

No. 30913-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
DEC 18, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

IVAN BUSTOS IZAZAGA,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Ruth E. Reukauf, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. Court's Instruction No. 21 misstated the law defining recklessness and relieved the State of its burden of proving this essential element of first degree manslaughter.

2. Ineffective assistance of counsel deprived Mr. Izazaga of his right to a fair trial in relation to the first degree manslaughter conviction

3. The State failed to prove beyond a reasonable doubt that Mr. Izazaga or an accomplice acted recklessly, and therefore failed to prove this essential element of first degree manslaughter.

4. The "to-convict" instructions erroneously stated the jury had a "duty to return a verdict of guilty" if it found each element proven beyond a reasonable doubt.

5. The record does not support the findings that Mr. Izazaga has the current or future ability to pay Legal Financial Obligations, including the means to pay costs of incarceration and medical care.

Issues Pertaining to Assignments of Error

1. Is reversal of the first degree manslaughter conviction required because defense counsel was ineffective in proposing a jury instruction that defined recklessness in a manner that relieved the State of proving that Mr.

Izazaga or an accomplice knew of and disregarded the risk that death may occur, rather than simply the risk that a wrongful act may occur?¹

2. Did the State fail to prove beyond a reasonable doubt that Mr. Izazaga or an accomplice recklessly caused death, where the State failed to present any evidence to establish that Mr. Izazaga or an accomplice personally knew that his actions could cause death?²

3. In a criminal trial, does a “to-convict” instruction, which informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt, violate a defendant’s right to a jury trial, when there is no such duty under the state and federal Constitutions?³

4. Should the findings that Mr. Izazaga has the current or future ability to pay Legal Financial Obligations including the means to pay costs of incarceration and medical care be stricken from the Judgment and Sentence as clearly erroneous, where they are not supported in the record?⁴

¹ Assignment of Error No. 1, 2.

² Assignment of Error 3.

³ Assignment of Error 4.

⁴ Assignment of Error 5.

B. STATEMENT OF THE CASE

A jury found the 20-year old defendant, Ivan Bustos Izazaga, guilty of first degree manslaughter. CP 264; X 5/25/12 RP 890.⁵ In the very early hours of a June morning Lucio Rivera, the driver of the car in which Mr. Izazaga was a passenger, took a gun out of the trunk and later fired the fatal shot “without hesitation” towards a red car pulling into a nearby parking lot. Mr. Izazaga had unsuccessfully told Lucio this was not the red car belonging to a person with whom Izazaga had had previous problems and that the beef was his— and not Lucio’s—to deal with. The bullet passed through the car door and killed the young school teacher driver, Yecenia Guerrero. II 4/16/12 RP 38, 78; 94, 98–99; III 4/17/12 RP 360, 363–65, 372, 374–76, 377–79, 381–82, 385, 389–91; IV 4/18/12 RP 318, 320, 322; X 5/25/12 RP 888–89. Lucio, who was never found by police, did not testify at trial.

Mr. Izazaga was charged, as principal or accomplice, with aggravated first degree murder or alternatively, first degree (premeditated) murder or first degree (extreme indifference to human life) murder. CP 17–18. At trial, the following pertinent evidence was presented.

⁵ The trial was reported by court reporter Joan Anderson and will be referenced by volume number, date and page, e.g. “VI 4/20/12 RP __”.

23-year-old Hector Epino testified he didn't know Mr. Izazaga but had seen him around. He mentioned three incidents in which Mr. Izazaga didn't seem very happy with him, one taking place at a time when Epino was ending a relationship with a person "Angeline" with whom Mr. Izazaga had a child. III 4/17/12 RP 204–10.

The night of the incident, Epino and his sister Griselda were at Johnny's night club in Yakima and at some point she noticed that Mr. Izazaga and his friend Hector Ramirez were also there. As they all left at closing, Ramirez appeared to want to fight Epino but security guards stopped it. II 4/16/12 RP 39–40; III 4/17/12 RP 175–79, 211. Mr. Izazaga's group left. III 4/17/12 RP 212.

Five minutes after Epino and Griselda crossed the street to the Les Schwab lot, a car pulled in. Mr. Izazaga and Ramirez got out of the passenger doors, faced off with Epino a few minutes and then got back in the car. Epino pushed the door closed on someone's leg and chased the car as it left, trying to strike at the occupants through the window. Griselda thought she heard Ramirez yell "get the gat [gun]" as the driver drove off. III 4/17/12 RP 180–83, 193, 212–15. Five minutes later as they stood in the lot waiting for a relative to pick them up, Griselda and her brother heard a gunshot. III 4/17/12 RP 184, 216.

Mr. Izazaga did not testify at trial. A redacted audio tape of his interview with officers of the Yakima Police Department after his arrest was played for the jury and the jury was given transcripts to follow along. II 4/16/12 RP III 4/17/12 RP 297, 306–08. Mr. Izazaga told police Epino had pulled a knife out in the Les Schwab incident, and that was when Lucio, the driver, got mad. After leaving the Les Schwab lot Lucio drove to the neighboring Neighborhood Health clinic parking lot. III 4/17/12 RP 372, 381, 385. At some point Lucio got out of the car and apparently brought a gun back inside. III 4/17/12 RP 374–75, 377–78. Mr. Izazaga told him to stay out of it, that it wasn't his beef. Lucio told Mr. Izazaga it just changed into his beef because of the knife. III 4/17/12 RP 360, 363, 365, 376, 378–79, 391. When told to just stay out of it Lucio accused him of acting like a pussy. III 4/17/12 RP 361.

All of a sudden a red car turned the corner and Lucio said that's the car. Mr. Izazaga said that's not [Epino's] car because [Epino's] car didn't have tinted windows. III 4/17/12 RP 363–64, 381–82, 389–90. But Lucio shot without hesitating, without telling them he was going to shoot. III 4/17/12 RP 364, 382, 389–90.

Earlier that evening Ms. Guerrero and Lisa and Mikaela, friends she'd known since high school, had also arrived at Johnny's hoping to

catch up on their busy lives. They left at closing, walked across the street to the Les Schwab lot where Ms. Guerrero's red car was parked, and then drove over into the nearby Taco Time lot to wait for Mikaela's boyfriend to pick her up. II 4/16/12 RP 36–43, 53–58. Mikaela's boyfriend had had a recent altercation with Hector Epino and, having seen Epino when they left Johnny's, Mikaela wanted to go to the Taco Time to avoid any confrontation. II 4/16/12 RP 56–57.

As they neared the drive-through the friends heard a sound and then Ms. Guerrero said, "I think I got shot". II 4/16/12 RP 43–46, 58–60. The car moved a few more feet and stopped. II 4/16/12 RP 46, 58, 60; III 4/17/12 RP 276. Ms. Guerrero died shortly thereafter at the hospital of a single gunshot wound which lacerated her aorta. II 4/16/12 RP 94, 98–99; IV 4/18/12 RP 318, 320, 322.

Ms. Guerrero's red Jetta car had very dark tinted windows. II 4/16/12 RP 48, 95. Epino and members of his family often drove a red 1966 Honda car that was owned by his mother, and it did not have tinted windows. III 4/17/12 RP 185, 187, 200, 217, 227.

Ms. Guerrero's friends had seen a car parked in the Neighborhood Health parking lot, and Lisa saw a male driver reaching out the driver's side window with a gun. II 4/16/12 RP 43, 103.

Several days prior to Mr. Izazaga's arrest, his mother had told him that Ms. Guerrero was his cousin. VI 4/20/12 RP 636⁶. During his interview Mr. Izzaga explained to police that prior to arrest he'd been making plans to come in and talk voluntarily and had left them a message to that effect, and that if police "thought that I would be able to live with something like this in my life, that I would kill my own cousin," then he was happy he was there to talk and glad to be getting it over with. III 4/17/12 RP 354, 363, 379. Defense counsel noted that in his earlier testimony that day, the Yakima Police Department detective had made a motion with his fingers indicating quotations at this explanation. The detective agreed that the reason he did so was because the detective didn't know what the relationship of Ms. Guerrero was to Mr. Izazaga, and had never interviewed Ms. Izazaga's mother to determine what the relationship was. III 4/17/12 RP 391-92.

The trial court granted a defense motion to dismiss the charge of first degree aggravated murder, but declined to dismiss the charges of first degree murder (premeditated or alternatively, extreme indifference to human life). VII 4/23/12 RP 683-92, 699. Over defense objection, the

⁶ Yolanda Bustos, Mr. Izazaga's mother, said that she and Ms. Guerrero's mother are friends. Ms. Guerrero's mother had told her that she and Mr. Izazaga's father are cousins. VI 4/20/12 RP 636.

court allowed the State to submit second degree murder instructions and declined to give defense requested instructions regarding second degree manslaughter. VII 4/23/12 RP 691–92, 694–97, 699. The State did not object to defense proposed instructions regarding first degree manslaughter. VII 4/23/12 RP 694,699–700.

The jury was given the following relevant “to convict” instruction:

Instruction No. 22. To convict the defendant of the crime of Manslaughter in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 12, 2011, the defendant or an accomplice engaged in reckless conduct;
- (2) That Yecenia Guerrero died as a result of defendant or an accomplice’s reckless acts; and
- (3) That any of these acts occurred in the State of Washington.

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 258.

The jury was also given the following definitional instruction:

Instruction 21. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP 257.

By special verdict, the jury found Mr. Izazaga or an accomplice was armed with a firearm during commission of the crime. CP 263.

The court imposed a high end standard range sentence of 162 months, which included the 60-month firearm sentence enhancement. CP 299. As part of the Judgment and Sentence, the court made the following pertinent findings:

¶ 2.7 Financial Ability: 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. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753 [sic].

...

¶ 4.D.4. Costs of Incarceration: In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of \$50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed \$100.00 per day of incarceration (the rate in 2012 is \$65.00 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2). *Capped at \$500 (handwritten in by Judge Ruth E. Reukauf).

¶ 4.D.5 Costs of Medical Care: In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

CP 299 and 301 (bolding in original).

This appeal followed. CP 306.

C. ARGUMENT

1. Jury Instruction 21 impermissibly lowered the State's burden of proof and defense counsel was ineffective in proposing it.

The trial court's instructions misstated the law by giving the jury an incorrect definition of "recklessness," thereby relieving the State of its burden of proving an essential element of the crime of manslaughter. Reversal of the first degree manslaughter conviction is required because counsel was ineffective in proposing the flawed instruction.

a. Standard of review. An appellant may challenge a jury instruction that he proposed if it is in the context of an ineffective assistance claim. State v. Bradley, 96 Wn. App. 678, 682, 980 P.2d 235 (1999); *see also* State v. Kyлло, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). The invited error doctrine does not preclude review. Kyлло, 166 Wn.2d at 861.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial. Strickland v. Washington, 466 U.S. 668, 687, 103 S.Ct. 2052, 80

L.Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. Failure on either prong defeats a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

b. To prove first-degree manslaughter, the State must show the defendant or an accomplice knew of and disregarded a substantial risk that death may occur, not a substantial risk that any wrongful act may occur.

The first-degree manslaughter statute provides, "A person is guilty of manslaughter in the first degree when [h]e recklessly causes the death of another person." RCW 9A.32.060(1)(a). In the context of first-degree manslaughter, "reckless" or "recklessly" means the defendant "knows of and disregards a substantial risk that a death may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." WPIC 10.03 and Comment.

In other words, "to prove manslaughter the State must show [the defendant] knew of and disregarded a substantial risk that a *homicide* may occur." State v. Gamble, 154 Wn.2d 457 , 467,114, P.3d 646 (2005)

(emphasis in original). Following the supreme court’s decision in Gamble, the Washington Supreme Court Committee on Jury Instructions revised the definition of recklessness. “As amended, WPIC 10.03 makes clear that the mens rea instruction defining reckless for manslaughter in the first degree must state that the defendant disregarded a substantial risk of death.” State v. Peters, 163 Wn. App. 836, 849, 261 P.3d 199 (2011).

Here, the jury was given the following definitional instruction regarding recklessness:

Instruction 21. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP 257.

In Peters, the court considered an identical instruction in the same context of first degree manslaughter and held it impermissibly lowered the State’s burden of proof:

We hold the jury instruction given in this case that defines reckless to mean Peters knew of and disregarded “a substantial risk that a wrongful act may occur,” rather than that “a substantial risk that death may occur” is contrary to Gamble and WPIC 10.03. The instruction impermissibly relieved the State of the burden of proving beyond a reasonable doubt that Peters knew of and disregarded a substantial risk that death may occur, and allowed the jury to convict Peters of only a wrongful act.

Peters, 163 Wn. App. at 849–50. Just as in Peters, the instruction given here impermissibly relieved the State of the burden of proving beyond a reasonable doubt that Mr. Izazaga or an accomplice knew of and disregarded a substantial risk that death may occur, and allowed the jury to convict Mr. Izazaga or an accomplice of only a wrongful act.

c. Defense counsel was ineffective in proposing the flawed recklessness instruction. Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland, 466 U.S. at 685-86; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Defense counsel proposed Instruction 21. CP 175. Although the State was “ambivalent” regarding inclusion of the manslaughter 1 instructions, it took no exception and made no objection to the final instructions of the court. VII 4/23/12 RP 694, 698–700. Counsel performed deficiently in proposing an instruction that lessened the State's burden of proof.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. In response to the 2005 decision in Gamble, WPIC 10.03 had been modified to alert practitioners that the mens rea instruction defining reckless for manslaughter in the first degree should state that the defendant disregarded a substantial risk that *death* might occur—not just that a wrongful act might occur. The 2011 decision in Peters squarely addressed this issue and held that the failure to so instruct the jury was reversible error. *See Peters*, 163 Wn. App. at 847–50.

Moreover, it has long been understood that proof of recklessness includes both a subjective and objective component. “Whether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts.” State v. R.H.S., 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). To say that the State need not prove that Mr. Izazaga or an accomplice subjectively knew and disregarded the risk of a specific result is simply incorrect and also relieves the State of establishing a critical fact. It is clear from Gamble and R.H.S. that the State is required to establish *what* “wrongful act” a defendant or an accomplice knew of and disregarded in order to prove that a defendant or an accomplice acted recklessly.

Counsel has a duty to know the relevant law. Kyllo, 166 Wn.2d at 861. A competent attorney is sufficiently aware of relevant case law to propose a proper instruction applicable to the facts of a given case.

Thomas, 109 Wn.2d at 227. A reasonably competent attorney would have been aware Instruction 21 was flawed at the time of Mr. Izazaga's trial.

d. Reversal is required. A jury instruction that lowers the State's burden of proof violates due process and therefore is an error of constitutional magnitude that may be raised for the first time on appeal. Kyllo, 166 Wn.2d at 862. Constitutional errors require reversal unless the State proves, beyond a reasonable doubt, that the error did not contribute to the verdict obtained. State v. Mills, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005) (citing Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Chapman v. California, 386 U.S. 18,24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

The State cannot prove beyond a reasonable doubt that this error did not prejudice Mr. Izazaga. It takes much, much less to establish knowledge and disregard of a substantial risk of any "wrongful act" than it does to establish knowledge and disregard of a substantial risk of death. Mr. Izazaga was clearly convicted as an accomplice and not as a principal. The jury concluded that Lucio, the principal, disregarded a substantial risk

of a wrongful act by shooting a gun towards a moving car, but it may not have concluded beyond a reasonable doubt that he knew this behavior would create a substantial risk of death. Indeed, the jury acquitted Mr. Izazaga of first degree (premeditated) murder, first degree (indifference to human life) murder, and second degree intentional murder, indicating that it *rejected* the State's theory that Lucio as principal (or Mr. Izazaga as accomplice) was pointing the gun at an occupant of the car.

A "wrongful act" could be any bodily injury, no matter how minor, as well as any damage to property, as well as any number of other non-homicidal acts. The erroneous jury instruction substantially lowered the State's burden of proof, prejudicing Mr. Izazaga. There was no logical or tactical reason for defense counsel to lower the State's burden of proof and, under the facts of this case, Mr. Izazaga was prejudiced by the deficient performance. The conviction should be reversed and the case remanded for a new trial. Mills, 154 Wn.2d at 15.

2. The State failed to prove beyond a reasonable doubt that Mr. Izazaga or an accomplice acted recklessly because it presented no evidence that either one personally knew that his actions could cause death.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonable can be drawn therefrom. Salinas, 119 Wn.2d at 201.

To convict Mr. Izazaga of first degree manslaughter as instructed, the State was required to prove that Mr. Izazaga or an accomplice engaged in reckless conduct that resulted in Ms. Guerrero’s death. RCW 9A.32.060(1)(a); CP 258. A person “is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur

and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c); CP 257. As argued above, in order to prove recklessness in this case, the State was required to prove that Mr. Izazaga or an accomplice knew of but disregarded the risk that death could result from his conduct. Gamble, 154 Wn.2d at 467–68.

The element of recklessness includes both a subjective and objective component. R.H.S., 94 Wn. App. at 847. The jury is permitted to find actual subjective knowledge if there is sufficient information that would lead a reasonable person to believe that a fact exists. R.H.S., 94 Wn. App. at 847; *see also* RCW 9A.08.010(1)(b)(ii); State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992). The State failed to present any evidence from which a reasonable juror could conclude that Lucio as principal or Mr. Izazaga as accomplice knew the extent of injury that could result from shooting in the direction of a moving car. The State presented medical testimony that a single shot could in fact be lethal. But the State presented no evidence that Lucio or Mr. Izazaga was trained or experienced in shooting such that either of them would know of and expect this same result from a single pull of the trigger at a moving target. The State also failed to present any evidence that Lucio or Mr. Izazaga personally knew

the risk of death associated with shooting—suddenly and “without hesitation”— in the direction of a moving car. There was simply no evidence showing that either of the two had the subjective knowledge that death could result from shooting in the direction of a moving car.

The State therefore failed to establish beyond a reasonable doubt the subjective component of recklessness, and therefore failed to prove this essential element of first degree manslaughter. The conviction should be dismissed

3. Mr. Izazaga’s constitutional right to a jury trial was violated by the court’s instruction, which affirmatively misled the jury about its power to acquit.

As part of the “to-convict” instruction used to convict Mr. Izazaga of first degree manslaughter the trial court instructed the jury as follows:

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.

Instruction No. 22 at CP 258. This is standard language from the pattern instruction. WPIC 28.02. Mr. Izazaga contends there is no constitutional

“duty to convict” and that the instruction accordingly misstates the law.

The instruction violated Mr. Izazaga’s right to a properly instructed jury.⁷

a. Standard of review. Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de novo*. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) , *overruled in part on other grounds*, 174 Wn.2d 707, ___ P.3d ___ (June 7, 2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

b. The United States Constitution. The right to jury trial in a criminal case was one of the few guarantees of individual rights enumerated in the United States Constitution of 1789. It was the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, § 2, ¶ 3; U. S. Const. amend. 6; U.S. Const. amend. 7. Thomas Jefferson wrote of the importance of this right in a letter to Thomas Paine in 1789: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its

⁷ Division One of the Court of Appeals rejected the arguments raised here in its decision in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005). Counsel respectfully contends Meggyesy was incorrectly decided.

constitution." The Papers of Thomas Jefferson, Vol. 15, p. 269 (Princeton Univ. Press, 1958).

In criminal trials, the right to jury trial is fundamental to the American scheme of justice. It is thus further guaranteed by the due process clauses of the Fifth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

Trial by jury was not only a valued right of persons accused of crime, but was also an allocation of political power to the citizenry.

[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power - - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. at 156.⁸

c. Washington Constitution. The Washington Constitution provides greater protection to its citizens in some areas than does the United States Constitution. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

⁸ In Sofie v. Fibreboard Corp., the majority saw this allocation of political power to the citizens as a limit on the power of the legislature. 112 Wn.2d 636, 650-53, 771 P.2d 711, 780 P.2d 260 (1989). Two of the dissenting members of the court acknowledged the allocation of power, but interpreted it rather as a limit on the power of the judiciary. Sofie, 112 Wn.2d at 676 (Callow, C.J., joined by Dolliver, J., dissenting).

Under the Gunwall analysis, it is clear that the right to jury trial is such an area. Pasco v. Mace, *supra*; Sofie v. Fiberboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

i. The textual language of the state constitution.

The drafters of our state constitution not only granted the right to a jury trial, Const. art. 1, § 22,⁹ they expressly declared it “shall remain inviolate.” Const. art. 1, § 21.¹⁰

The term “inviolable” connotes deserving of the highest protection . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolable, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie, 112 Wn.2d at 656. Article 1, section 21 “preserves the right [to jury trial] as it existed in the territory at the time of its adoption.” Pasco v. Mace, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (1910). The right to trial by jury “should be continued unimpaired and inviolable.” Strasburg, 60 Wash. at 115.

The difference in language suggests the drafters meant something different from the federal Bill of Rights. See Hon. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the

⁹ **Rights of Accused Persons.** In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . .

¹⁰ “The right of trial by jury shall remain inviolable”

Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984)

(Utter).

The framers added other constitutional protections to this right. A court is not permitted to convey to the jury its own impression of the evidence. Const. art. 4, § 16.¹¹ Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987). The right to jury trial also is protected by the due process clause of article I, section 3.

While the Court in State v. Meggyesy¹² may have been correct when it found there is no specific constitutional language that addresses this precise issue, the language that *is* there indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

ii. State constitutional and common law history.

State constitutional history favors an independent application of Article I, Sections 21 and 22. In 1889 (when the constitution was adopted), the Sixth Amendment did not apply to the states. Furthermore, Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. State

¹¹ “Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law.”

¹² 90 Wn. App. 693, 701, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001), *citing* Utter, 7 U. Puget Sound Law Review at 497. This difference supports an independent reading of the Washington Constitution.

State common law history also favors an independent application. Article I, Section 21 “preserves the right as it existed at common law in the territory at the time of its adoption.” Sofie, 112 Wn.2d at 645; Pasco v. Mace, 98 Wn.2d at 96; *see also* State v. Hobble, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt. Leonard v. Territory, 2 Wash.Terr. 381, 7 Pac. 872 (Wash.Terr.1885). In Leonard, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. The court instructed the jurors that they “should” convict and “may find [the defendant] guilty” if the prosecution proved its case, but that they “must” acquit in the absence of such proof.¹³ Leonard, at 398-399. Thus the common law practice *required* the jury to acquit upon a

¹³ The trial court’s instructions were found erroneous on other grounds.

failure of proof, and *allowed* the jury to acquit even if the proof was sufficient.¹⁴ Id.

The Court of Appeals in Meggyesy attempted to distinguish Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. But the Meggyesy court missed the point—at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the jury to make a finding of guilt. The current practice does not comport with the scope of the right to jury trial existing at that time, and should now be re-examined.

iii. Preexisting state law.

In criminal cases, an accused person's guilt has always been the sole province of the jury. State v. Kitchen, 46 Wn. App. 232, 238, 730 P.2d 103 (1986); *see also* State v. Holmes, 68 Wash. 7, 122 P. 345 (1912); State v. Christiansen, 161 Wash. 530, 297 P. 151 (1931). This rule applies even where the jury ignores applicable law. *See, e.g.*, Hartigan v. Washington Territory, 1 Wash.Terr. 447, 449 (1874) ("[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is

¹⁴ Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). *See, e.g.*, Miller v. Territory, 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr.1888); White v. Territory, 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr.1888); Leonard, *supra*.

plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.”)¹⁵

iv. Differences in federal and state constitutions' structures.

State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, "Presenting a State Constitutional Argument: Comment on Theory and Technique," 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. Gunwall indicates that this factor will always support an independent interpretation of the state constitution because the difference in structure is a constant. Id., 106 Wn.2d at 62, 66; *see also* State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

v. Matters of particular state interest or local concern.

The manner of conducting criminal trials in state court is of particular local concern, and does not require adherence to a national standard. *See, e.g.*, State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934

¹⁵ This is likewise true in the federal system. *See, e.g.*, United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

(2003); State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Gunwall factor number six thus also requires an independent application of the state constitutional provision in this case.

vi. An independent analysis is warranted.

All six Gunwall factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

d. Jury's power to acquit. A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict of guilty improper even where no issues of fact are in dispute); Holmes, 68 Wash. at 12-13. If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the right to jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); *see* Neder, 527 U.S. at 8, 15-16 (omission of element in jury instruction subject to harmless error analysis).

The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amend. 5; Const. art. I, § 9.¹⁶ A jury verdict of not guilty is thus non-reviewable.

Also well-established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. *See generally* Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the

¹⁶ "No person shall be ... twice put in jeopardy for the same offense."

judge and contrary to the evidence... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. Hartigan, *supra*. A judge cannot direct a verdict for the state because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982). *See also* State v. Salazar, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

This is not to say there is a right to instruct a jury that it may disregard the law in reaching its verdict. *See, e.g.*, United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other

grounds). However, if the court may not tell the jury it may disregard the law, it is at least equally wrong for the court to direct the jury that it has a duty to return a verdict of guilty if it finds certain facts to be proved.

e. Scope of jury's role re: fact and law. Although a jury may not strictly determine what the law is, it does have a role in applying the law of the case that goes beyond mere fact-finding. In Gaudin, the Court rejected limiting the jury's role to merely finding facts. Gaudin, 515 U.S. at 514-15. Historically the jury's role has never been so limited: "[O]ur decision in no way undermine[s] the historical and constitutionally guaranteed right of a criminal defendant to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." Gaudin, 515 U.S. at 514.

Prof. Wigmore described the roles of the law and the jury in our system:

Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide. ... We want justice, and we think we are going to get it through 'the law' and when we do not, we blame the law. Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. ... That is what a jury trial does. It supplies that

flexibility of legal rules which is essential to justice and popular contentment. ... The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.

John H. Wigmore, "A Program for the Trial of a Jury", 12 Am. Jud. Soc. 166 (1929).

Furthermore, if such a "duty" to convict existed, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty to reverse the conviction or enter a judgment of acquittal notwithstanding the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); State v. Carlson, 65 Wn. App. 153, 828 P.2d 30, *rev. denied*, 119 Wn.2d 1022 (1992).

Thus, a legal "threshold" exists before a jury may convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. The "duty" to return a verdict of not guilty, therefore, is genuine and enforceable by law. A jury must return a verdict of not guilty if there is a reasonable doubt; however, it may return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

f. Current example of correct legal standard in instructions. The duty to acquit and permission to convict is well-reflected in the instruction in Leonard:

If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you **may** find him guilty of such a degree of the crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you **must** acquit.

Leonard, 2 Wash.Terr. at 399 (emphasis added). This was the law as given to the jury in murder trials in 1885, just four years before the adoption of the Washington Constitution. This allocation of the power of the jury “shall remain inviolate.”

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict. *See* WPIC 160.00, the concluding instruction for a special verdict, in which the burden of proof is precisely the same:

... In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. ... If you unanimously have a reasonable doubt as to this question, you must answer “no”.

The due process requirements to return a special verdict—that the jury must find each element of the special verdict proven beyond a reasonable doubt—are exactly the same as for the elements of the general

verdict. This language in no way instructs the jury on "jury nullification."

But it at no time imposes a "duty to return a verdict of guilty."

In contrast, the "to convict" instruction at issue here does not reflect this legal asymmetry. It is not a correct statement of the law. As such, it provides a level of coercion, not supported by law, for the jury to return a guilty verdict. Such coercion is prohibited by the right to a jury trial. Leonard, *supra*; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

g. Contrary case law is based on a poor analysis; this Court should decide the issue differently.¹⁷ In State v. Meggyesy, the appellant challenged the WPIC's "duty to return a verdict of guilty" language. The court held the federal and state constitutions did not "preclude" this language, and so affirmed. Meggyesy, 90 Wn. App. at 696.

In its analysis, Division One of the Court of Appeals characterized the alternative language proposed by the appellants—"you **may** return a verdict of guilty"—as "an instruction notifying the jury of its power to acquit against the evidence." 90 Wn. App. at 699. The court spent much

¹⁷ A decision is incorrect if the authority on which it relies does not support it. State v. Nunez, 174 Wn.2d 707, 713, 285 P.3d 21 (2012).

of its opinion concluding there was no legal authority requiring it to instruct a jury it had the power to acquit against the evidence.

Division Two has followed the Meggyesy holding. State v. Bonisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), *rev. denied*, 137 Wn.2d 1024 (1999); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005). Without much further analysis, Division Two echoed Division One's concerns that instructing with the language 'may' was tantamount to instructing on jury nullification.

Appellant respectfully submits the Meggyesy analysis addressed a different issue. "Duty" is the challenged language herein. By focusing on the proposed remedy, the Meggyesy court side-stepped the underlying issue raised by its appellants: the instructions violated their right to trial by jury because the "duty to return a verdict of guilty" language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

However, portions of the Meggyesy decision are relevant. The court acknowledged the Supreme Court has never considered this issue. 90 Wn. App. at 698. It recognized that the jury has the power to acquit against the evidence: "This is an inherent feature of the use of general verdict. But the power to acquit does not require any instruction telling

the jury that it may do so.” Id. at 700 (foot notes omitted). The court also relied in part upon federal cases in which the approved “to-convict” instructions did *not* instruct the jury it had a “duty to return a verdict of guilty” if it found every element proven. *See, Meggyesy*, 90 Wn. App. at 698 fn. 5.^{18, 19} These concepts support Izazaga’s position and do not contradict the arguments set forth herein.

The Meggyesy court incorrectly stated the issue. The question is not whether the court is required to tell the jury it can acquit despite finding each element has been proven beyond a reasonable doubt. The question is whether **the law** ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury it does. And an instruction that says it has such a duty impermissibly directs a verdict. Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

¹⁸ E.g., United States v. Powell, 955 F.2d 1206, 1209 (9th Cir.1991) (“In order for the Powells to be convicted, the government must have proved, beyond a reasonable doubt, that the Powells had failed to file their returns.”).

¹⁹ Indeed, the federal courts do not instruct the jury it “has a duty to return a verdict of guilty” if it finds each element proven beyond a reasonable doubt. *See* Ninth Circuit Model Criminal Jury Instructions:

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: ...

Unlike the appellant in Meggyesy,²⁰ Mr. Izazaga does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively misled. This question was not addressed in either Meggyesy or Bonisisio; thus the holding of Meggyesy should not govern here. The Brown court erroneously found that there was “no meaningful difference” between the two arguments. Brown, 130 Wn. App. at 771. Meggyesy and its progeny should be reconsidered, and the issue should be analyzed on its merits.

h. The court’s instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instructions given in Mr. Izazaga’s case did not contain a correct statement of the law. The court instructed the jurors that it was their “duty” to accept the law as instructed, and that it was their “duty” to convict the defendant if the elements were proved beyond a reasonable doubt. Instruction Nos. 13, 16, 19 and 22 at CP 249, 252, 255, 258. A duty is “[a]n act or a course of action that is required of one by... law.” *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). The court’s use of the word “duty” in the “to-convict” instruction conveyed to the jury that it *could not* acquit if the elements had

²⁰ And the appellant in Bonisisio.

been established. This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence, Leonard, *supra*, and failed to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864. By instructing the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict.

The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The trial court's error violated Mr. Izazaga's state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial. Hartigan, *supra*; Leonard, *supra*.

4. The findings that Mr. Izazaga has the current or future ability to pay Legal Financial Obligations including the means to pay costs of incarceration and medical care are 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 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) (emphasis added).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” A court-ordered legal financial obligation may include the costs of incarceration (prison and/or county jail) and medical care incurred in a county jail. RCW 9.94A.760; RCW 10.01.160; RCW 70.48.130; *see also* RCW 9.94A.030(30).

b. There is insufficient evidence to support the trial court's findings that Mr. Izazaga had the present or future ability to pay legal financial obligations, including the means to pay costs of incarceration and medical care. 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 made express and formal findings that Mr. Izazaga had the present ability or likely future ability to pay legal financial obligations ("LFOs"), including the means to pay for the costs of incarceration and the means to pay for any costs of medical care incurred by Yakima County on his behalf. CP 299 at ¶ 2.7²¹, 301 at ¶¶ 4.D.4 and 4.D.5. But, 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

²¹ The Judgment and Sentence at ¶ 2.7 incorrectly cites to RCW 9.94A.753, which concerns restitution. The correct authority is RCW 9.94A.760.

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.

The record here does not show that the trial court took into account Mr. Izazaga’s financial resources and the nature of the burden of imposing LFOs including the costs of incarceration and medical care on him. In fact, the pertinent record discloses that the court found Mr.

Izazaga indigent for purposes of appeal. Order of Indigency, on file. The record contains no evidence to support the trial court's findings in ¶ 2.7 that Mr. Izazaga was “not disabled and therefore has the ability or likely future ability to pay” LFOs, including the means to pay costs of incarceration (¶ 4.D.4)²² and the means to pay costs of medical care (¶ 4.D.5). See X 5/25/12 RP 841–905.

Nor is the boilerplate language at ¶2.7²³ sufficient “evidence” of actual consideration by the trial court. The Court in Bertrand rejected such a notion:

The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, *the record* before us on appeal *contains no evidence to support the trial court's finding number 2.5* that Bertrand has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding number 2.5 was clearly erroneous.

Bertrand, 165 Wn. App. 393, 405, 267 P.3d at 517 (footnote omitted, emphasis added). Without support in the record, the findings are clearly erroneous and must be stricken from the Judgment and Sentence. Id.

²² The sentencing court imposed a total term of confinement of 162 months. The costs of incarceration at \$50/day would roughly total \$246,375 (18,250/year x 13.5 years). Here, the court did cap the costs of incarceration at \$500, appearing to acknowledge without discussion Mr. Izazaga's “current [in]ability to pay those costs”. CP 301; X 5/25/12 RP 902.

²³ (CP 299).

c. The remedy is to strike the unsupported findings. Bertrand is clear: where there is no evidence to support the trial court's findings regarding ability and means to pay, the findings must be stricken. As to medical costs, the State may argue that the issue is somehow "moot" because it appears no medical costs were imposed in this case. However, Mr. Izazaga does not challenge the *imposition* of medical costs. Rather, the trial court made a specific finding that he has the means to pay costs of medical care, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Similarly, Mr. Izazaga is not at this time challenging the *imposition* of costs of incarceration at Yakima County Jail or in a prison, or the specified monetary assessment of \$11,760.64 at ¶ 4.D.3 of the Judgment and Sentence.²⁴ As with medical costs, the trial court's findings that he has the means and ability to pay costs of incarceration and total legal financial obligations are unsupported by the record and must be stricken. Id.

The reversal of the trial court's judgment and sentence findings at ¶ 2.7, ¶¶ 4.D.4 and 4.D.5 simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Izazaga until after a future

²⁴ CP 301.

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).

The clearly erroneous findings must be stricken from the record. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). Counsel is aware of no authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. *Cf. State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved

of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); Lohr (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

D. CONCLUSION

For the reasons stated, the conviction should be reversed and dismissed. In the alternative, the findings of ability and means to pay legal financial obligations including costs of medical care and incarceration should be stricken from the Judgment and Sentence.

Respectfully submitted on December 18, 2012.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 18, 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:

Ivan Bustos Izazaga (#358954)
Coyote Ridge Corrections Center
P. O. Box 769
Connell WA 99326-0769

E-mail: Kevin.eilmes@co.yakima.wa.us
Kevin Eilmes, Deputy Pros Atty
Yakima County Prosecuting Atty's Office
128 N. Second St., Room 211
Yakima WA 98901

s/Susan Marie Gasch, WSBA #16485