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January 19, 2016
Court of Appeals
Division III
State of Washington

33281-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY TRAMELL SPEARMAN,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Does the reasonable doubt instruction in WPIC 4.01 violate due process?
2. Shall this Court exercise its discretion to review the unchallenged finding that the Defendant had the ability to pay legal financial obligations where the Defendant and his family vigorously represented to the court his current and future ability to pay?
3. Will the court consider an unpreserved challenge to the imposition of the DNA collection fee?

IV. STATEMENT OF THE CASE

The Defendant Anthony Spearman is convicted of delivering

dihydrocodeneinone in a school zone. CP 54.

On appeal, the Defendant challenges the jury instruction defining reasonable doubt and taken from WPIC 4.01. Brief of Appellant (BOA) at6-12.

The challenge jury instruction No. 3 reads:

> The defendant has entered a plea of not guilty. That plea puts in issue each element of each crime charged. The state is the plaintiff and has the burden of proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues through the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 27.

And the Defendant challenges the imposition of legal financial obligations (LFO's) and the court's finding that he has the current or future ability to pay. BOA at 12-30.

At sentencing, the defense told the court in no uncertain terms that the Defendant "was, in fact, working full time." RP 412.

The Defendant addressed the court:

> Your Honor, I feel that the jury found me guilty of the appropriate crime. I was working the whole time. I was making strides in the right direction. I have a job still when I get out that is willing to pay for six months of treatment when I get out.
>
> ....
>
> Well, I gave my lawyer the pay stubs – all of my pay stubs for the last eight months that will say I spent most of my time at work for the last eight months.
>
> I also want to encourage you to ask my DOC officer, Dwayne Evans, from March, all the way to September, before October, I had no dirty UA's, no violations, and I was working consistently. I know I messed up. I am not a perfect person, but I have made strides of progress in other areas.
>
> And I think the most important part is I have the tools for when I do get out. [T]hey are willing to take me back to work, willing to take me back because I was a hard worker. And I think that was the best rehabilitation for me is working. It occupied my whole day from 4:30 to 3:30 in the afternoon. I think that is really important to take into consideration.

RP 400-01. *See also* CP 52.

The Defendant's mother also addressed the court:

> Being unemployed Anthony went out on a Friday looking work, got the job that same day, started that Monday and had the job for eight months. He was doing quite well.
>
> In spite of his recent setback, Anthony and I have believed that a program like Coyote Ridge is more beneficial than a prison – more beneficial. He is interested in a program that offers intense wellness counseling and work release. I feel that prison will not change what needs to be changed for him. It makes it worse.
>
> Please take this into consideration so that Anthony can become a productive member of society.

RP 402. Another relative Willie Dyer spoke to the Defendant's education and employment as well as his potential. RP 403. And the Defendant's cousin and IBP Tyson supervisor spoke to the Defendant's work ethic and the job that would be waiting for him after prison. RP 404. "They do give you a chance after you have been incarcerated for drugs, they do let you come back after you get out and continue your work." RP 404.

The court found the Defendant has the ability or likely future ability to pay the LFO's. CP 57. The court imposed $3525 in LFO's. CP 58. Some of the costs were discretionary, some were mandatory. BOA at 4 n.10 and 5, n.11. One of the costs was the $100 DNA fee imposed under RCW 43.43.7541. CP 58. The Defendant did not object to the imposition of LFO's. BOA at 5. The court imposed a low end sentence of 84 months. CP 56, 60.

V. ARGUMENT

A. WPIC 4.01 DOES NOT VIOLATE DUE PROCESS.

The Defendant challenges Instruction 4 under *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The court's instruction No. 3 to the jury comes directly from WPIC 4.01. Therefore, the Defendant is

challenging the pattern instruction crafted by the Washington Supreme Court Committee on Jury Instructions.

It is apparent from the comment to WPIC 4.01 that this is not new ground.

> ....
>
> **Mandatory use of WPIC 4.01.** In *State v. Bennett*, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007), the Washington State Supreme Court, in the exercise of its inherent supervisory powers, instructed the trial courts to use WPIC 4.01 in every case. In *Bennett*, the Supreme Court discussed the various definitions of the reasonable doubt standard in this and other jurisdictions. The Supreme Court found that the concept of reasonableness was so fundamental that it required Washington courts to adhere to a "clear, simple, accepted and uniform instruction." *State v. Bennett*, 161 Wn.2d at 317–18.
>
> Given the clarity and directness of the Supreme Court's opinion in *Bennett*, the Court of Appeals held that a failure to use WPIC 4.01 was not only error, but reversible error. See *State v. Castillo*, 150 Wn.App. 466, 208 P.3d 1201 (Div. 1 2009). The Court of Appeals left open the possibility that a non-standard instruction could still be approved if it improved on the traditional language of WPIC 4.01, *see State v. Castillo*, 150 Wn. App. at 472–75, but the risk of experimentation is now evident.
>
> **Abiding belief.** Washington's traditional abiding-belief instruction (WPIC 4.01 in the second edition's main volume) has been upheld in several appellate cases. *See State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn.App. 286, 299–301, 786 P.2d 277 (Div. 3 1989) (rejecting the argument that WPIC 4.01 dilutes the State's burden of proof); *State v. Mabry*, 51 Wn.App. 24, 751 P.2d

> 882 (Div. 3 1988) (relied on by the state Supreme Court in *Pirtle*); *State v. Price*, 33 Wn.App. 472, 655 P.2d 1191 (Div. 1 1982). The U.S. Supreme Court has also upheld the use of traditional abiding-belief instructions. *See Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).
>
> Likewise, the definition from former WPIC 4.01A (referring generally to a reasonable person's doubt, without the additional abiding-belief language) has been approved by appellate opinion. *See State v. Woods*, 143 Wn.2d 561, 594–95, 23 P.3d 1046 (2001) (approving the trial court's instruction, which tracked the language from former WPIC 4.01A). *See also State v. Cervantes*, 87 Wn.App. 440, 447, 942 P.2d 382 (Div. 1 1997) (quoting with approval the operative sentence from former WPIC 4.01A, although the court focused primarily on the language directing the jurors to fully, fairly, and carefully consider all the evidence or lack of evidence in the case).

WPIC 4.01, Comment.

The Defendant relies on *State v. Emery*, 174 Wn. 2d 741, 278 P.3d 653 (2012). In *State v. Emery*, the Washington Supreme Court held that the prosecutor improperly suggested that jury's job was to determine the truth and that to find reasonable doubt the jury should be able to fill in a blank, thereby muddling the burden of proof. *State v. Emery*, 174 Wn.2d at 760. However, the defendants failed to demonstrate that the error was so flagrant and ill intentioned as to be incurable by instruction. *State v. Emery*, 174 Wn.2d at 764.

The *Emery* opinion notes that closing argument cannot be likened to

instructional error, because jurors are instructed to disregard argument that is contrary to the court's instruction. *State v. Emery*, 174 Wn.2d at 759. Based on this, the Defendant asserts it is error to instruct the jury that "[i]f, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 27. But this WPIC has been thoroughly vetted on precisely this question.

The Defendant acknowledges that the challenged language comes from WPIC 4.01. Washington's traditional abiding-belief instruction has been upheld in several cases. *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); *State v. Bennett*, 161 Wn.2d 303, 309, 165 P.3d 1241 (2007). *See State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn.App. 286, 299–301, 786 P.2d 277 (1989) (rejecting the argument that WPIC 4.01 dilutes the State's burden of proof); *State v. Mabry*, 51 Wn.App. 24, 751 P.2d 882 (1988); *State v. Price*, 33 Wn.App. 472, 655 P.2d 1191 (1982).

The Defendant argues that in *Pirtle* the question was different. BOA at 6n. This is plainly not so. In *Pirtle*, the question was whether the "abiding belief" language ***changed the burden of proof***. *State v. Pirtle*, 127 Wn.2d at 656 ("Pirtle argues the last sentence [] invites the jury to convict under a

preponderance test"); Appellant's Brief at 8, 9, 12 (agreeing that this was the question). That is the same question here, and the answer must be the same. The addition of the last sentence is not error. *State v. Pirtle*, 127 Wn.2d at 658. It does not "diminish the definition of reasonable doubt given in the first two sentences." *Id.* The instruction does not change the burden of proof and, therefore, is a correct statement of law.

In *State v. Emery*, the Supreme Court held that it was misconduct (although not reversible) for a prosecutor to tell the jury that its job is to "speak the truth," because its job is merely to determine whether the State has proved the offenses beyond a reasonable doubt. *State v. Emery*, 174 Wn.2d at 760. Seizing on this language, the Defendant finds offense in the word "truth" without regard for context.

The problem in *Emery* was that the prosecutor was suggesting that the jury's verdict would be a declaration of truth rather than an assessment of the sufficiency of the State's case by the proper standard. *State v. Emery*, 174 Wn.2d at 760. *See also United States v. Shamsideen*, 511 F.3d 340, 347-48 (2d Cir. 2008); *United States v. Wilson*, 160 F.3d 732, 747 (D.C. Cir. 1998); *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994); *United States v. Pine*, 609 F.2d 106, 108 (3d Cir. 1979) (criticizing "search

for the truth" instructions). But the prosecutor's statement in *Emery* did not quote the jury instruction.

The jury instruction does not ask jurors to search for the truth but to have an abiding belief in the truth of the charge. The instruction explains that the jury is to determine the truth of every element of the crimes charged after fully, fairly, and carefully considering all the evidence or lack of evidence. This is not a misdirect from the burden of proof.

Other courts agree that "truth" is not an impermissible word. *State v. Aleksey,* 538 S.E.2d 248, 251-53 (S.C. 2000); *State* v. *Weisbrode,* 653 A.2d 411, 416-17 (Me. 1995); *State* v. *Purnell,* 601 A.2d 175, 187-88 (N.J. 1992); *State* v. *Marshall*, 586 A.2d 85, 154-55 (N.J. 1991); *State* v. *Giroux,* 561 A.2d 403, 405-06 (Vt. 1989). The concern is only the when the instructions misdirect the jury's focus. *Victor v. Nebraska*, 511 U.S. at 1.

> The failure to give a jury charge in the precise language requested is not a cause for reversal where the given instruction substantially covers the applicable principles of law. *Walker v. State,* 282 Ga. 406, 408(2), 651 S.E.2d 12 (2007). Moreover, the pattern charge's mention of jurors "seeking the truth" does not, as Moore urges, dilute or cause confusion over the State's burden of proof and the role of the jury by suggesting that the jurors embark on "their own intuitive search for the truth." In criminal cases, the factfinder does have the task of seeking the truth. *Sherrod v. State,* 280 Ga. 275, 276, 627 S.E.2d 36 (2006). But, the jury is to determine the truth in view of the evidence, considered in

> light of the court's instructions. *Mayfield v. State,* 276 Ga. 324, 331(2)(b), 578 S.E.2d 438 (2003). The court's instruction properly focused the jurors on their consideration of the evidence presented at trial.

Moore v. State, 656 S.E.2d 796, 800 (Ga. 2008).

Any instruction or part of an instruction must be read within the context of the jury instructions as a whole. *State v. Pirtle*, 127 Wn.2d at 656 ("Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt."); *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). The actual instruction repeats the phrase "reasonable doubt" five times. (The *Pirtle* court also found this significant. *State v. Pirtle*, 127 Wn.2d at 657.) The instruction explains that the State has this burden, and the defendant has no burden. It explains that a reasonable doubt is one for which a reason exists. In this context, "if from such consideration," the jury has an abiding belief in the truth of the charge, it has not found a reasonable doubt.

This jury instruction is not tantamount to the *Emery* prosecutor's argument and it is not error.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LFO'S.

The Defendant challenges the imposition of LFO's. He acknowledges that this claim of error is not preserved. BOA at 5, 13. As such, this Court may decline review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (it is well settled that a defendant who fails to object at sentencing is not entitled to review); *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014) (refusing to review unpreserved challenges to the imposition of LFO's).

The Defendant alleges the sentencing judge failed to inquire into his ability to pay and relied on boilerplate findings in the sentencing form. BOA at 15. This is a false representation of the record. The court had no need to further inquire when the Defendant and his witnesses volunteered over and over again that the Defendant's current and future ability to pay was robust. There was no need to solicit more information. The court's finding is more than adequately supported in the record.

The Defendant alleges that he is unable to pay the $100 DNA fee. BOA at 20. Not only does the record patently contradict the allegation, but the allegation is immaterial. Trial courts must impose such fees regardless of a defendant's indigency. *State v. Stoddard*, No. 32756-6-III (Wn. App. filed

Jan. 12, 2016) (refusing to hear a challenge to the constitutionality of a statute when the challenge was not raised below).

The Defendant argues that a mandatory LFO, in particular the one required under RCW 43.43.7541 for a mere $100 fee, is unconstitutional as applied to a defendant who lacks the ability to pay. The Defendant's premise fails. *He* does not lack the ability to pay. *He* is not a member of that class. Accordingly, he does not have standing to make this challenge on behalf of other criminal defendants who may lack the ability to pay. RAP 3.1 (only an aggrieved party may seek review by the appellate court).

Even were there standing, the challenge must fail. Substantive due process protects against arbitrary or capricious government action. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). The collection of a mere $100 after a guilty plea or finding of guilt beyond reasonable doubt of a felony in order to support a criminal database is not arbitrary or capricious government action. Substantive due process requires that deprivations of property be substantively reasonable, supported by legitimate justification, and rationally related to a legitimate state interest. *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). The Defendant acknowledges that the State has a

legitimate interest in collecting the fee, but argues that imposition upon defendants who cannot pay does not rationally serve that interest. BOA at 22. The collection of a small fee from convicted criminals in order to police those same criminals is rationally related to a state interest. The Defendant acknowledges the $100 fee "is such a small amount that most defendants would likely be able to pay." BOA at 23.

The Defendant argues that because the fee is not prioritized, it *could* be the cause for the accumulation of significant interest. BOA at 23. Again, an appeal cannot be based on a hypothetical. The appellant must be actually aggrieved. However, *if* down the road a payment of $100 comes to impose a manifest hardship on the Defendant, the legislature and the courts have provided a mechanism for relief. Under RCW 10.01.160(4), a defendant may petition for remission of any portion of unpaid costs, including interest, if it imposes a hardship on the defendant or his immediate family. The court has created court forms CR 08.0800 and CR 08.0810 to assist a defendant in filing such a petition. And legal aid offices have additional forms for this purpose. The law has provided for this hypothetical should it come into existence.

The Defendant argues that a person who has previously been

convicted of a felony and had his DNA collected should not be required to pay the fee mandated by RCW 43.43.7541, because he believes the fee only goes toward collection of his sample. BOA at 24-27. As this Court has already explained, the fee is not purely to facilitate a one-time individual DNA collection. *State v. Thornton*, 188 Wn. App. 371, 374, 353 P.3d 642 (2015) (the fee funds the database and the agencies that collect samples).

The Defendant objects to the reference in the judgment and sentence for a DNA sample to be taken consistent with RCW 43.43.754, complaining that such is unnecessary if a sample were taken previously. BOA at 27; CP 62. The argument misstates the record. The judgment orders compliance with RCW 43.43.754 which explains that a biological sample must be collected from every adult convicted of a felony, ***except that*** "if the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required." RCW 43.43.754(2). The court order includes this exception by reference. The WSP will not duplicate efforts that are neither necessary not required by the statute. The Defendant objects to a non-existent order, therefore there is nothing to reverse.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: January 19, 2016.

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Susan Marie Gasch <gaschlaw@msn.com> Anthony Tramell Spearman (#847924) Larch Corrections Center 15314 NE Dole Valley Road Yacolt, WA 98675-9531	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 19, 2016, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**