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APR 08, 2016

Court of Appeals  
Division III  
State of Washington

**NO. 33423-6-III**

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**COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MAURICIO LEON DELGADO, APPELLANT

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APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

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BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

A. *Is the phrase "a reasonable doubt is one for which a reason exists" constitutional and is it required to be given in all criminal trials by established Washington law? (Assignment of Error No. 1)*

B. *Should this Court decline to pre-emptively find Delgado lacks the present or future ability to pay appellate costs under RCW 10.73.160 absent some indication the State intends to seek recoupment? (Assignment of Error No. 2)*

II. STATEMENT OF THE CASE.<sup>1</sup>

The State adopts and supplements the substantive and procedural facts recited by appellant Mauricio Leon Delgado in his Statement of the Case. RAP 10.3(b).

Delgado did not object at trial to any of the State's proposed jury instructions. RP 171. Instruction No. 2 states, in pertinent part,

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 a consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt as to that charge.

CP 65.

Following his conviction for Rape in the Second Degree (Forcible

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<sup>1</sup> The Report of Proceedings of trial in this case consists of three consecutively paginated trial volumes. The State refers to the trial transcript as "RP \_\_."

Compulsion), RCW 9A.44.050(1)(a), CP 104, the court imposed mandatory legal financial obligations of \$1,132.15. CP 112. It did not impose attorney fees. Delgado did not contest imposition of these LFOs. The felony judgment and sentence included a statement of Delgado's "Rights Regarding Appeal." CP 124. The rights included his right to be represented by a lawyer at public expense and the right to have the necessary trial record prepared at public expense. CP 124.

### III. ARGUMENT.

*A. The phrase "a reasonable doubt is one for which a reason exists" has long been held constitutional and is required to be given in all criminal trials by established Washington law.*

Delgado contends the phrase, "A reasonable doubt is one for which a reason exists," contained in the standard reasonable doubt instruction, 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, (WPIC 4.01), impermissibly requires the jury to articulate a reason in order to establish reasonable doubt. Br. of Appellant at 3. He asserts the court erred in instructing the jury with that phrase because it "undermines the presumption of innocence and is effectively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases." *Id.* Delgado argues the phrase requires the jury to articulate a reason in order to establish reasonable doubt,

rendering the instruction constitutionally defective. *Id.* His assertions are without merit.

Delgado did not object to the propriety of this language at trial, waiving his right to object on appeal unless the error of which he complains is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). “Manifest” error under RAP 2.5(a)(3) “requires a showing of actual prejudice.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). To show prejudice, Delgado must plausibly demonstrate “the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* There is no error. There can be no prejudice.

Nine years ago, the Washington Supreme Court expressly approved WPIC 4.01 as a correct statement of the law that “adequately permits both the government and the accused to argue their theories of the case.” *State v. Bennett*, 161 Wn.2d 303, 317–18, 165 P.3d 1241 (2007). As noted in numerous recent opinions, published and unpublished, the phrase “a doubt for which a reason exists” has been held constitutionally sound for decades. See, e.g. *State v. Thompson*, 13 Wn. App. 1, 533 P.2d 395 (1975) (the phrase does not direct the jury to assign a reason for their doubts, but merely points out their doubts must be based on reason, not something vague or imaginary); *State v. Emery*, 174 Wn.2d 741, 759-60,

278 P.3d 653 (2012) (prosecutor in closing argument properly described reasonable doubt as a doubt for which a reason exists). The Court of Appeals stated thirty years ago: “A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.” *Thompson*, 13 Wn. App. at 5 (citing *State v. Harras*, 25 Wash. 416, 65 P.774 (1901)).

Four years ago, the Washington Supreme Court repudiated Delgado’s assertion that the phrase is effectively identical to improper “fill-in-the-blank” argument. *Emery*, 174 Wn.2d at 460. The Court distinguished the phrase of which Delgado complains from the subtle burden-shifting of “fill-in-the-blank” arguments, with their improper implication that the jury must be able to articulate its reasonable doubt. *Emery*, 174 Wn.2d at 760. *Emery* unambiguously held that while fill-in-the-blank argument is improper, a jury is properly instructed by defining reasonable doubt as “a doubt for which a reason exists.” *Id.*

Delgado’s arguments are frivolous. This Court should affirm his conviction for rape in the second degree (forcible compulsion).

*B. This Court should decline to pre-emptively find Delgado lacks the present or future ability to pay appellate costs under RCW 10.73.160 absent some indication the State intends to seek recoupment.*

The State does not intend to seek cost recoupment in this case.

Delgado’s arguments, however, demand response. RAP 10.3(b). At a time

when the Washington Supreme Court has held the legislature in contempt for failing to fully fund public schools<sup>2</sup> and state agencies are ordered to reduce delays in examining mentally ill criminal defendants,<sup>3</sup> Delgado asserts five reasons he should not be required to pay statutory costs associated with his frivolous and tiresome “reasonable doubt” appeal. These arguments, too, are frivolous because the statutory procedures and safeguards built into RCW 10.73.160 sufficiently protect his interests.

1. Imposition of costs on appeal does not turn the order of indigency into a falsehood.

Delgado first argues that he, like “any reasonable person,” was led by the language of his indigency order to believe he would obtain various legal services at no cost, regardless of whether he eventually won or lost. Br. of Appellant at 12. Imposition of costs, he asserts, would convert the indigency order “into a falsehood.” This is nonsense. Criminal defendants are told they are entitled to attorneys “at no expense” from their first *Miranda*<sup>4</sup> warnings through their notice of right to appeal. Their court-appointed defense attorneys later explain that, if convicted, they may be required to reimburse the court or the State for a portion of the defense costs. Delgado was represented by trial counsel at his sentencing hearing,

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<sup>2</sup> *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012).

<sup>3</sup> *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, 73 F.Supp. 3d 1311 (W.D. Wash. 2014).

<sup>4</sup> *Miranda v. Ariz.*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

the same attorney who prepared his appellate indigency paperwork. One assumes counsel, having just shepherded Delgado through trial and sentencing, explained he could be responsible for certain appellate costs as well, and that eventual determination would depend on his financial status.

Application of RCW 10.73.160 is not “offensive to fairness” to defendants who have been told of their right to appeal at public expense but are not told they may have to repay certain costs if they lose. *State v. Blank*, 131 Wn.2d 230, 243, 930 P.2d 1213, 1221 (1997). In *Blank*, the Court held “it is not fundamentally unfair to impose a repayment obligation without notice and an opportunity to be heard prior to the decision to appeal, provided that before enforced payment or sanctions for nonpayment may be imposed, there is an opportunity to be heard.” *Id.* at 244. The statutory scheme under RCW 10.73.160 creates this opportunity. A defendant may petition the court at any time for remission of all of the costs or of any unpaid portion, so long as the defendant is not in contumacious default of the imposed legal financial obligation. RCW 10.73.160(4). “The statute thus contemplates the constitutionally required inquiry into ability to pay, the financial circumstances of the defendant, as well as the burden payment will place on defendant and his or her immediate family.” *Blank*, 131 Wn.2d at 242.

This, however, is not sufficient for Delgado, who argues it is unfair

to expect him to have to make this argument without assistance of counsel. This, too, is not an issue. At least one appellate court recently determined indigent defendants may include the issue of ability to pay in their direct appeal, thus ensuring the availability of pre-paid counsel. See *State v. Sinclair*, 192 Wn. App. 380, 389–90 (2016).

In light of the fact that Delgado can petition *at any time* for remission of all costs, or, under *Sinclair*, argue against imposition as part of a decision terminating review, his first cost-related argument—that it is unfair for him to pay costs on appeal because he thought he was entitled to free legal services—is as frivolous as his argument concerning the appropriate definition of reasonable doubt.

2. RCW 10.73.160 does not create a conflict of interest between indigent criminals and their public defenders.

A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.

*Blank*, 131 Wn.2d at 236-37, 930 P.2d 1213, 1217 (1997) (quoting *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) (rejecting

argument that defendant might decline counsel, the right to counsel thus chilled by foreknowledge that repayment could be required)).

Delgado asserts it is unfair to require his appellate defenders to explain to him that, should he lose his appeal, he “will have to pay, at a minimum, thousands of dollars in appellate costs.” Br. of Appellant at 13. He claims this undermines his attorney’s fundamental role in advancing all issues of arguable merit, forcing counsel to “hedge the strength of their arguments against the vast sums of money their clients will owe[.]” Here again, Delgado reacts to the considerable benefit obtained from his status as an indigent criminal defendant with a prolonged wail of self-identified deprivation. The United States Supreme Court recognized in *Fuller, supra*, that criminal defendants who are not indigent have to pay their appellate attorneys in advance, as do most civil litigants. In all retained cases, appellate counsel must tailor their efforts to their client’s financial resources or risk going unpaid. The fact that a defendant is not legally indigent does not magically render that person capable of scraping together the thousands of dollars necessary to pursue an appeal.

The conflict of interest of which Delgado complains is inherent in any attorney-client relationship in which the client pays for services. Granted, the Office of Public Defense receives the lion’s share of collected fees. That does not mean Delgado’s appellate attorney will be out of a job

unless he loses. The Office of Public Defense is not now, and never will be, funded on the backs of indigent criminals. The taxpayers of the State of Washington carry most of that load, as they do most costs related to the criminal justice system.

Litigation has been called the sport of kings. It is expensive—often, prohibitively so. It is arguable that only indigent defendants have an unlimited budget on appeal because only indigent defendants can petition “at any time” for full remission of the payment of costs, regardless of the merits of their appeal. RCW 10.73.160(4). Those of modest means have to find a way to fund access to their constitutional rights and bear the ensuing financial hardship. Only the truly wealthy have a lack of budgetary constraint similar to that of an indigent appellant. Everyone else faces life-altering financial consequences, consequences that encourage a realistic look at the merits of their issues and arguments.

3. County prosecutors do not seek costs to punish the exercise of constitutional rights.

Delgado asserts that the exercise of prosecutorial discretion in seeking fee recoupment is evidence of malicious vindictiveness. One may assume Delgado would also assert retaliatory vindictiveness if, instead of exercising discretion, prosecutors around the state uniformly sought fee recoupment from every losing criminal appellant. Delgado muses: “Given

the small sum [of recovered funds apportioned to the prosecutor's office], it is not unreasonable to question whether a given county prosecutor's real purpose in filing cost bills may be to punish those who exercise their rights to counsel and to appeal under article 1, section 22 of the state constitution." Br. of Appellant at 14. One might as easily conclude it is not unreasonable to question whether county prosecutors, cognizant of the painfully limited fund of state resources, share concerns expressed in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) (school funding) and *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, 73 F.Supp. 3d 1311 (W.D. Wash. 2014) (mental health evaluations) and responsibly seek to recoup public expenditures when statutorily authorized, as supported by the facts of each case.

Delgado is not entitled to publicly funded counsel beyond his first appeal as a matter of right. *State v. Mahone*, 98 Wn. App. 342, 343, 989 P.2d 583, 585 (1999). Under the standard recoupment procedure, the State submits a cost bill within ten days of the decision terminating review. RAP 14.4. In order to avail himself of his last pre-paid lawyer, Delgado requests pre-emptive determination of his inability to pay at this stage of the proceedings. And this he may do. As Division One of this Court recently held, "it is appropriate for [the reviewing court] to consider the issue of appellate costs in a criminal case during the course of appellate

review when the issue is raised in an appellant’s brief.” *State v. Sinclair*, 192 Wn. App. 380, 389–90 (2016).

4. This Court does not have to be admonished to follow the law as stated in *Blazina* and its progeny; and
5. Imposing costs on indigent persons without assessing whether they have the ability to pay is against established Washington law and does not require briefing on appeal.

Delgado finally turns to a litany of horrors brought about by “*Blazina* problems,” indiscriminate imposition of costs on indigent criminal defendants without consideration of present and future ability to pay, resulting in extended State jurisdiction for LFO enforcement. *State v. Blazina*, 182 Wn.2d 827, 836–37, 344 P.3d 680 (2015). There is no question that this Court has discretion to make its own determination of Delgado’s present and future ability to pay LFOs and to assess the propriety of imposing appellate costs based on its determination. *Sinclair*, 192 Wn. App. at 388. There is, however, a distinction between the statute considered in *Blazina*, RCW 10.01.160, and the recoupment statute at issue here. *Sinclair*, 192 Wn. App. at 389. RCW 10.01.160 covers costs that may be imposed at the trial court level and “specifically sets forth parameters and limitations, prominently including the defendant’s ability to pay and [his] financial resources.” *Id.* The appellate recoupment statute,

however, does not set forth parameters for exercise of discretion. *Id.* While ability to pay is an important factor, “it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor.” *Id.* Delgado argues only that he is legally indigent, which the State does not contest.

Here, the State had no intention of seeking recoupment based on facts peculiar to Delgado’s case. His histrionics and ad hominem attack did not factor into that decision. Nor, absent a ruling overturning the plain language of *Sinclair*, will the State argue against allowing convicted indigent appellants the use of publicly funded defense counsel to combat apportionment of some of the costs of their representation.

This court cannot provide effective relief because, on this issue, Delgado needs none. His argument is moot. *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105, 1133-34 (1995).

The State considers it not unreasonable to question whether an indigent defendant would pause before filing a frivolous appeal if there were a genuine possibility he or she might have to contribute toward its cost. That issue, however, is not before this Court.

IV. CONCLUSION.

This Court should reaffirm the propriety of the phrase defining reasonable doubt as “a doubt for which a reason exists” and affirm Delgado’s second degree rape conviction.

The State is not seeking recoupment of costs on appeal. This Court should decline to consider as moot Delgado’s request for a pre-emptive finding of indigency.

DATED this 22<sup>nd</sup> day of April, 2016.

Respectfully submitted,

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

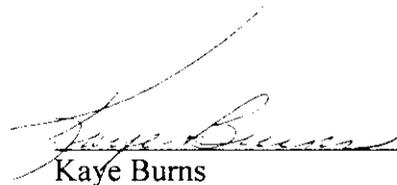
STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    ) No. 33423-6-III  
  )  
                                  vs.                )  
  )  
MAURICIO LEON DELGADO,        ) DECLARATION OF SERVICE  
  )  
                                  Appellant.     )  
\_\_\_\_\_ )

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Susan M. Gasch  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

Dated: April 8, 2016.

  
\_\_\_\_\_  
Kaye Burns