Supreme Court No.: _____
Court of Appeals No.: 32254-8-III

92723-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES AUSTIN,

Petitioner.

PETITION FOR REVIEW

KATHLEEN A. SHEA
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

The State obtained incriminating statements from Mr. Austin after interrogating him using the Reid Technique. At his trial, Mr. Austin sought to introduce expert testimony that the incidence of false confessions increases when the Reid Technique is used. The trial court excluded this evidence, citing concerns about the reliability of the methodology because – despite the expert's unrefuted testimony to the contrary – it knew of no generally accepted principle that it is possible to extrapolate from controlled studies to the real world.

On review, the Court of Appeals did not address the Frye standard and failed to perform the searching, de novo review required by this Court in State v. Copeland. Instead, the court relied heavily on the fact that more expert testimony about the Reid Technique was admitted in this case than in a past case, and found the trial court did not abuse its discretion. Because the Court of Appeals failed to perform the necessary analysis under Copeland, this Court should grant review.

B. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. Austin requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division Three, in State v. James Austin, No. 32254-8-III, filed November 10, 2015. A copy of the opinion is attached as Appendix A. The Court of Appeals denied Mr.

Austin's motion to reconsider on December 22, 2015. A copy of the court's order is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals affirmed Mr. Austin's conviction after finding the trial court properly excluded expert testimony on research showing the use of the Reid Technique during an interrogation increases the incidence of false confessions. In reaching this conclusion it failed to perform an analysis under Frye.[1] in direct contravention of State v. Copeland.[2] Should this Court grant review in the substantial public interest because the Court of Appeals' opinion failed to perform the appropriate analysis on review? RAP 13.4(b)(1), (4).

2. During closing argument, the deputy prosecutor shifted the burden of proof to Mr. Austin and appealed to the jurors' passion and prejudice. Should review be granted in the substantial public interest? RAP 13.4(b)(4).

3. The Court of Appeals declined to remand Mr. Austin's case for consideration of whether he could afford the $3,310 in discretionary legal financial obligations imposed against him at sentencing, finding the imposition of costs was justified by Mr. Austin's testimony at trial that he

[1] Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923).
[2] State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996).

had been steadily employed in the past. Where the trial court failed to make an individualized inquiry as to Mr. Austin's current and future ability to pay, and gave no indication it was relying on Mr. Austin's testimony at trial, should this Court grant review because the opinion is contrary to State v. Blazina and raises an issue of substantial public interest?[3] RAP 13.4(b)(1), (4)

D. STATEMENT OF THE CASE

James Austin had primary custody of his two children, a son, J.A., and a daughter, A.A. 10/23/13 RP 176; 10/25/13 RP 553. Although the kids had "cots" in their own room, they preferred to share Mr. Austin's twin bed. 10/23/13 RP 264-65. J.A., who is a couple years older than A.A., testified that they slept in Mr. Austin's room because it had a television, and he enjoyed watching television and playing video games before bed. 10/23/13 RP 219, 240, 242. Typically J.A. and A.A. went to bed first, and Mr. Austin came to bed later. 10/23/13 RP 242-43.

One weekend, when A.A. was staying at her maternal grandmother's home during a visit with her mother, A.A. told a cousin that Mr. Austin had touched her with his "thing," referring to his penis. 10/23/13 RP 194-95. A.A. was nine years old at the time. 10/23/13 RP

[3] 182 Wn.2d 827, 344 P.3d 680 (2015).

177. According to A.A.'s mother, A.A. then told her that she would wake up to Mr. Austin touching her with his penis and when she moved away, he would stop. 10/23/13 RP 96. A.A. said this happened five times. Id.

Detective Randolph Grant, with the Chelan Sheriff's Office, and a CPS worker interviewed both A.A. and J.A. 10/23/13 RP 323. J.C. made no allegations during the interview. 10/23/13 RP 358. A.A. said that Mr. Austin rubbed his penis against her, and that three of the five times he had pushed her underwear out of the way and placed his penis inside of her underwear. 10/23/13 RP 278, 329, 330. However, A.A. said that once she started wearing pajamas to bed, this stopped. 10/23/13 RP 281, 330.

Detective Grant arranged to interview Mr. Austin. 10/23/13 RP 344. Mr. Austin arrived for the interview knowing only that an allegation of child abuse had been made. 5/25/13 RP 537. When Detective Grant revealed the substance of the allegations against him, Mr. Austin expressed shock and adamantly denied them. 10/25/13 RP 542; CP 43-45. During the first hour of the interrogation, Mr. Austin continued to deny the allegations against him. 9/5/13 RP 135-36.

Detective Grant employed the Reid Technique during the interrogation, a guilt presumptive tactic designed to secure a confession from a suspect. 9/5/13 RP 130; 10/23/13 RP 366; 10/25/13 RP 511. As part of this technique, Detective Grant presented Mr. Austin with two

options: either Mr. Austin was a "sick evil" individual or a "guy who made a mistake." CP 93; 9/5/13 RP 137. Mr. Austin eventually acquiesced, choosing the less culpable option and indicating that he "made a mistake" and "probably" pushed up against A.A.'s vagina while in bed with her. CP 95.

Mr. Austin testified at trial that he believed no matter what he said Detective Grant would not believe him, and that he needed to admit to something in order to see his children again. 10/25/12 RP 543, 546. He explained that he sometimes woke up with an erection, with the flap in his boxer shorts no longer covering his penis, and A.A. pressed close to his body. 10/25/13 RP 544. However, whenever that happened, Mr. Austin changed his position and moved away from A.A. 10/25/13 RP 544.

Prior to trial, the defense notified the State of its intent to call an expert witness, Deborah Connolly, who has both a law degree and Ph.D. in psychology and teaches forensic law and psychology at Simon Fraser University. 10/25/13 RP 506-07. The State moved to exclude Professor Connolly's testimony at trial. CP 33. After a hearing, the trial court granted most of the relief the State requested, allowing Professor Connolly to testify about the three phases of the Reid Technique but preventing her from offering her opinion that it increases the incidence of false

confessions and that some of the statements made by Detective Grant could be interpreted as promises of leniency. CP 214.

During closing, the deputy prosecutor stated that Mr. Austin "presented no evidence, whatsoever" and "[h]e's got to prove two separate things." 10/28/13 RP 633, 679. He also, when discussing the Reid Technique, asked the jury "[a]re we supposed to let nine-year-old girls be raped and not try and get to the bottom of this?" 10/28/13 RP 681. Mr. Austin objected to the prosecutor's improper statements and at one point the prosecutor acknowledged, "[s]ometimes I get caught up, and I lose it." 10/28/13 RP 634.

The jury acquitted Mr. Austin of first degree rape of a child and first degree incest, but found him guilty of first degree child molestation. CP 265-67. Mr. Austin was sentenced to an indeterminate sentence of 60 months to life. CP 272. The court also imposed at least $3,310 in discretionary legal financial obligations without conducting an individualized inquiry of whether Mr. Austin had the present or likely future ability to pay them. CP 271, 274.

E. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. This Court should grant review because the Court of Appeals' opinion is contrary to State v. Copeland and raises an issue of substantial public interest.

Mr. Austin's statements to Detective Grant were critical to the State's case. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" Arizona v. Fulminate, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)). Such persuasive evidence of guilt is difficult for any reasonable juror to dismiss. Fulminate, 499 U.S. at 296; see also Saul M. Kassin, et al., Confessions that Corrupt: Evidence from the DNA Exoneration Case Files, 23(1) Psychological Science 41-45 (2012).

When the credibility of a confession is central to the defendant's claim of innocence, the exclusion of competent, reliable evidence bearing on that issue violates the defendant's constitutional right to present his defense. Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S.Ct. 2142, 90 L.Ed. 636 (1986); see also Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. "[A] defendant's case may stand or fall on his

ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." Crane, 476 U.S. at 688.

The State used the Reid technique to extract a "confession" from Mr. Austin. 9/5/13 RP 130; 10/23/13 RP 366-67. This technique has the single-minded goal of obtaining incriminating statements from a suspect by (1) isolating the suspect in a small private room; (2) confronting the suspect with accusations of guilt and refusing to accept his denials; and (3) offering sympathy and moral justification and introducing "themes" that minimize the alleged crime and lead suspects to see confessing as an expedient means to escape the interrogation. Saul M. Kassin, et al., Police-Induced Confessions: Risk Factors and Recommendations, 34(1) Law and Human Behavior 7 (2010); CP 132.

Mr. Austin sought to call forensic psychologist Deborah Connolly to testify at trial about the impact the Reid Technique has on a suspect's willingness to falsely confess, and identify factors that were present during Mr. Austin's interrogation that put him at risk for falsely confessing. CP 125; 9/5/13 RP 175. She did not intend to offer an opinion as to whether any specific statements made by Mr. Austin were false. 9/5/13 RP 7.

The trial court allowed Professor Connolly to testify about the Reid Technique, but prohibited her from explaining how the technique contributes to false confessions, reasoning that there was an "insufficient

basis of reliability" for her opinion testimony and that such testimony "would be highly speculative." CP 214. It also prohibited her from testifying that some of the detective's minimization statements could be interpreted as promises of leniency. CP 214. Mr. Austin later asked the court to reconsider its ruling, but this motion was denied. 10/25/13 RP 494.

Expert testimony involving scientific evidence should be excluded unless the testimony satisfies both Frye[4] and ER 702. Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 296 P.3d 860 (2013); State v. Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996).

> Frye and ER 702 work together to regulate expert testimony: Frye excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology is reliable; ER 702 excludes testimony where the expert fails to adhere to that reliable methodology.

Lakey, 176 Wn.2d at 918-19.

There was no question Professor Connolly's testimony was consistent with the methodology at issue, and thereby satisfied ER 702. Instead, the trial court's concern was whether the methodology was generally accepted. At a pre-trial hearing, Professor Connolly explained the scientific paper she relied on to explain how the Reid Technique

[4] Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923).

increases the incidence of false confessions was the first scientific review paper the American Psychology and Law Society accepted for publication in its journal in 42 years. 9/5/13 RP 163-65. She testified that journal articles are extensively reviewed prior to publication and that a scientific review paper is subjected to a particular rigorous review process. 9/5/13 RP 159-60, 163-64. She also explained that once endorsed, as this scientific review paper was, it is considered to represent the views of the American Psychology and Law Society, which is the largest North American society involving those who work on issues at the intersection of psychology and the law. 9/5/13 RP 164.

Despite Professor Connolly's undisputed testimony that the theories she anticipated discussing at trial were generally accepted in the relevant scientific community, the trial court indicated it did not believe it met the Frye standard because the court "didn't know of any generally accepted principle that you conduct – a study of university students somehow can extrapolate to being applied to suspects in criminal cases without knowing which ones falsely confessed and which ones didn't." 9/5/13 RP 183-84. In response to this concern, Professor Connolly explained that the research upon which she relied used students in a controlled environment, as scientific studies often do, because:

> [T]he real world data will not allow you to draw causal inferences from the data, so you can't say that x caused y. In order to do that, you have to randomly assign people to different conditions, and that simply is not possible in the real word [sic]. So in order to draw causal inferences, you need lab based research involving random assignment. And those – those findings can then be tested in real world settings.

9/5/13 RP 186-87.

On appeal, the court did not even consider the application of the Frye standard. It simply relied on State v. Rafay, 168 Wn. App. 734, 285 P.3d 83 (2012), to find the trial court allowed "far more than was permitted in Rafay," and therefore did not abuse its discretion.[5] Slip Op. at 8. This holding is contrary to this Court's opinion in Copeland, where the Court held:

> Review of admissibility under Frye is de novo and involves a mixed question of law and fact. The reviewing court will undertake a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority. A key reason for consideration of such material is that it is impractical in many instances for a true cross-section of scientists to testify at a hearing.

130 Wn.2d at 255-56.

[5] As discussed in Mr. Austin's opening and reply briefs, Rafay provides no guidance in this case because the question at issue in Rafay was whether the expert testimony would have been helpful to the trier of fact, not whether the scientific theory was generally accepted in the relevant community. Op. Br. at 33; Reply Br. at 5.

Contrary to Copeland, the Court of Appeals' failed to engage in a de novo review of the admissibility of the evidence under Frye and ignored the fact the trial court based its ruling on a finding there was no generally accepted scientific principle that it is possible to extrapolate from a study involving university students. Such a finding is unsupported by the record, as demonstrated by Professor Connolly's undisputed testimony, and fails to understand a basic scientific principle. 9/5/13 RP 186-87.

The evidence excluded by the trial court was neither irrelevant nor inadmissible. See Slip Op. at 7. Mr. Austin's defense was that his "confession" was false. Expert testimony about research demonstrating the use of the Reid Technique increases the incidence of false confessions was highly relevant. Whether it was admissible is a question to be decided under Frye, which the Court of Appeals did not consider. Its analysis and holding is contrary to Copeland and raises an issue of substantial public interest. This Court should accept review.

2. Review should be granted in the substantial public interest because improper argument during the State's closing denied Mr. Austin a fair trial.

The deputy prosecuting attorney shifted the burden to Mr. Austin twice during closing argument, withdrawing his comment both times and explaining "[s]ometimes I get caught up, and I lose it." 10/28/13 RP 633-

34; 10/28/13 RP 679. The prosecutor also sought to align the jurors with the State by referring to Professor Connolly as an "ivory tower kind of person" that did not understand the plight of the hardworking police officers "in the trenches" and asked the jurors what else were they supposed to do, "let nine-year-old girls be raped, and not try and get to the bottom of this?" 10/28/13 RP 681.

A prosecutor is obligated to perform two functions: "enforce the law by prosecuting those who have violated the peace and dignity of the state" and serve "as the representative of the people in a quasijudicial capacity in a search for justice." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id.; see also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Here, the State failed in its duty when it made these improper comments during its closing argument. This Court should accept review.

3. **This Court should grant review because contrary to the opinion in this case, State v. Blazina requires an individualized inquiry into a defendant's ability to pay LFOs, not simply evidence that the defendant testified about his work history at trial.**

At sentencing, the trial court ordered Mr. Austin to pay $3,910 in legal financial obligations (LFOs), which included discretionary costs of $450 for a court appointed attorney and $2860 in court costs. CP 65. It also reserved the imposition of costs for retaining Professor Connolly, to be determined at the subsequent restitution hearing. CP 65; 1/27/14 RP 714. While boilerplate language in the Judgment and Sentence stated the Court had considered Mr. Austin's ability to pay, nothing in the record suggests that the court actually considered Mr. Austin's financial circumstances before imposing the LFOs, or determined it was likely Mr. Austin would be able to pay them in the future. CP 9. In fact, the court made no inquiry into Mr. Austin's financial resources before imposing the costs. RP 427-34.

On appeal, the Court of Appeals declined to strike the LFOs, relying on State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). Slip Op. at 15. It held that because Mr. Austin "testified at trial concerning his education and work history," and this testimony suggested he was able to find steady work, the trial court had sufficient evidence to consider whether Mr. Austin had the ability to pay the LFOs. Slip Op. at

15 (emphasis added). The Court characterized it has a "Bertrand-type evidentiary sufficiency claim" rather than a "Blazina-type error preservation issue." Slip Op at 15; State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015).

However, as the Court of Appeals acknowledged, Blazina contemplated a more thorough inquiry than the one engaged in by the trial court at Mr. Austin's sentencing. Slip Op. at 16. Indeed, there was no inquiry at sentencing in his case. The Court of Appeals simply found the trial court had the evidence it needed, assuming the trial court recalled Mr. Austin's testimony at trial. But the trial court gave no indication it was relying on Mr. Austin's trial testimony, and that testimony described the life Mr. Austin had before he was convicted of a sex offense and the trial court imposed an indeterminate sentence of 60 months to life. CP 272. Simply because Mr. Austin had steady work before his conviction does not mean he was likely to have steady work after being released from prison.

In Blazina, the Court acknowledged that LFOs have significant consequences for defendants. 182 Wn.2d at 835. Unpaid costs from a criminal conviction increase recidivism for indigent offenders because they "accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time"; an impoverished person is

far more likely to accumulate astronomical interest than a wealthy person who can pay the costs in a timely manner: and "legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs." which may "have serious negative consequences on employment, on housing, and on finances." *Id.* at 836 (internal citations omitted). "LFO debt also impacts credit ratings, making it more difficult to find secure housing." Id. at 837 (citing Katherine A. Beckett, Alexes M. Harris & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State (2008), at 43).

In apparent recognition of the serious negative consequences for defendants who are burdened with LFOs they will likely never have the ability to pay, this Court has granted a number of petitions for review only on the issue of the imposition of discretionary legal financial obligations, and remanded to the trial court with instructions to conduct an individualized inquiry of the defendant's current and future ability to pay. See e.g., State v. Youell, 184 Wn.2d 1018, 361 P.3d 744 (2015); State v. Thomas, 184 Wn.2d 1018, 361 P.3d 745 (2015); State v. Licon, 184 Wn.2d 1010, 359 P.3d 791 (2015).

As this Court noted in its orders, remanding these cases to the trial court is consistent with its holding in Blazina, which requires a trial court

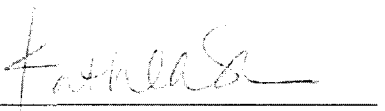
to consider a defendant's ability to pay before imposing LFOs. Id. The Court of Appeals' holding that the trial court may be presumed to have recalled Mr. Austin's testimony at trial and therefore conducted an adequate individualized inquiry is contrary to Blazina. This Court should accept review and require the trial court to conduct an individualized inquiry into Mr. Austin's current and future ability to pay any LFOs.

F. CONCLUSION

On each of these bases, the Court should grant review of the Court of Appeals opinion affirming Mr. Austin's conviction.

DATED this 21st day of January, 2016.

Respectfully submitted,



Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

COURT OF APPEALS, DIVISION III OPINION

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JAMES C. AUSTIN, Appellant.	)	No. 32254-8-III UNPUBLISHED OPINION

KORSMO, J. — James Austin appeals his conviction on one count of first degree child molestation, arguing that the trial court erred by excluding portions of his expert's testimony, the prosecutor committed misconduct in closing argument, the trial court should have granted him a mistrial, and the court imposed legal financial obligations (LFOs) without a sufficient inquiry. We affirm.

FACTS

Mr. Austin was charged with one count of first degree child rape, one count of first degree child molestation, and one count of first degree incest. The matter ultimately proceeded to jury trial in the Chelan County Superior Court. The jury acquitted him of the rape and incest counts, but, as noted, convicted him on the molestation charge.

Mr. Austin had primary custody of his two children, J.A. and A.A., after he separated from their mother. A.A., then age 9, was identified as the victim of the three charges. Mr. Austin and the children lived in his mother's house. He had the basement bedroom, while the two children shared the two upstairs bedrooms with his mother. However, most nights the two children slept with their father in his bedroom.

One evening A.A.'s maternal grandmother overheard A.A. explaining to her cousin about her father touching her with his "thing." A.A.'s grandmother summoned A.A.'s mother who asked A.A. what had happened. The child told her mother that on five occasions she had awakened to feel her dad touching her with his penis, which had been taken out of his boxers. The next day the child and her mother made an oral report to a deputy sheriff. A detective, with the assistance of a child protective services (CPS) investigator, subsequently interviewed both J.A. and A.A. The older child reported no incidents, but A.A. described how her father would pull his penis out and rub against her. She indicated that on one occasion he achieved penetration.

The detective, Randy Grant, then arranged an interview with Mr. Austin. The detective used the "Reid" technique to conduct the interview. At trial, the deputy prosecutor was allowed to play a recording of the interview to the jury. The prosecutor also handed each juror a transcript of the recording. The jurors would turn the pages of their transcripts in conjunction with the recording. Forty-five pages into the recording, the prosecutor paused it and explained that he was looking ahead in the transcript and

noticed that he had inadvertently distributed copies made from his own annotated version. He requested time to correct the mistake. The markings included one page where statements were underlined and seven other pages with marks in the margins alongside the question.[1]

The defense moved for a mistrial. The trial court noted (1) that the situation was a product of inadvertence, (2) that the jury was not being exposed to anything new or inadmissible, and (3) that a limiting instruction could be offered. Even if the jury happened to flip ahead, the body of evidence is so large, that a few sections of underlining would not likely have a great impact. The court concluded that, under the totality of the circumstances, the mistake did not expose the defendant to unfair prejudice. The court instructed the jury to disregard any markings in the transcript.

The prosecutor sought pre-trial to limit testimony from defense expert Dr. Deborah Connolly. The purpose of her testimony was to explain the nuances of the Reid technique and to offer expert opinion on its coercive effects. The technique prompts the questioner to first presume guilt and then offer a "face-saving" justification, i.e., the questioner presents a suspect with two options. "Either you are a premeditated, calculating criminal or" "you're an unfortunate character who found themselves in a bad spot and made a mistake." Dr. Connolly posits that this method heightens the anxiety of

[1] The trial court described the notations as "placeholder marks, in the margin."

the suspect and decreases voluntariness, in part, because it is often misinterpreted as an offer of leniency. She also believed that the technique increases the rate of false confessions.

The trial court excluded testimony relating to her opinion of the technique's involuntariness, frequency of false confessions, and her opinion that the detective's statements could be interpreted as offers of leniency under the Reid technique, but allowed her to describe the technique and the nature of the questioning. Dr. Connolly then testified under those limitations. Mr. Austin took the stand in his own defense and denied molesting A.A. He testified that there were occasions when he had awakened to find his penis erect and his daughter sleeping against his body, but denied ever intentionally having sexual contact with her. He contended that the form of the interview questioning left him unable to answer the detective correctly, but acknowledged that some of his answers showed awareness that his erect penis had touched his daughter.

In closing argument, the deputy prosecuting attorney made several statements that are at issue here. Addressing the testimony that the interview technique left Mr. Austin to choose among incorrect answers, the prosecutor argued:

> MR. STEVENSEN: He appears to be mature. I mean, he's 34 now. He appeared to have at least average intelligence.
> He has presented no evidence, whatsoever, that he, in particular - -
> MR. HOWARD: Objection, Your Honor, that misplaces the burden of proof.
> MR. STEVENSEN: I withdraw that. And my apologies.

MR. HOWARD: And I'd ask the Court to move - - to strike the comment.

THE COURT: The jury will disregard.

MR. STEVENSEN: My mistake. I stepped on over a little. I apologize, ladies and gentlemen of the jury. Sometimes I get caught up, and I lose it.

Report of Proceedings (RP) at 633-634.

Later, the prosecutor said:

MR. STEVENSEN: Then [Mr. Austin] goes in, and gives a statement to law enforcement, admitting most - - not all; he doesn't admit the penetration, but he admits most of it.

Okay, so what do we do?

Well, if he didn't do it, then we have to have two things going here. He's got to prove two separate things.

Well, strike that. He doesn't - - he doesn't have to prove anything. Except define penetration, he has to prove that it wasn't conscious. So, sorry, Stuck to myself again.

The State has to prove everything. But, having done so, how does he explain it?

RP at 679.

During rebuttal arguments, the deputy prosecutor stated:

MR. STEVENSEN: He used the Reid technique. Oh, my God, the Reid technique.

You know, you got Dr. Connolly coming here. She's a nice lady. Academic and, you know, ivory tower kind of person. Everything is perfect. She's not in the trenches, with the police.

Do you think that the police can't use any kind of techniques to try and get people to confess?

Are we supposed to let nine-year-old girls be raped, and not try and get to the bottom of this?

MR. HOWARD: Objection, Your Honor. We need - - we're going to need to approach or take this outside the presence of the jury.

THE COURT: Sustained.

The jury will disregard the last statement, by Mr. Stevensen.

RP at 681.

The jury acquitted Mr. Austin on the two counts that required proof of penetration, but convicted on the molestation count. The trial court imposed LFOs totaling $3,910. Mr. Austin then timely appealed to this court.

ARGUMENT

Mr. Austin argues that the court erred in limiting his expert's testimony, the prosecutor committed misconduct in closing argument, the court erred in denying his request for a mistrial concerning the transcript, and that an insufficient inquiry was conducted before imposing LFOs. We address the four issues in the order stated.

Expert Testimony

Mr. Austin first contends that the trial court erred in limiting some of the issues his expert could address concerning the Reid technique, thereby infringing on his right to present a defense. The trial court acted within its discretion and did not err by excluding portions of the proffered testimony.

Several general principles govern review of this argument. To admit expert testimony, the proponent must show that the testimony would be helpful to the jury. ER 702. Expert testimony is not helpful if the judge determines that the testimony is based on speculation or is unreliable. *Miller v. Likins*, 109 Wn. App. 140. 148, 34 P.3d 835

(2001); *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 920, 296 P.3d 860 (2013). A court also may not admit expert testimony if the court determines that the facts or data relied on by the expert are not of a type reasonably relied upon by experts in the particular field. *Lakey*, 176 Wn.2d at 918.

A trial court's evidentiary rulings concerning expert testimony under ER 702 are reviewed for abuse of discretion. *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999); *Moore v. Harley-Davidson Motor Co.*, 158 Wn. App. 407, 417, 241 P.3d 808 (2010). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion." *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

A criminal defendant also has a constitutional right to present evidence in his own defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). There is, however, no right to present irrelevant or inadmissible evidence. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Mr. Austin argues that the court did abuse its discretion, to his detriment, in precluding some of his expert's testimony. We disagree. A similar challenge to

the Reid technique was rejected in *State v. Rafay*, 168 Wn. App. 734, 285 P.3d 83 (2012), *review denied*, 176 Wn.2d 1023 (2013). There an expert had sought to testify that the Reid technique was one of the coercive practices that could produce false confessions. *Id.* at 784. The trial court excluded the expert's testimony and Division One affirmed, concluding that the information was not helpful to the jury. *Id.* at 790.

Here, the trial court permitted the expert to testify concerning the characteristics of the Reid technique and point out where those varying aspects were used in the course of the interview. This is far more than was permitted in *Rafay* and allowed the jury to understand how the interrogation was structured and to evaluate the particular techniques used to obtain Mr. Austin's statements. In contrast, the topics excluded by the trial judge were either not related to this specific case (whether the Reid technique produces false confessions) or were not the proper subject of expert testimony (whether Mr. Austin's confession was false). The court had very tenable reasons for excluding the portions it did.

The expert was permitted to testify to a significant amount of material. There was no abuse of discretion in excluding irrelevant or improper topics. The court did not err in its ruling in limine.

Closing Argument

Mr. Austin next argues that the prosecutor committed misconduct in closing argument by shifting the burden of proof and appealed to the passions of the jury. Mr. Austin cannot establish any prejudice to his right to a fair trial because the trial judge corrected any errors that were made.

Once again, very well settled standards govern our review of this argument. To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was both improper and resulted in prejudice in light of the context of the entire record and the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Prejudice exists only where there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 442-443. When a defendant fails to object to an improper remark, he or she waives a claim of error unless the remark is "'so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *Id.* at 443 (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). This court reviews alleged improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

A prosecutor has wide latitude to argue reasonable inferences from the evidence. *Thorgerson*, 172 Wn.2d at 448. However, the prosecutor commits reversible misconduct when he urges the jury to consider evidence outside the record and appeals to passion and prejudice are typically based on matters outside the record. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Furthermore, a prosecutor is not allowed to assert in argument his personal belief in the accused's guilt. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Finally, it is improper for the prosecutor to shift the burden of proof to the defendant or argue that the defendant failed to present evidence. *E.g.*, *Thorgerson*, 172 Wn.2d at 453. Indeed, the State bears the whole burden of proving each element of the case beyond a reasonable doubt. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990).

The last-noted issue is the first presented by Mr. Austin. He contends that the first two comments of the prosecutor detailed earlier expressly stated that the defense had a burden of proof. To the extent there was any error, it was corrected.

The prosecutor, talking about Mr. Austin's ability to understand the interrogation, stated that the defendant was an articulate man of average intelligence and he had "presented no evidence, whatsoever, that he, in particular" when a defense objection was presented. The prosecutor apologized and withdrew the incomplete statement, which the court also struck from the record. This

statement was not so prejudicial that it was beyond all cure. Defense counsel timely objected, the prosecutor apologized, and the court struck the statement. We can think of little else that could be done to correct the error.

In rebuttal, the prosecutor made a similar error when talking about the defendant's statement to law enforcement, stating that Mr. Austin need "to prove two separate things." Before the defense could even object, the prosecutor struck his own statement and twice told the jury that Mr. Austin did not have to prove anything, but the State had to "prove everything." Once again, this passing error was promptly addressed by the offending party.[2]

Mr. Austin also contends that the prosecutor improperly appealed to jury passion by commenting on Dr. Connolly and asking "are we supposed to let nine-year-old girls be raped?" The later rhetorical statement was clearly improper, immediately objected to by defense counsel, and the judge instructed the jury to disregard the remark. In these circumstances, the error in that statement was cured by the trial court. *Thorgerson*, 172 Wn.2d at 452.

There was no challenge to the comments concerning Dr. Connolly at trial, which means that Mr. Austin has to show that they were so egregious that they

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[2] We suggest that the prosecutor use a more neutral, evidence focused statement when discussing whether the evidence supports a defense theory. It is simpler and far less risky to state that "the evidence does not establish" a particular proposition than it is to say that the defense has not done so.

could not have been cured by a timely objection. *Id.* at 443. He cannot meet that burden here. It is very doubtful that there was any error. The prosecutor called the expert "a nice lady" and suggested that theoretical approaches to interrogation do not translate well to the reality of actual practice. The statement did not disparage the expert or her work, but merely questioned the practicality of treating the issue as an academic exercise. The failure to object is strong evidence that defense counsel did not see the argument as improper. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). We agree that is likely the case here. Nonetheless, if there was an improper statement here, it clearly was not so egregious that it was beyond cure from a timely objection. This claim fails.

The trial court and the parties properly dealt with the prosecutor's few erroneous statements. Mr. Austin has not met his burden of establishing prejudicial misconduct.

Mistrial

Mr. Austin next argues that the court erred in denying his motion for a mistrial. The "irregularity" in the transcripts was properly dealt with by the trial court. Once again, there was no abuse of discretion in denying the motion.

When inadmissible testimony is put before the jury, the trial court should declare a mistrial if the irregularity, in light of all of the evidence in the trial, so tainted the proceedings that the defendant was deprived of a fair trial. *State v.*

Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). A ruling on a motion for a mistrial is reviewed for abuse of discretion. *Id.* at 166.

Here, the prosecutor appeared to catch his error before any member of the jury was likely to have seen that there were notes in the margin of upcoming pages in the transcript. The trial court noted that it was unlikely that the jurors saw the notes and that it also was unlikely any of the notes would have prejudiced the defense in view of their innocuous nature and the large transcript. The court then concluded under the totality of the circumstances that the mistake did not expose the defendant to unfair prejudice and instructed the jury to disregard any markings in the transcript.

These were very tenable reasons for the trial judge to take the actions he did. It was likely that no juror saw the notes and they were of no consequence to the case. Under the circumstances, there was no reason to order a new trial. If there was an error, it was corrected by the trial court. There was not such a significant error that only a new trial could remedy the problem.

The court did not err in denying the mistrial.

Financial Obligations

The trial court imposed a total of $3,910 in LFOs, with at least $2,860 (services fees of $2,410 and appointed attorney fees of $450) in the discretionary fee category. Mr. Austin requests that we remand his case for another hearing into

his ability to pay these obligations. Because the trial court was familiar with his work history, we decline the request.

This court reviews the trial court's determination concerning a defendant's resources and ability to pay under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). A decision on whether to impose fees is reviewed for abuse of discretion. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). RCW 10.01.160(3) provides that, "the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." This inquiry is only required for *discretionary* LFOs. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (mandatory fees, which include victim restitution, victim assessments, DNA[3] fees, and criminal filing fees, operate according to the current sentencing scheme and without the court's discretion by legislative design.). Trial courts are not required to enter formal, specific findings. *Id.* at 105.

As has been noted in many places, the question of the trial court's compliance with its longstanding statutory obligation to inquire into an offender's ability to pay for court costs before assessing them has been the subject of much appellate litigation over the past several years. The statute is straightforward. The

[3] Deoxyribonucleic acid.

court shall not impose costs "unless the defendant is or will be able to pay them." RCW 10.01.160(3). Nonetheless, the subject often is not raised at sentencing even though the defendant is the best, and often only, source of the information the trial court needs. It is this fact, in conjunction with the statutory basis of the trial court's obligation, that has triggered the litigation explosion on this topic. If the defendant does not address the LFO issue in the trial court, appellate courts are not required to consider the claim on appeal because it arises from a statute rather than the constitution. RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 832-834, 344 P.3d 680 (2015). Appellate courts do retain discretion to decide if they will hear an LFO claim for the first time on appeal. *Blazina*, 182 Wn.2d at 834-835.

Mr. Austin argues this as a *Blazina*-type error preservation issue. However, we see this case more as a *Betrand*-type evidentiary sufficiency claim rather than as an error preservation problem. Mr. Austin testified at trial concerning his education and work history. He generally had been employed at various forms of labor since leaving high school. While his career does not suggest that he has earned high wages, it does appear that he has been able to find steady work.

There was no searching inquiry into the defendant's finances or bank records. The trial court went through each of the LFOs it was assessing on the record, but Mr. Austin made no objection to them and did not claim an inability to pay or otherwise raise any issue concerning his finances. Under these

circumstances, while *Blazina* contemplates a more thorough inquiry, we think the defendant's work history provided the trial judge with a basis for concluding that he had an ability to pay the assessed obligations.[4]

Although we expect that a more thorough inquiry will be made in post-*Blazina* sentencings, the information presented at trial provided a tenable basis for imposing the LFOs. There was no abuse of discretion.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

[4] He retains the right to seek remission of his obligations at any time if he had financial information he failed to present to the trial court. RCW 10.01.160(4).

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

December 22, 2015

FILED
DEC 22, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JAMES C. AUSTIN, Appellant.	)	No. 32254-8-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of November 10, 2015 is hereby denied.

PANEL: Judges Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

LAUREL SIDDOWAY
Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, JAMES AUSTIN, Appellant.	)))))))))	COA NO. 32254-8-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	DOUGLAS SHAE, DPA CHELAN COUNTY PROSECUTOR'S OFFICE PO BOX 2596 WENATCHEE, WA 98807-2596	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	EDWARD STEVENSEN ATTORNEY AT LAW 534 OXENFORD RD PORT ANGELES WA 98363-8864	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	JAMES AUSTIN 370770 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JANUARY, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711