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February 22, 2016  
Court of Appeals  
Division III  
State of Washington

No. 33425-2-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ISMAEL SOTO-VALDEZ,

Defendant/Appellant.

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Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by giving a constitutionally defective reasonable doubt instruction.

2. The record does not support the finding Mr. Valdez has the current or future ability to pay the imposed legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with “an abiding belief in the truth of the charge,” did the court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Valdez’ right to a jury trial?

2. A juror with reasonable doubt must acquit, even if unable to articulate a reason for the doubt. By defining a “reasonable doubt” as a doubt “for which a reason exists,” did the court undermine the presumption of innocence and impermissibly shift the burden of proof by telling jurors they must be able to articulate a reason to have a reasonable doubt?

3. Does erroneously instructing a jury regarding the meaning of reasonable doubt vitiate the jury-trial right, constituting structural error?

4. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs?

C. STATEMENT OF THE CASE

Ismael Soto-Valdez was convicted by a jury of possession of a controlled substance, oxycodone. CP 21. The Court instructed the jury that a reasonable doubt was one "for which a reason exists." CP 28. The same instruction defined satisfaction beyond a reasonable doubt as an "abiding belief in the truth of the charge." *Id.*

At sentencing the Court imposed discretionary costs of \$2906 and mandatory costs of \$800<sup>1</sup>, for a total Legal Financial Obligation (LFO) of \$3706. CP 11. The Judgment and Sentence contained the following language:

¶ 2.5 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 has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 10.

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<sup>1</sup> \$500 Victim Assessment, \$200 criminal filing, and \$100 DNA fee. CP 11.

The Court asked Mr. Valdez if he was employable. Mr. Valdez responded, “Uh-huh.” 6/3/15 RP 5. The Court did not inquire further into Mr. Valdez’ financial resources or consider the burden payment of LFOs would impose on him. 6/3/15 RP 2-5. The Court ordered Mr. Valdez to begin making payments immediately at \$100 per month. CP 12.

This appeal followed. CP 6.

D. ARGUMENT

1. The court’s “reasonable doubt” instruction infringed Valdez’ constitutional right to due process.

*a. The instruction improperly focused the jury on a search for “the truth.”*

A jury’s role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Here, the trial court instructed the jury that proof beyond a reasonable doubt means having an abiding belief “*in the truth of the charge.*” CP 28 (emphasis added). Rather than determining the truth, a jury’s task “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760. In this

case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 28.<sup>2</sup>

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. Jurors were obligated to follow that instruction.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315–16, 165 P.3d 1241 (2007). Courts must vigilantly protect the

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<sup>2</sup> Valdez does not challenge the phrase “abiding belief.” Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. See *Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708(1887); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995)). Rather, Valdez objects to the instruction’s focus on “the truth.”

presumption of innocence by ensuring that the appropriate standard is clearly articulated.<sup>3</sup> *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281–82. By equating that standard with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Valdez his constitutional right to a jury trial. U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22.

*b. WPIC 4.01’s language improperly adds an articulation requirement, requiring reversal.*

*i. Jurors need not articulate a reason for doubt in order to acquit.*

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 3; *Sullivan*, 508 U.S. 275; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing *Victor v. Nebraska*, 511 U.S. 1, 5–6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)).

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<sup>3</sup> Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the “truth” language in that instruction. *Bennett*, 161 Wn.2d at 315–16.

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. amends. VI, XIV; *Sullivan*, 508 U.S. at 278–81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty “vitiates *all* the jury’s findings.” *Sullivan*, 508 U.S. at 279–81.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *Emery*, 174 Wn.2d at 759–60 (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a reason for their doubt is “inappropriate” because it “subtly shifts the burden to the defense.” *Id.*<sup>4</sup>

Requiring articulation “skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit . . . .” *Humphrey v. Cain*, 120 F.3d 526, 531 (5<sup>th</sup> Cir. 1997), on reh’g en banc, 138 F.3d 552 (5<sup>th</sup> Cir.

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<sup>4</sup> See also *State v. Walker*, 164 Wn. App. 724, 731–32, 265 P.3d 191 (2011), as amended (Nov. 18, 2011), review granted, cause remanded, 175 Wn.2d 1022, 295 P.3d 728 (2012); *State v. Johnson*, 158 Wn. App. 677, 684–86, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011).

1998).<sup>5</sup> An instruction imposing an articulation requirement “creates a lower standard of proof than due process requires.” *Id.*, at 534.<sup>6</sup>

*ii. The trial court erroneously told jurors to convict unless they had a doubt “for which a reason exists.”*

Valdez’ jury was instructed, “A reasonable doubt is one for which a reason exists . . . .” CP 28; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01, at 85 (3d Ed 2008) (“WPIC”). This suggested to the jury that it could not acquit unless it could find a doubt “for which a reason exists.” This instruction—based on WPIC 4.01—imposes an articulation requirement that violates the constitution.

A “reasonable doubt” is not the same as a reason to doubt. “Reasonable” means “being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous . . . being or remaining within the bounds of reason . . . Rational.” *Webster’s Third New Int’l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. Accord *Jackson v. Virginia*, 443

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<sup>5</sup> The Fifth Circuit decided *Humphrey* before enactment of the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Subsequent cases applied the AEDPA’s strict procedural limitations to avoid the issue. See, e.g., *Williams v. Cain*, 229 F.3d 468, 476 (5<sup>th</sup> Cir. 2000).

<sup>6</sup> In *Humphrey*, the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as “a serious doubt, for which you can give a good reason.” *Humphrey*, 120 F.3d at 530.

U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum is one based upon ‘reason’”); *Johnson v. Louisiana*, 406 U.S. 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’” (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2<sup>nd</sup> Cir 1965))).

The article “a” before the noun “reason” in the instruction inappropriately alters and augments the definition of reasonable doubt. “[A] reason” is “an expression or statement offered as an explanation of a belief or assertion or as a justification.” *Webster’s Third New Int’l Dictionary*. The phrase “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

Thus, this language requires more than just a reasonable doubt to acquit. *Cf. In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.”). Jurors applying the instruction, herein, could have a reasonable

doubt but also have difficulty articulating or explaining why their doubt is reasonable.<sup>7</sup> For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under this instruction if jurors could not put their doubts into words.

As a matter of law, the jury is “firmly presumed” to have followed the court’s reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474–75, 285 P.3d 873 (2012). The instruction here left jurors with no choice but to convict unless they had a reason for their doubts. This meant Valdez could not be acquitted, even if jurors had a reasonable doubt.

The instruction “subtly shift[ed] the burden to the defense.” *Emery*, 174 Wn.2d at 759–60. It also “create[d] a lower standard of proof than due process requires . . . .” *Humphrey*, 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court’s instruction violated Valdez’s right to due process and his right to a jury trial. *Id.*; *Sullivan*, 508 U.S. at 278–81; *Bennett*, 161 Wn.2d at 307. Failing to properly instruct jurors regarding reasonable doubt “undoubtedly qualifies as ‘structural error.’” *Sullivan*, 508 U.S. at 281–82. Accordingly, Valdez’

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<sup>7</sup> See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L.

convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan, Id.* at 278–82.

2. Since the directive to pay LFO’s was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.

a. *This court should exercise its discretion and accept review.*

Mr. Valdez did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand ... reach[ing] the merits ... .” *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many

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REV. 1165, 1213–14 (2003).

“reentry difficulties” that ultimately work against the State’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist.*

#405, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—“to stand by the thing decided”—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Valdez’ case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”)(citations omitted).

The sentencing court’s signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 344 P.3d at 685. Post-*Blazina*, one would expect future trial courts to make the appropriate inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Valdez respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and

accept review. *Blazina*, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument.*

There is insufficient evidence to support the trial court's finding that Mr. Valdez has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for 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). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendnat had the ability to pay, violates the defendant's right to equal protection under Washington Constituion, Article 1, § 12 and United States Constituion, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.”

RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. “This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Id.* The remedy for a trial court’s failure to make this inquiry is remand for a new sentencing hearing. *Id.*

*Blazina* further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove

indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings 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." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915-16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has "considered" Mr. Valdez' present or future ability to pay legal financial obligations. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's

resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

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

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Valdez’ financial resources and the potential burden of imposing LFOs on him. The Court only asked Mr. Valdez if he was employable, to which Mr. Valdez responded, “Uh-huh.” 6/3/15 RP 5. The Court did not inquire further into Mr. Valdez’ financial resources or consider the burden payment of LFOs would impose on him. 6/3/15 RP 2-5. The Court ordered Mr. Valdez to begin making payments immediately at \$100 per month. CP 12.

The boilerplate finding that Mr. Valdez has the present or future ability to pay LFOs is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Valdez' current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

E. CONCLUSION

For the reasons stated, the conviction should be reversed or, in the alternative, the case should be remanded to make an individualized inquiry into Mr. Valdez' current and future ability to pay before imposing LFOs.

Respectfully submitted February 22, 2016,

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s/David N. Gasch  
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