

**FILED**

JUL 06, 2012  
Court of Appeals  
Division III  
State of Washington

No. 30629-1-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

JUAN CRUZ JUAREZ,  
Defendant/Appellant.

APPEAL FROM THE ADAMS COUNTY SUPERIOR COURT  
Honorable Richard W. Miller, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to support the conviction for possession of an unlawful firearm.
2. The record does not support the implied finding that Mr. Juarez has the current or future ability to pay Legal Financial Obligations.

*Issues Pertaining to Assignments of Error*

1. Was Mr. Juarez’ right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the elements of the crime as instructed?
2. Should the implied finding that Mr. Juarez has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where it is not supported in the record?

**B. STATEMENT OF THE CASE**

A jury convicted Juan Cruz Juarez of possession of an unlawful firearm.<sup>1</sup> CP 30; RP 97.

The “to convict” instruction provided:

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<sup>1</sup> A second original charge of alien in possession of a firearm was dismissed the day of trial. CP 1; RP 6–7.

Instruction No. 11. To convict the defendant of the crime of possession of unlawful firearm, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 25, 2011, the defendant knowingly had a short barreled shotgun in his possession or control;

(2) The defendant knew of the characteristics making it a short barreled shotgun; and

(3) **That this act occurred in the State of Washington, County of Adams.**

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 44 (emphasis added).

At sentencing the court imposed a total amount of Legal Financial Obligations (“LFOs”) of \$900.00. CP 53–54. The court made no express finding that Mr. Juarez had the present or future ability to pay the LFOs.

RP 102–08; *see* CP 51 at ¶ 2.5. However, the Judgment and Sentence contained the following pertinent language by the Court:

**¶ 2.5 Ability To Pay Legal Financial Obligations.** The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 51. The court ordered that all payments on the LFOs be paid “commencing immediately”, at the rate of \$50.00 per month beginning in June 2012. CP 54 at ¶ 4.3. The court made no inquiry into Mr. Juarez’ financial resources and the nature of the burden that payment of LFOs would impose. RP 102–08.

This appeal followed. CP 65.

### **C. ARGUMENT**

**1. Mr. Juarez’ right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the elements of the crime of possession of an unlawful firearm as instructed in the “to convict” jury instruction.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); State v. Hickman, 135 Wn.2d 97, 101–04, 954 P.2d 900 (1988); State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The federal and state constitutions require a reviewing court to reverse and dismiss a conviction for insufficient evidence where the state fails to prove an element of the charged offense beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1 § 3; Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); In re Winship, 397 U.S. at 358; Lee, 128 Wn.2d at 164. .

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)). While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491, 670 P.2d 646.

While the state constitution requires trial in the county where the crime was committed,<sup>2</sup> venue is not an element of the offense of possession of an unlawful firearm. *See* RCW 9.41.190; *see also* State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994). "Under the law of the case doctrine jury instructions not objected to become the law of the case. In

criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction." Hickman, 135 Wn.2d at 102 (citations omitted).

The "to convict" instruction in Mr. Juarez' case required the State to prove, *inter alia*, that the prohibited possession of an unlawful firearm occurred in Adams County. CP 44. The State was not surprised or ambushed by this instruction since—although the State apparently did not propose it<sup>3</sup>—the State included the Adams County venue in its charging document<sup>4</sup> and did not except or object to the court including "Adams County" in the jury instruction.<sup>5</sup>

The decision in State v. Hickman is instructive. In Hickman, the "to convict" jury instruction added venue as an additional element for the jury to consider by indicating that the crime occurred in Snohomish County. Venue was not an element of the crime for which Hickman was charged. Hickman argued that, by adding venue to the instruction, the State assumed the burden of proving that element beyond a reasonable

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<sup>2</sup> Const. art. I, § 22 (amend.10) provides the defendant the right "to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed ...".

<sup>3</sup> See CP 18. The defendant included "Adams County" in his proposed instructions. CP 29. There is no record of the discussion of the proposed instructions, which took place in chambers. See RP 72.

doubt. The Washington Supreme Court agreed with this argument and held that added elements become the law of a case when they are included in jury instructions and that a defendant may challenge the sufficiency of the evidence of an added element.

There, the remaining inquiry was whether the State offered sufficient evidence that Hickman presented or caused to be presented a false insurance claim in Snohomish County. When Hickman allegedly called his insurance company to submit the fraudulent claim, he was in Hawaii while his insurance company was in King County. The relevant reference to Snohomish County was the Snohomish County Sheriff's testimony that he had been called, following the theft of the vehicle, to an address "off Logan Road." "Even assuming Logan Road is somewhere in Snohomish County and only in Snohomish County, such evidence simply does not demonstrate Hickman knowingly presented or caused to be presented a fraudulent insurance claim in Snohomish County." Hickman, 135 Wn.2d at 106. The court reversed and dismissed Hickman's conviction for insufficient evidence because the State failed to meet its burden of proving venue as an additional element of the crime for which Hickman was charged. Id.

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<sup>4</sup> CP 1.

<sup>5</sup> RP 72-73.

The facts in the present case are indistinguishable from those in Hickman. The relevant reference to Adams County was the testimony from Deputy Craig Frank (Adams County Sheriff's office) and [former] Sergeant Nels Larson (Othello Police Department) that they had responded to an address of 2568 West Bench Road. CP 24–27, 33–34. The State offered no evidence that 2568 West Bench Road is located somewhere in Adams County. During closing the State did contend “[I]t would be difficult, unless you’re a real skeptical metaphysician [sic], to argue that this did not occur in Adams County, State of Washington. As the deputies testified, they responded to a call near Othello, Washington.” RP 84–85. The State was incorrect. Deputy Frank mentioned only that state records showed the registered owner of the car police were seeking lived on O’Brian Road in Othello. RP 35. Law enforcement did not testify they ever went to O’Brian Road. The record remains the same—there was no evidence that 2568 West Bench Road is located somewhere in Adams County.

Even after viewing this scant evidence in the light most favorable to the State, no rational juror could have found that the crime took place in Adams County. Thus, the State failed to prove the assumed element of venue of the crime beyond a reasonable doubt. Therefore, the evidence

was insufficient to support conviction of possession of an unlawful firearm. The conviction must be reversed and dismissed. Hickman, 135 Wn.2d at 106.

**2. The implied finding that Mr. Juarez has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.**

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of

costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

b. There is insufficient evidence to support the trial court's implied finding that Mr. Juarez has the present or future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” Id. at 915-16.

Here, the court considered Mr. Juarez’s “past, present, and future ability to pay legal financial obligations” but made no express finding that Mr. Juarez had the present or likely future ability to pay those LFOs. However, the finding is implied because the court ordered that all payments on the LFOs be paid “commencing immediately” and at the rate of \$50.00 per month *after* it considered “the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the

likelihood that the defendant's status will change.” CP 51 at ¶ 2.5; CP 54 at ¶ 4.3.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Juarez' financial resources and the nature of the burden of imposing LFOs on him. In fact, the record contains no evidence to support the trial court's implied finding in ¶ 2.5 that Mr. Juarez has the present or future ability to pay LFOs. The record instead supports the opposite conclusion. Mr. Juarez indicated that if imposed, he'd prefer to be locked up with credit given until the fines were paid off "because I don't know how I could pay that." RP 104. Defense counsel had been appointed due to the indigency, and further advised the sentencing court that Mr. Juarez had no means to pay any fines. RP 104. Moreover, the court was aware when signing paperwork for processing the Notice of Appeal that Mr. Juarez remained indigent. RP 107–08. The implied finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence.

Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no evidence to support the trial court's finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the present or future ability to pay LFOS of any nature must be stricken where

the court made no inquiry and there is no evidence in the record to support such findings.

The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Juarez until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ ‘[t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*’ ” Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

Since the record does not support the trial court's finding that Mr. Juarez has or will have the ability to pay these LFOs when and if the State attempts to collect them, the implied finding is clearly erroneous and must therefore be stricken from the record. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

**D. CONCLUSION**

For the reasons stated, the conviction should be reversed and dismissed. Alternatively, the implied finding of present and future ability to pay legal financial obligations should be stricken from the Judgment and Sentence.

Respectfully submitted on July 6, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 6, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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