

**FILED**

DEC 18, 2012

Court of Appeals  
Division III  
State of Washington

NO. 30731-0-III

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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State of Washington,

Respondent,

v.

Alexander S. Bulmer,

Appellant.

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Appeal From The Superior Court  
Of Whitman County  
Case No. 11-1-00067-7  
The Honorable David Frazier

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BRIEF OF RESPONDENT

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Denis P. Tracy, WSBA # 20383  
Whitman County Prosecutor

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I. DEFENDANT / APPELLANT'S ASSIGNMENTS OF ERROR

1. The defendant argues that the standard WPIC "To Convict" instructions are unconstitutional in that they instruct the jury that the jury has "a duty" to return a verdict of guilty, if the jury finds that all elements have been proven beyond a reasonable doubt. The State believes the WPIC is not unconstitutional, and points this court to the earlier-decided cases on point.

2. Defendant argues that the trial court made errors in its findings related to the defendant's ability to pay Legal Financial Obligations (LFO's).

A. Defendant argues there is no support for the trial court's finding that defendant has the ability to pay costs of incarceration. The State believes 1) this issue is moot, since no costs of incarceration were imposed; and 2) defendant is correct and the State believes the "finding" is just the result of a scrivener's error, since there was no mention of this issue at sentencing.

B. Defendant also argues that the trial court's implied finding that defendant would have the ability to pay the restitution and other LFO's at some reasonable payment plan, was unsupported by the record. The State believes defendant is not

correct on this point, but believes the issue to be moot and has no objection to granting the relief requested of striking the findings.

## II. STATEMENT OF THE CASE

For purposes of responding to appellant's brief, the State agrees with appellant's Statement of the Case.

## III. ARGUMENT

1. The standard WPIC instruction, which instructs juries that they have a duty to return a verdict of guilty if the State proves every element of an offense beyond a reasonable doubt is not unconstitutional.

The defendant argues that a jury can always find a defendant not guilty, and points out that if a jury does find a defendant not guilty, despite what might be considered overwhelming evidence, there is nothing the State can do about it. As quoted by the defendant's brief: "[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy." Hartigan v. Washington Territory, 1 Wash.Terr. 447, 449 (1874). Such a statement is true. But it does not lead to the conclusion that the WPIC is wrong.

This issue has been explicitly decided three times in recent cases in the Washington Court of Appeals. First in State v. Meggyesy, 90 Wn.App. 693, *rev. denied* 136 Wn.2d 1028 (1998), *abrogated on other grounds* by State v. Recuenco, 154 Wn.2d 156 (2005), the Court of Appeals explicitly rejected this argument. Then in State v. Bonisisio, 92 Wn.App. 783 (1998), the court made the same ruling on this issue. Then again in State v. Brown, 130 Wn.App. 767 (2005), the court again rejected defendant's argument. Defendant notes all of these cases in his brief.

With respect to this court and to defense counsel, this author can't word the State's argument better than the court's decisions in those three cases.

The State believes the cases cited were correctly decided and asks the Court to follow precedent in this area.

## 2. Legal Financial Obligations

A. There was error in finding the defendant had the ability to pay the costs of incarceration.

The State concedes that there is not sufficient support in the record to support the sentencing court's finding that defendant has the present or future ability to pay the costs of incarceration. There was no mention of that issue at sentencing or elsewhere in the record. The State believes that

“the box was checked” in error, and the State does not oppose striking that finding from the Judgment and Sentence.

B. There was not error in finding the defendant could make some payments towards LFO's, but no payment plan was set by the court.

The trial court was aware at the time of sentencing that defendant was about 18 years old, had held a job before the trial, and was spry enough to force entry of the animal shelter building through a window. But while there is evidence which supports an implied finding by the trial court that the defendant will be able to pay a reasonable payment plan, to be set by the court clerk and/or the Department of Corrections, the defendant is correct that the clerk, or the DOC, must examine the defendant's ability to pay at the time that the payment plan is actually set. Therefore, the State has no objection to the relief requested of striking the implied finding, as striking the implied finding will not affect a future determination of ability to pay.

#### IV. CONCLUSION

The standard WPIC 'to convict' instruction does not violate the defendant's right to jury trial. The issue has been decided in multiple published cases and should not be overruled here.

As to the finding of an ability to pay the costs of incarceration, the State concedes error. As to the indirect/implied finding of ability to pay various LFO's, the State agrees with defendant that a future determination of ability to pay will have to be made in order to set a reasonable payment plan. Therefore, the sentencing court's implied finding as to that issue is moot and the State does not object to striking it.

Respectfully submitted this 17 day of December, 2012.



Denis Tracy, WSBA 20383  
Whitman County Prosecutor  
Attorney for the State

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

STATE OF WASHINGTON, Plaintiff,  v.  ALEXANDER SAMUEL BULMER, Defendant,	Court of Appeals No. 30731-0 No. 11-1-00067-7  AFFIDAVIT OF DELIVERY
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STATE OF WASHINGTON )  
COUNTY OF WHITMAN )

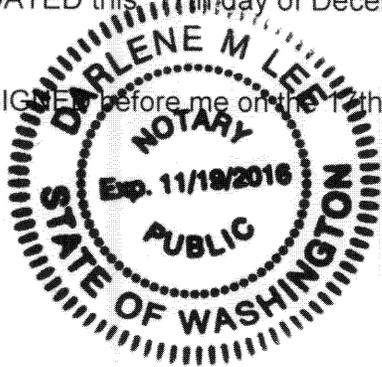
JENNIFER GRIFFIN, being first duly sworn, deposes and says as follows: That on the 12th day of December, 2012 I caused to be delivered a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

- Mailed to Alexander Bulmer, 3175 Tomer Rd, #18, Moscow, ID 83843.
- Emailed to Susan Gash, gashlaw@msn.com, with prior approval from both parties.

DATED this 17th day of December, 2012.

*Jennifer Griffin*  
\_\_\_\_\_  
JENNIFER GRIFFIN

SIGNED before me on the 17th day of December, 2012.



*Darlene M. Lee*  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
Washington, residing at: Colfax  
My Appointment Expires: 11/19/2016