argument set forth in the Opening Brief.

**CONCLUSION**

Mr. Paschal's convictions must be reversed and the case remanded for a new trial. If the convictions are not reversed, the case must nonetheless be remanded for vacation of either the rape or the assault conviction.

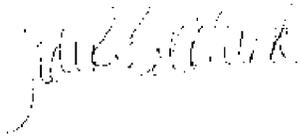
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<sup>14</sup> Similar orders were also entered on August 5th in *State v. Cole*, No. 89977-1; *State v. Joyner*, No. 90305-1; *State v. Mickle*, No. 90650-5; *State v. Norris*, No. 90720-0; *State v. Chenault*, No. 91359-5; *State v. Thomas*, No. 91397-8; *State v. Bolton*, No. 90550-9; *State v. Stoll*, No. 90592-4; *State v. Bradley*, No. 90745-5; *State v. Calvin*, No. 89518-0; and *State v. Turner*, No. 90758-7.

Even if the court does not vacate one conviction, the sentence must be vacated and the case remanded for a new sentencing hearing. Upon resentencing, the court must determine whether Mr. Paschal will ever have the ability to pay discretionary legal financial obligations, given his indigent status and lengthy incarceration.

Respectfully submitted on October 2, 2015,

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Charles Paschal, DOC #374765  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

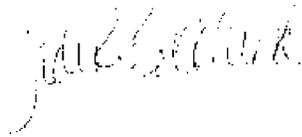
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 2, 2015.



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Jodi R. Backlund, WSBA No. 22917  
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## BACKLUND & MISTRY

October 02, 2015 - 10:32 AM

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