No. 46093-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Hernandez,

Appellant.

Pierce County Superior Court Cause No. 13-1-02943-1

The Honorable Judge Garold Johnson

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS ..... **i**

TABLE OF AUTHORITIES ..... **iv**

ISSUES AND ASSIGNMENTS OF ERROR **1**

STATEMENT OF FACTS AND PRIOR PROCEEDINGS **5**

ARGUMENT **9**

I. Mr. Hernandez's conviction violated his Fifth and Fourteenth Amendment privilege against self-incrimination and due process. **9**

A. Standard of Review. 9

B. The privilege against self-incrimination and the right to due process prohibit comment on an accused person's exercise of the right to remain silent at trial. 10

II. Mr. Hernandez received ineffective assistance of counsel. **15**

A. Standard of Review. 15

B. Counsel provided ineffective assistance by unreasonably waiving Mr. Hernandez's right to present to the jury his complete statement, including exculpatory portions that put his "confession" in context. 16

III. The court's to-convict instruction for possession of a stolen vehicle violated Mr. Hernandez's right to due process. **23**

A. Standard of Review. 23

B. The court's instructions permitted the jury to convict Mr. Hernandez for possession of a stolen vehicle even if the state did not prove each element of the crime. 24

IV. Mr. Hernandez's conviction for possession of a stolen vehicle violated his right to a unanimous verdict. 27

A. Standard of Review. 27

B. Mr. Hernandez's conviction for possession of a stolen vehicle violated his right to a unanimous verdict because the state did not present substantial evidence in support of each alternative means included in the to-convict instruction and the court did not require an expression of unanimity. 28

V. The Information was constitutionally deficient because it failed to include critical facts. 31

A. Standard of Review. 31

B. The document charging Mr. Hernandez with possession of a stolen vehicle fails to allege the critical facts necessary for him to prepare a defense or plead to an acquittal or conviction as a bar against a second prosecution for the same crime. 31

VI. The court violated Mr. Hernandez's Sixth Amendment right to counsel by imposing attorney's fees in a manner that impermissibly chills the exercise of that right. 34

A. Standard of Review. 34

B. The court violated Mr. Hansen's right to counsel by ordering him to pay attorney fees without inquiring into his present or future ability to pay. 34

C. Erroneously-imposed legal financial obligations may be challenged for the first time on appeal. 38

CONCLUSION 40

TABLE OF AUTHORITIES

FEDERAL CASES

Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) 28

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988) 19

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 17

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) 17

Edwards v. United States, 266 F. 848 (4th Cir. 1920) 33

Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) (Fuller II) 35, 36, 38

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 24

Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) 32, 33, 34

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 16

U.S. v. King, 351 F.3d 859 (8th Cir. 2003) 19

U.S. v. Moussaoui, 382 F.3d 453 (4th Cir. 2004) 19

U.S. v. Webber, 255 F.3d 523 (8th Cir. 2001) 19

United States v. Velasco, 953 F.2d 1467 (7th Cir. 1992) 20, 21

United States v. Wilkerson, 84 F.3d 692 (4th Cir. 1996) 19

Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005) 32, 33, 34

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) 17

WASHINGTON STATE CASES

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 281 P.3d 289 (2012) 24

Barton v. State, Dep't of Transp., 178 Wn.2d 193, 308 P.3d 597 (2013). 24

City of Seattle v. Termain, 124 Wn. App. 798, 103 P.3d 209 (2004) 33

Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus., 179 Wn. App. 601, 319 P.3d 847 (2014) *review denied,* 180 Wn.2d 1023, 328 P.3d 902 (2014) 9, 28, 34

Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) 17

In re Detention of Martin, 163 Wn.2d 501, 182 P.3d 951 (2008) 25, 26

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001) 16, 39

In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) 13, 14

Nguyen v. City of Seattle, 179 Wn. App. 155, 317 P.3d 518 (2014) 10

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010) 21

Seashore Villa Ass'n v. Hugglund Family Ltd. P'ship, 163 Wn. App. 531, 260 P.3d 906 (2011) *review denied,* 173 Wn.2d 1036, 277 P.3d 669 (2012) 25, 26

State v. Alsup, 75 Wn. App. 128, 876 P.2d 935 (1994) 20, 21

State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000) 26

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008) 39, 40

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) 25

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997) 35, 38

State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013) *review granted,* 178 Wn.2d 1010, 311 P.3d 27 (2013) 39

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) 13

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008) 11, 14

State v. Calvin, --- Wn. App. ---, 316 P.3d 496 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013) 39

State v. Crook, 146 Wn. App. 24, 189 P.3d 811 (2008) 35

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) 35

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002) 17, 22, 23

State v. Duncan, 180 Wn. App. 245, 327 P.3d 699 (2014) 39

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) 10

State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005) 28

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 10, 15

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009) 11

State v. Ford, 137 Wn.2d 427, 973 P.2d 452 (1999) 39

State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979) 10

State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012) *review denied,* 176 Wn.2d 1006, 297 P.3d 68 (2013) (Fuller I) 11, 12

State v. Greathouse, 113 Wn. App. 889, 56 P.3d 569 (2002) 33, 34

State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011) 29, 30, 31

State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004) . 11, 12, 13, 22, 23

State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006) 16

State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008) (Jones I) 14

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) (Jones II) 18, 21

State v. Kiser, 87 Wn. App. 126, 940 P.2d 308 (1997) 28

State v. Knapp, 148 Wn. App. 414, 199 P.3d 505 (2009) 10, 14, 15

State v. Knutz, 161 Wn. App. 395, 253 P.3d 437 (2011) 28

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 15, 16, 22, 23

State v. Larry, 108 Wn. App. 894, 34 P.3d 241 (2001), *review denied,* 146 Wn.2d 1022 (2002) 19, 20

State v. Lobe, 140 Wn. App. 897, 167 P.3d 627 (2007) 29

State v. Locke, 175 Wn. App. 779, 307 P.3d 771 (2013) 28

State v. Lord, 161 Wn.2d 276, 165 P.3d 1251 (2007) 18

State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) 17

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 16

State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) 24, 27

State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996) 39

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008) 25, 27

State v. Moultrie, 143 Wn. App. 387, 177 P.3d 776 (2008) 28

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994) 29

State v. Pavlik, 165 Wn. App. 645, 268 P.3d 986 (2011) 18

State v. Pinson, 44259-1-II, 2014 WL 4358461, --- Wn. App. ---, --- P.3d --- (Sept. 3, 2014) 11

State v. Rivas, 168 Wn. App. 882, 278 P.3d 686 (2012) *review denied,* 176 Wn.2d 1007, 297 P.3d 68 (2013) 31, 34

State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998) 16, 22, 23

State v. Silva, 119 Wn. App. 422, 81 P.3d 889 (2003) 10, 11, 15

State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) 35

State v. Stallworth, 19 Wn. App. 728, 577 P.2d 617 (1978) 18

State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) 11

State v. West, 70 Wn.2d 751, 424 P.2d 1014 (1967) 18

Troxell v. Rainier Public School Dist. No. 307, 154 Wn.2d 345, 111 P.3d 1173 (2005) 25

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 1, 9, 10, 12, 13

U.S. Const. Amend. VI 1, 2, 3, 4, 16, 17, 32, 34, 37

U.S. Const. Amend. XIV 1, 2, 3, 4, 9, 10, 12, 13, 16, 17, 24, 32, 34

Wash. Const. art. I, § 21 ..... 3, 28

Wash. Const. art. I, § 22 ..... 3, 4, 17, 32

Wash. Const. art. I, § 3 ..... 3, 4, 24, 32

Wash. Const. art. I, § 9 10

WASHINGTON STATUTES

RCW 10.01.160 35

RCW 9A.56.068 ..... 6, 25

RCW 9A.56.140 ..... 6, 26, 29

OTHER AUTHORITIES

ER 106 ..... 19, 20, 22

ER 401 ..... 18, 21

ER 402 18

ER 601 2

Minn. Stat. § 611.17 37

RAP 2.5 ..... 15, 24, 28

RPC 1.5 35

State v. Dudley, 766 N.W.2d 606 (Iowa 2009) 37

State v. Morgan, 173 Vt. 533, 789 A.2d 928 (2001) 37

State v. Tennin, 674 N.W.2d 403 (Minn. 2004) 37

WPIC 77.21 ..... 26, 29

ISSUES AND ASSIGNMENTS OF ERROR

1. Officer testimony violated Mr. Hernandez's Fifth Amendment right to remain silent and Fourteenth Amendment right to due process by directly commenting on his post-*Miranda* exercise of that right.

2. The officer's testimony was a direct comment on Mr. Hernandez's exercise of his privilege against self-incrimination.

> **ISSUE 1:** Officer testimony commenting on an accused person's refusal to answer questions post-*Miranda* violates due process and the privilege against self-incrimination. Here, a police witness testified that Mr. Hernandez declined to speak with officers after arrest. Did the officer's comment on Mr. Hernandez's exercise of his right to remain silent violate his rights under the Fifth and Fourteenth Amendments?

3. Prosecutorial misconduct denied Mr. Hernandez his right to a fair trial.

4. The prosecutor improperly commented on Mr. Hernandez's right to remain silent.

5. The prosecutor's improper comments violated Mr. Hernandez's Fifth and Fourteenth Amendment privilege against self-incrimination and his Fourteenth Amendment right to due process.

> **ISSUE 2:** A prosecutor commits misconduct by commenting on an accused person's post-*Miranda* exercise of his/her right to remain silent. Here, the prosecutor encouraged the jury to infer that Mr. Hernandez was guilty because he failed to speak in his defense after arrest. Did prosecutorial misconduct deprive Mr. Hernandez of his due process right to a fair trial and his privilege against self-incrimination?

6. Ineffective assistance of counsel deprived Mr. Hernandez of his Sixth and Fourteenth Amendment right to counsel.

7. After the prosecutor introduced incriminating and out-of-context portions of Mr. Hernandez's statement to police, defense counsel unreasonably failed to offer the exculpatory portions to explain the context.

8. Defense counsel unreasonably failed to offer the exculpatory portion of Mr. Hernandez's statement under ER 601 and the common law rule of completeness.

9. Defense counsel unreasonably failed to assert Mr. Hernandez's Sixth and Fourteenth Amendment rights to confront adverse witnesses and to present a defense, which entitled the defense to cross-examine the state's witnesses regarding the exculpatory portions of Mr. Hernandez's statement.

10. Defense counsel's deficient performance prejudiced Mr. Hernandez.

> **ISSUE 3:** An accused person is deprived of effective assistance when defense counsel provides deficient performance resulting in prejudice. Here, defense counsel unreasonably waived her client's right to present a defense and to confront adverse witnesses by failing to introduce exculpatory portions of Mr. Hernandez's statement under ER 601 and the rule of completeness. Was Mr. Hernandez denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

11. The court erred by giving instruction number 6.

12. The court's to-convict instruction for possession of a stolen vehicle violated Mr. Hernandez's Fourteenth Amendment right to due process by permitting conviction absent proof of each element of the charged crime.

13. The trial court erred by incorporating into its "to convict" instruction the statutory definition of possession of stolen property, which does not apply to possession of a stolen vehicle.

> **ISSUE 4:** The legislature has provided a broad definition of "possession of stolen property," but has elected not to apply that definition to the crime of possession of a stolen vehicle. Here, the court instructed jurors they could convict based on the broad definition, which did not apply to Mr. Hernandez's possession of a stolen vehicle charge. Did the court's instruction violate Mr. Hernandez's Fourteenth Amendment right to due process by permitting the jury to convict him absent proof of each element of the charged offense?

14. The court violated Mr. Hernandez's Wash. Const. art. I, § 21 right to a unanimous verdict by failing to instruct the jury that it had to unanimously agree on the means by which Mr. Hernandez possessed a stolen vehicle.

15. Because the state did not present substantial evidence that Mr. Hernandez received or disposed of a stolen vehicle, the court's failure to provide a unanimity instruction requires reversal.

16. Under the law of the case, the state undertook the burden of proving each "alternative means" of committing possession of a stolen vehicle by substantial evidence.

17. Under the law of the case, the state failed to present sufficient evidence to support two "alternative means" of committing possession of a stolen vehicle.

18. Under the law of the case, the state failed to prove that Mr. Hernandez "received" or "disposed of" a stolen vehicle.

> **ISSUE 5:** The state constitutional right to a unanimous verdict requires unanimity as to the means by which an offense was committed. Here, the jury was instructed regarding several means of committing possession of a stolen vehicle and the state did not present substantial evidence to support at least two of those means. Did the court violate Mr. Hernandez's right to a unanimous verdict by failing to instruct the jury that they had to unanimously agree regarding the means by which Mr. Hernandez had committed the offense?

19. Mr. Hernandez's conviction violated his Sixth and Fourteenth Amendment right to an adequate charging document.

20. Mr. Hernandez's conviction violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.

21. The charging document failed to allege critical facts identifying the charge and allowing Mr. Hernandez to plead a former acquittal or conviction in any subsequent prosecution for a similar offense.

> **ISSUE 6:** In addition to specifying the essential elements of an offense, a charging document must set forth any critical facts necessary to identify the particular crime charged. Here, the

Information included only the essential legal elements of possession of a stolen vehicle, and failed to specifically describe the vehicle Mr. Hernandez allegedly possessed. Did the omission of critical facts infringe Mr. Hernandez's right to an adequate charging document under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 3 and 22?

22. The order imposing $1800 in attorney fees violated Mr. Hernandez's Sixth and Fourteenth Amendment right to counsel.

23. The trial court erred by imposing attorney fees in the absence of any evidence showing that Mr. Hernandez had the present or likely future ability to pay.

24. The court erred by adopting Finding of Fact No. 2.5 in the Judgment and Sentence.

ISSUE 7: A trial court may only order an offender to pay attorney fees upon finding that s/he has the present or likely future ability to pay. Here, the court imposed $1800 in costs for court-appointed counsel without any evidence that Mr. Hernandez had the ability to pay them. Did the trial court violate Mr. Hernandez's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jason Hernandez was at a 7-11 store in Tacoma when he was picked up by his child's mother. She was in a car driven by someone he didn't know. RP 10, 262, 318; CP 68. Soon after he got into the back seat, the car accelerated with a police car following. RP 140-41, 262.

The car raced through traffic until it eventually flipped and crashed into an unoccupied car in a parking lot. RP 141, 143-45. Mr. Hernandez, his ex-girlfriend, and the driver all climbed out of the car and ran. RP 189-90.

The police caught up to the car's three occupants and arrested them all. RP 214-17, 224-25. Officer Michel Volk immediately *Mirandized* Mr. Hernandez. RP 225. At some point, Mr. Hernandez told the officers that he was not the one who had been driving the car. RP 10. He said that the driver of the car had picked him up at 7-11 just before the accident, and that he'd been in the back seat. RP 10.

At booking, a jail nurse interviewed Mr. Hernandez to ensure he could be safely admitted to the jail. RP 232. The nurse asked how fast the car had been going, and Officer Volk estimated 60 mph. RP 233. Mr. Hernandez corrected her, saying that it had actually been between 70 and 100 mph. RP 234.

The state charged Mr. Hernandez with possession of a stolen vehicle, reckless driving, and hit and run unattended. CP 1-2. The charging language for possession of a stolen vehicle alleged that Mr. Hernandez:

> .... did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.
> CP 1.

The defense theory at trial was that the state had failed to prove that Mr. Hernandez drove the vehicle. RP 381-402.

After a 3.5 hearing, the court ruled that Mr. Hernandez's statement about the car's speed was admissible. RP 71-74. The state moved *in limine* to exclude Mr. Hernandez's statements that he was not the driver of the car and that he had just been picked up at 7-11. RP 9-10; CP 12. Defense counsel did not object, and the court granted the motion. RP 10.

At trial, state witness Watters testified that, while he was still on the phone with his wife and before he knew that the car was stolen, he was able to look over his shoulder, through two windows, and see that Mr. Hernandez was the one driving the car. RP 161-65. He acknowledged that he did not put in his report that he saw any other people in the car. RP 165. However, when he testified, he told the jury that he'd seen the head of one other person in the car. RP 164-65.

Only one other witness identified Mr. Hernandez as the car's driver. RP 211. This witness testified that the car had been occupied by four Hispanic men. RP 201.

The prosecution also called Volk. Volk testified that she read Mr. Hernandez his *Miranda* rights and that he said he did not want to talk. RP 227. Mr. Hernandez objected. RP 227. The court sustained the objection and admonished the jury that it could not make any inferences based on Mr. Hernandez's exercise of his right to silence. RP 230.

Volk testified about Mr. Hernandez's statement that the car had been going 70-100 mph. RP 234. Defense counsel did not cross-examine her about Mr. Hernandez's additional statements that he was not the driver of the car and had just been picked up at 7-11. RP 236-39.

In the closing argument, the prosecutor brought up Mr. Hernandez's apparent failure to speak in his defense:

> PROSECUTOR: What we have in this case is a person who the moment he realized he was caught did everything he could to avoid taking accountability. And who even when he had a chance to say something about it, the only thing he said was a prideful boast about how fast he actually was going, because he was concerned not …
> DEFENSE ATTORNEY: Your Honor, I'm sorry. I have to make an objection.
> THE COURT: Objection is sustained. You can continue.
> PROSECUTOR: *The only thing he said was* that I'm sorry, you don't know what you're talking about. We were driving -- we were going 70 to 100 miles per hour.
> RP 373 (emphasis added).

Defense counsel asked to be heard outside the jury's presence. RP 373-74. She objected again and moved for a mistrial:

> Your Honor, I think that was a huge comment on his right to remain silent, him saying that the only thing he said is that we were speeding. That leaves the jurors with an impression that he was refusing to make any statements or say anything, when, in fact, we know he did but it's been suppressed. It was self-serving. I don't know how that can be cured. I would move for a mistrial at this time.
> RP 374.

The court denied the motion but offered to give another curative instruction. RP 377. Mr. Hernandez's attorney expressed concern that an instruction would call more attention to the prosecutor's comments. RP 378. In the end, the court admonished the jury that the attorney's arguments are not evidence in the case. RP 380.

At the conclusion of trial, the court adopted instructions proposed by the prosecution. Plaintiff's Proposed Jury Instructions, Supp CP. The "to-convict" instruction for possession of a stolen vehicle permitted the jury to convict if they found that Mr. Hernandez "knowingly received, retained, possessed, or disposed of a stolen motor vehicle." CP 38. The court did not provide a unanimity instruction or special verdict form. CP 29-54.

The jury convicted Mr. Hernandez of all three counts. RP 414.

At sentencing, the judge did not inquire into Mr. Hernandez's ability to pay legal financial obligations (LFOs), but ordered him to pay $1800 in fees for his court-appointed attorney.[1] CP 80.

This timely appeal follows. CP 97-111.

ARGUMENT

I. MR. HERNANDEZ'S CONVICTION VIOLATED HIS FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND DUE PROCESS.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014) *review denied,* 180 Wn.2d 1023, 328 P.3d 902 (2014).

Prosecutorial misconduct in the form of a comment on the accused's exercise of his/her right to remain silent is constitutional error, requiring reversal unless the state can prove harmlessness beyond a reasonable doubt. *State v. Emery*, 174 Wn.2d 741, 757, 278 P.3d 653 (2012) (*citing State v. Easter,* 130 Wn.2d 228, 922 P.2d 1285 (1996); *State v. Fricks*, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1979)).

[1] The Judgment and Sentence form does include a boilerplate finding that "the Defendant has the ability or likely future ability to pay." CP 79.

Constitutional error prejudices the accused unless the prosecution establishes it was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." *Nguyen v. City of Seattle*, 179 Wn. App. 155, 159 n. 3, 317 P.3d 518 (2014).

B. The privilege against self-incrimination and the right to due process prohibit comment on an accused person's exercise of the right to remain silent at trial.

Accused persons have a constitutional privilege to remain free from self-incrimination. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9. Courts liberally construe the constitutional provisions protecting the right to silence. *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009).

Miranda warnings carry an implicit assurance that the defendant's silence will not carry a penalty. *State v. Silva*, 119 Wn. App. 422, 429, 81 P.3d 889 (2003). Thus, telling the jury that the accused invoked his rights after *Miranda* "violates fundamental due process by undermining [that] implicit assurance." *Id.*

A suspect's post-*Miranda* invocation of the right to remain silent is not admissible for any purpose, including impeachment. *State v. Pinson*, 44259-1-II, 2014 WL 4358461, --- Wn. App. ---, --- P.3d --- (Sept. 3,

2014) (*citing State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008)). Even partial silence, post-*Miranda*, may not be used as evidence of guilt. *Pinson*, 2014 WL 4358461, --- Wn. App. ---.

An inference of guilt resting on exercise of a constitutional right "always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial." *Silva*, 119 Wn. App. at 429. A reviewing court presumes that an impermissible comment on the exercise of the right to silence harmed the accused unless the state proves otherwise beyond a reasonable doubt.[2] *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012) *review denied,* 176 Wn.2d 1006, 297 P.3d 68 (2013) (Fuller I).

Once an improper comment on an accused person's silence has been made, "the bell is hard to unring." *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004). The situation puts defense counsel in the difficult position of gambling on whether to ask for a curative instruction "—a course of action which frequently does more harm than good" – or ignoring the comment. *Id.*

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[2] Prosecutorial misconduct can be so flagrant and prejudicial that it requires reversal even though the court attempts to cure it with an instruction. *State v. Stith*, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993); *see also State v. Fisher*, 165 Wn.2d 727, 749, 202 P.3d 937 (2009). A curative instruction is insufficient, for example, if it tells the jury to disregard an improper argument's evidentiary value but does not admonish against considering the argument when determining guilt. *Fisher*, 165 Wn.2d at 749.

1. Officer Volk's direct comment on Mr. Hernandez's post-*Miranda* exercise of his right to remain silent violated that right.

Officer testimony commenting on an accused person's exercise of his/her right remain silent violates the Fifth and Fourteenth Amendments. *Holmes*, 122 Wn. App. at 445. A direct comment – explicitly relaying to the jury that the accused chose to remain silent – is always constitutional error. *Id.*

Here, Officer Volk directly commented on Mr. Hernandez's post-*Miranda* exercise of his right to remain silent:

> I … advised the defendant that the was being under arrest (sic) for those charges, and then read him his *Miranda* rights again… but he stated he didn't want to talk…
> RP 226-27.

Defense counsel objected and the court attempted to cure the error with an instruction. RP 227, 230. But the bell had already been rung. *Holmes*, 122 Wn. App. at 446. Additionally, any curative effect of the instruction was undone by the prosecutor's later arguments about Mr. Hernandez's exercise of his right to remain silent. RP 373.

The state cannot demonstrate that this constitutional error was harmless beyond a reasonable doubt. *Fuller I*, 169 Wn. App. at 813. The state presented only minimal evidence that Mr. Hernandez had driven the car. The jury was left with the impression that Mr. Hernandez never told

police that he was actually a passenger. The officer's direct comment on his exercise of his right to silence permitted the jury to draw further negative inferences from Mr. Hernandez's exercise of his constitutional rights. The state cannot overcome the presumption of prejudice beyond a reasonable doubt. *Id.*

Volk's direct comment on Mr. Hernandez's post-*Miranda* exercise of his right to remain silent violated his rights under the Fifth and Fourteenth Amendments. *Holmes*, 122 Wn. App. at 445. Mr. Hernandez's convictions must be reversed. *Id.*

2. The prosecutor committed misconduct by commenting on Mr. Hernandez's right to remain silent.

Prosecutorial misconduct can deprive the accused of a fair trial. U.S. Const. Amend. XIV; *In re Glasmann*, 175 Wn.2d 696, 702-704, 286 P.3d 673 (2012). In considering whether prosecutorial misconduct warrants reversal, the court looks to its prejudicial nature and its cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Misconduct prejudices the accused if there is a substantial likelihood that the jury's verdict was affected. *Glasmann*, 175 Wn.2d at 704. A reviewing court considers the prosecutor's statements during closing argument in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008) (Jones I).

A prosecutor commits misconduct and violates the privilege against self-incrimination by arguing that constitutionally protected silence constitutes evidence of guilt. *Knapp*, 148 Wn. App. at 420.

Here, the prosecutor committed misconduct by twice commenting on Mr. Hernandez's "failure" to speak in his defense after his arrest. RP 373. The state's attorney continued with the improper argument even after Mr. Hernandez's first objection was sustained. RP 373. Mr. Hernandez's alleged post-*Miranda* silence was not admissible for any purpose. *Burke*, 163 Wn.2d at 217. His purported exercise of his right was not probative of any element of the charges offenses. The only possible objective of the prosecutor's argument was to encourage the jury to infer Mr. Hernandez's guilt based on his supposed exercise of his right to remain silent. The prosecutor's argument was improper.[3]

There is a substantial likelihood that the prosecutor's improper argument affected the verdict. *Glasmann*, 175 Wn.2d at 704. The state presented only slim evidence that Mr. Hernandez was the driver of the car. One of the state's police witnesses had already improperly noted Mr. Hernandez's exercise of his right to silence.[4] RP 227-30. The

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[3] The argument was especially egregious in this case because Mr. Hernandez *did* tell police that he had not been the driver. RP 9-10. Thus, the prosecutor's statements were deliberately misleading, in addition to commenting on Mr. Hernandez's constitutional right to silence.

[4] The court had already attempted to cure this error. RP 227-30.

prosecutor's comments on Mr. Hernandez's silence undid any curative effect of the court's prior instruction. The state here encouraged the jury to infer from Mr. Hernandez's post-*Miranda* "silence" that he'd been driving the car.[5] The state cannot prove that the prosecutor's improper comment on Mr. Hernandez's exercise of his right to remain silent was harmless beyond a reasonable doubt. *Emery*, 174 Wn.2d at 757.

The prosecutor committed prejudicial misconduct by making repeated comments on Mr. Hernandez's post-*Miranda* exercise of his right to remain silent. *Silva*, 119 Wn. App. at 429; *Knapp*, 148 Wn. App. at 420. Mr. Hernandez's convictions must be reversed. *Id.*

II. MR. HERNANDEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

[5] As noted, this also reflects a deliberate attempt to mislead the jury. RP 9-10.

Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Counsel provided ineffective assistance by unreasonably waiving Mr. Hernandez's right to present to the jury his complete statement, including exculpatory portions that put his "confession" in context.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Defense counsel provides ineffective assistance by failing to make a valid objection absent a tactical reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (*citing State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).

3. The rights to confront adverse witnesses and to present a defense protect the right to present relevant and admissible evidence.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amends. VI, XIV; art. I, § 22. The primary and most crucial aspect of confrontation is the right to conduct meaningful cross-

examination of adverse witnesses *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence "must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." *Darden,* 145 Wn.2d at 621.

The due process clause (along with the Sixth Amendment right to compulsory process) also guarantees criminal defendants a meaningful opportunity to present a complete defense. U.S. Const. Amends. VI; XIV; art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The accused must be able to present his version of the facts, so the fact-finder may decide where the truth lies. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has called this right "a fundamental element of due process of law." *Washington v. Texas,* 410 U.S. at 19. The right to present a defense includes the right to introduce relevant and admissible evidence. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Unless otherwise limited, all relevant evidence is admissible. ER 402. Evidence tending to establish the defendant's theory of the case or to disprove the state's theory is highly probative. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010) (Jones II).

There is no "self-serving hearsay" bar to otherwise admissible evidence. *State v. Pavlik*, 165 Wn. App. 645, 650, 268 P.3d 986 (2011).

4. The exculpatory portions of Mr. Hernandez's statement to police were admissible under the rule of completeness, to provide context for his "confession."

The common law rule of completeness provides that "when a confession is introduced, the defendant has the right to require that the whole statement be placed before the jury." *State v. Stallworth*, 19 Wn. App. 728, 734-735, 577 P.2d 617 (1978). This is so even where the evidence would have not have been admissible in the first place. *State v. West*, 70 Wn.2d 751, 754-755, 424 P.2d 1014 (1967).

The rule applies to the entire confession (including when the defendant's statement is given piecemeal during a series of interrogations) so long as the proponent specifies testimony which is relevant to the issue

and which qualifies or explains portions of the statement(s) already admitted. *U.S. v. King*, 351 F.3d 859, 866 (8th Cir. 2003); *U.S. v. Webber*, 255 F.3d 523, 526 (8th Cir. 2001).

The common law rule has been partially codified by ER 106:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106.[6] Although ER 106 codifies the common law in part, the common law doctrine of completeness survives the partial codification and continues to have force and effect. *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 172, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988).

The purpose of ER 106 "is 'to prevent a party from misleading the jury.'" *U.S. v. Moussaoui*, 382 F.3d 453, 481 (4th Cir. 2004) (quoting *United States v. Wilkerson,* 84 F.3d 692, 696 (4th Cir. 1996)). The rule applies to oral, written, and recorded statements. *State v. Larry*, 108 Wn. App. 894, 909-910, 34 P.3d 241 (2001), *review denied,* 146 Wn.2d 1022 (2002).

A statement is admissible under ER 106 if it passes either of two tests. Under the first test (the "*Alsup*" test), a partial statement must be completed where the partial statement distorts the meaning of the whole or

excludes information that is substantially exculpatory. *Larry,* 108 Wn. App. at 909 (citing *State v. Alsup*, 75 Wn. App. 128, 133-134, 876 P.2d 935 (1994)). Under the second test (the "*Velasco*" test), a statement should also be admitted if it (1) explains other statements already admitted, (2) places the previously admitted portions in context, (3) helps avoid misleading the trier of fact, and (4) helps ensure fair and impartial understanding of the evidence. *Larry,* 108 Wn. App. at 910 (citing *United States v. Velasco,* 953 F.2d 1467 (7th Cir. 1992)).

Here, Mr. Hernandez told the police that he was not driving the car, and that the car was going 70-100 mph. RP 234. But the jury only heard his statement about the car's speed. RP 234. The prosecutor used these statements (and the "lack" of any exculpatory statements) as proof that Mr. Hernandez had been the driver. RP 373.

The exculpatory portions of Mr. Hernandez's statements were admissible under ER 106 and the common law rule of completeness. ER 106; *Alsup*, 75 Wn. App. at 133-134; *Velasco*, 953 F.2d at 1475. The balance of his statement "ought in fairness to [have been] considered contemporaneously with" the portion introduced by the state. ER 106.

The excluded portion should also have been admitted under both the *Alsup* and *Velasco* tests. The partial statement distorted the meaning

[6] The Washington rule is substantially the same as the federal rule. Comment to ER 106.

of the whole by permitting the jury to infer that Mr. Hernandez's statement about the car's speed was a "boast" about how fast he was driving. RP 373; *Alsup*, 75 Wn. App. at 133-134. In actuality, Mr. Hernandez qualified his statement by saying that he was a passenger in the car. RP 10. In the context of his entire statement, his comment about the car's speed was not incriminating.

The court's ruling also excluded information that was substantially exculpatory. *Alsup*, 75 Wn. App. at 133-134. The excluded portion also explained Mr. Hernandez's statement about the car's speed and placed that statement in important context. *Velasco*, 953 F.2d at 1475. Admission of Mr. Hernandez's entire statement would have helped avoid misleading the jury, and helped to ensure a fair and impartial understanding of the evidence. *Id.*

The evidence was at least minimally relevant under ER 401. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). It was also highly probative to Mr. Hernandez's theory of the case – that he was not the driver of the car. *Jones* II, 168 Wn.2d at 721. Because the exculpatory portions of Mr. Hernandez's statement were otherwise admissible, their exclusion violated his rights to confront adverse witnesses and to present a defense. *Darden*, 145 Wn.2d at 620; *Holmes* 547 U.S. at 324.

5. Mr. Hernandez's defense attorney provided ineffective assistance by acceding to the state's motion to exclude the portion of Mr. Hernandez's statement telling police that he was not the driver of the car.

Mr. Hernandez's defense attorney provided ineffective assistance by failing to object to the state's motion to exclude the exculpatory portions of his statement to the police. *Saunders*, 91 Wn. App. at 578; *Kyllo*, 166 Wn.2d at 862; RP 10.

As outlined above, Mr. Hernandez's qualification of his statement about the car's speed – in which he said that he was merely a passenger – was admissible under ER 106 and the rule of completeness. Mr. Hernandez's rights to confront adverse witnesses and to present a defense also entitled him introduce the balance of his statement to the jury. *Darden*, 145 Wn.2d at 620; *Holmes* 547 U.S. at 324. Defense counsel provided deficient performance by agreeing to exclude Mr. Hernandez's exculpatory statements. *Kyllo*, 166 Wn.2d at 862

The entire defense theory in Mr. Hernandez's case was that he was not the driver of the car. RP 381-402. Defense counsel had no valid tactical reason for waiving admission of the exculpatory portions of Mr. Hernandez's statement to police. *Saunders*, 91 Wn. App. at 578.

There is a reasonable probability that defense counsel's deficient performance affected the outcome of Mr. Hernandez's trial. *Kyllo*, 166

Wn.2d at 862. Without Mr. Hernandez's statement that he was not driving, his statement that the car was going 70-100 mph sounded like a boast about how fast he was driving. Indeed, the prosecutor argued extensively in closing that that is exactly what it was. RP 373. Mr. Hernandez was prejudiced by his attorney's failure to place his statement about the car's speed in its vital context. *Kyllo*, 166 Wn.2d at 862.

Defense counsel provided ineffective assistance by failing to introduce the exculpatory portions of Mr. Hernandez's statement. These portions of his statement were admissible, and were critical to his defense. *Id.* Mr. Hernandez's rights to confront adverse witnesses and to present a defense entitled him to the introduction of that evidence. .*Darden*, 145 Wn.2d at 620; *Holmes* 547 U.S. at 324. Mr. Hernandez's convictions must be reversed. *Kyllo*, 166 Wn.2d at 862.

III. THE COURT'S TO-CONVICT INSTRUCTION FOR POSSESSION OF A STOLEN VEHICLE VIOLATED MR. HERNANDEZ'S RIGHT TO DUE PROCESS.

A. Standard of Review.

Jury instructions are reviewed *de novo. Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions that violate an accused person's constitutional rights create

manifest error and may be raised for the first time on appeal. RAP 2.5(a)(3).

Issues of statutory interpretation are also reviewed *de novo*. *Barton v. State, Dep't of Transp.*, 178 Wn.2d 193, 202, 308 P.3d 597 (2013).

B. The court's instructions permitted the jury to convict Mr. Hernandez for possession of a stolen vehicle even if the state did not prove each element of the crime.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const Amend. XIV; art. I, § 3.

The jury is entitled to regard the court's to-convict instruction as a yardstick against which to measure guilt or innocence. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). A to-convict instruction violates due process if it permits conviction absent proof of each element of a charged offense. *Id.* at 7.

A court's instructions are improper if they inaccurately state the law or mislead the jury. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). An improper jury instruction affecting a constitutional right requires reversal unless the state can demonstrate beyond a reasonable doubt that it did not contribute to the verdict. *State v. Montgomery*, 163 Wn.2d 577, 600, 183 P.3d 267 (2008).

A statute must be construed according to its plain language. *Seashore Villa Ass'n v. Hugglund Family Ltd. P'ship*, 163 Wn. App. 531, 538-39, 260 P.3d 906 (2011) *review denied,* 173 Wn.2d 1036, 277 P.3d 669 (2012). If the statute's language is unambiguous, the analysis ends. *Id.* An interpretation that leads to absurd results must be rejected, as it "would belie legislative intent." *Troxell v. Rainier Public School Dist. No. 307,* 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). Under the maxim *expressio unius est exclusio alterius*, statutory omissions are deemed to be exclusions. *In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008).

The statute criminalizing possession of a stolen vehicle covers simple possession of a stolen vehicle. RCW 9A.56.068. Possession of stolen property, on the other hand, is defined more broadly as:

> knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1). By its plain language, this definition applies only to "possession of stolen property." RCW 9A.56.140(1); *Seashore Villa Ass'n*, 163 Wn. App. at 538-39. The legislature's omission of possession of a stolen vehicle from the definition of possession of stolen property indicates an intentional exclusion. *Martin*, 163 Wn.2d at 510.

Here, the court instructed the jury that it could convict Mr. Hernandez for possession of a stolen vehicle if they found that he "knowingly received, retained, possessed, or disposed of a stolen motor vehicle."[7] CP 38.

The court's instruction violated Mr. Hernandez's right to due process by permitting conviction for disposing of a vehicle even if the state did not prove that he actually possessed it. *Mills*, 154 Wn.2d at 6.

The state cannot demonstrate that this constitutional error was harmless beyond a reasonable doubt. *Montgomery*, 163 Wn.2d at 600. It was uncontested at trial that Mr. Hernandez ran from a stolen car after it had crashed. The defense theory, however, was that Mr. Hernandez never actually possessed the car because he was not the driver. RP 381-402. The jury could have found that Mr. Hernandez disposed of the vehicle by running from it after the accident even if he did not possess it by driving it.

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[7] This language is taken from the pattern to-convict instruction for possession of a stolen vehicle. WPIC 77.21. The instruction's comment acknowledges that the legislature did not apply the definition of possession of stolen property to the offense of possession of a stolen vehicle. Comment to WPIC 77.21. Still, the WPIC committee chose to include it in the instruction to prevent possession of a stolen vehicle from becoming a strict liability offense. Comment to WPIC 77.21.

But a court can prevent possession of a stolen vehicle from becoming a strict liability offense by inferring a knowledge requirement without needlessly incorporating the broader definition of possession from the statutory definition of possession of stolen property. *See e.g. State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000). Additionally, the issue of whether possession of a stolen vehicle is a strict liability offense is not relevant to Mr. Hernandez's case and does not affect his due process right to have the jury instructed in a manner permitting conviction only if the state proves each element of the offense with which he was charged.

Accordingly, the jury could have convicted Mr. Hernandez for possession of a stolen vehicle even if the state did not prove that he actually possessed it. Mr. Hernandez was prejudiced by the instruction's violation of his right to due process.

The court's instructions violated Mr. Hernandez's right to due process by permitting conviction even if the state did not prove each element of the charge. *Mills*, 154 Wn.2d at 6. Mr. Hernandez's conviction for possession of a stolen vehicle must be reversed. *Id.*

IV. MR. HERNANDEZ'S CONVICTION FOR POSSESSION OF A STOLEN VEHICLE VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dellen Wood Products,* 179 Wn. App. at 626. A trial court's failure to provide a unanimity instruction is a manifest error affecting the constitutional right to a unanimous verdict. *State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). Such errors can be raised for the first time on appeal. *Moultrie,* 143 Wn. App. at 392; *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997).[8]

[8] There appears to be a split between Divisions I and II as to whether or not failure to provide a unanimity instruction automatically qualifies as manifest error affecting a constitutional right. *See, e.g., State v. Locke,* 175 Wn. App. 779, 802, 307 P.3d 771 (2013) (requiring appellant to demonstrate practical and identifiable consequences of error); *State v. Knutz*, 161 Wn. App. 395, 406, 253 P.3d 437 (2011) (same). The difference may have little

B. Mr. Hernandez's conviction for possession of a stolen vehicle violated his right to a unanimous verdict because the state did not present substantial evidence in support of each alternative means included in the to-convict instruction and the court did not require an expression of unanimity.

An accused person has a state constitutional right to a unanimous jury verdict.[9] Art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). This right also includes the right to jury unanimity on the *means* by which the defendant is found to have committed the crime. *State v. Lobe*, 140 Wn. App. 897, 903-905, 167 P.3d 627 (2007). A particularized expression of unanimity (in the form of a special verdict) is required unless there is sufficient evidence to support each alternative means submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).

Accordingly, when the court instructs the jury regarding alternative means of committing an offense and does not require an expression of unanimity, reversal is required if the state failed to produce substantial evidence in support of each of the alternative means. *State v. Hayes*, 164 Wn. App. 459, 473, 262 P.3d 538 (2011).

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practical effect, however, as Division II will analyze the merits of the claimed error to determine whether or not it qualifies for review.

[9] The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon,* 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

The statutory definition of possession of stolen property includes "receiv[ing], retain[ing], possess[ing], conceal[ing], or dispos[ing] of stolen property..." RCW 9A.56.140(1). Although the statute criminalizing possession of a stolen vehicle does not incorporate this language, the WPIC committee extended this definition to charges of possession of a stolen vehicle. *See* Comment to WPIC 77.21; *Hayes*, 164 Wn. App. at 480.

Ordinarily, each term in the definition of possession of stolen property does not provide a separate alternative means of committing the offense. *Hayes*, 164 Wn. App. at 477. If, however, the state chooses to include those definitional alternatives in the to-convict instruction, they become alternative means. *Id.* at 481. Accordingly, the state takes on the responsibility of supporting each one with substantial evidence under the "law of the case" doctrine. *Id.*

Here, the to-convict instruction for Mr. Hernandez's possession of a stolen vehicle charge required the jury to find that he "received, retained, possessed, or disposed of a stolen motor vehicle." CP 38. As a result, the state adopted the burden of providing substantial evidence for each of those alternative means of possessing a stolen vehicle. *Hayes*, 164 Wn. App. at 481.

The court's instruction did not inform the jury that they had to be unanimous as to the means by which Mr. Hernandez had possessed a stolen vehicle and did not include a special verdict form. CP 29-54.

Mr. Hernandez's possession of a stolen vehicle conviction violated his right to a unanimous verdict because the state did not provide substantial evidence that he received or disposed of a stolen vehicle. *Id.* At most, the prosecution presented evidence that Mr. Hernandez drove a stolen vehicle and then fled from the scene of an accident. There was no evidence that Mr. Hernandez received or disposed of a stolen vehicle.[10]

The court violated Mr. Hernandez's right to a unanimous verdict by instructing the jury regarding alternative means of possessing a stolen vehicle that were not supposed by substantial evidence and not requiring the jury to be unanimous as to means. *Hayes*, 164 Wn. App. at 481. Mr. Hernandez's possession of a stolen vehicle conviction must be reversed. *Id.*

[10] Above, Mr. Hernandez argues that he was prejudiced by the court's improper to-convict instruction because the jury could have found that he disposed of the stolen vehicle. This argument is presented in the alternative.

V. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO INCLUDE CRITICAL FACTS.

A. Standard of Review.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied,* 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.,* at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.,* at 893.

B. The document charging Mr. Hernandez with possession of a stolen vehicle fails to allege the critical facts necessary for him to prepare a defense or plead to an acquittal or conviction as a bar against a second prosecution for the same crime.

The Sixth Amendment right "to be informed of the nature and cause of the accusation" and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI,

XIV.[11] A charging document "is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy." *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005). The charge must include more than "the elements of the offense intended to be charged." *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).

Any offense charged in the language of the statute "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense." *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction "in case any other proceedings are taken against him for a similar offense." *Id.*

Any "critical facts must be found within the four corners of the charging document." *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). Thus, for example, a charging document for violation of a domestic violence protection order must specifically identify the order allegedly violated. *Id.*

In cases involving stolen property, the Information need not name the owner of the property, but must "clearly" charge the accused person

[11] Wash. Const. art. I, §§3 and 22 impose similar requirements.

with a crime relating to "specifically described property." *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes "not a single word to indicate the nature, character, or value of the property," the charge is "too vague and indefinite upon which to deprive one of his [or her] liberty." *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

In this case, the Information passes only the first of the three requirements: it charges in the language of the statute, and thus "contains the elements of the offense intended to be charged." *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it includes no critical facts. In the absence of any critical facts, the Information does not give adequate notice of the charges; nor does it provide any protection against double jeopardy. *Id.; Valentine,* 395 F.3d at 631.

The Information does not include any description of the stolen vehicle Mr. Hernandez was alleged to have possessed. CP 1. Accordingly, even when liberally construed, it does not charge Mr. Hernandez with possession of "specifically described property." *Greathouse*, 113 Wn. App. at 903. Because of this, the allegation is "too vague and indefinite upon which to deprive [Mr. Hernandez] of his liberty." *Id.* It provides neither notice nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine,* 395 F.3d at 631.

The Information is constitutionally deficient. Mr. Hernandez's conviction for possession of a stolen vehicle must be reversed, and the charge dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

VI. THE COURT VIOLATED MR. HERNANDEZ'S SIXTH AMENDMENT RIGHT TO COUNSEL BY IMPOSING ATTORNEY'S FEES IN A MANNER THAT IMPERMISSIBLY CHILLS THE EXERCISE OF THAT RIGHT.

A. Standard of Review.

Constitutional errors are reviewed *de novo. Dellen Wood Products,* 179 Wn. App. at 626.

B. The court violated Mr. Hansen's right to counsel by ordering him to pay attorney fees without inquiring into his present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) (Fuller II). Under *Fuller,* the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

> The court *shall not order* a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the defendant's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.[12] *Fuller* II, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will

[12] In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay". *Fuller* II, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller* II, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment"); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the

equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn. Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller,* we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller* II, 417 U.S. at 53.

Here, neither party provided the court with information about Mr. Hernandez's present or likely future ability to pay attorney's fees. RP 422-40. Although the Judgment and Sentence includes a boilerplate

finding that "the Defendant has the ability or likely future ability to pay," this finding is not supported by anything in the record. CP 79. Indeed, the court found Mr. Hernandez indigent at the end of the proceedings. CP 112-14. Mr. Hernandez's felony convictions and lengthy incarceration will also negatively impact his prospects for employment

The lower court ordered Mr. Hernandez to pay $1800 in attorney fees without conducting any inquiry into his present or future ability to pay. This violated his right to counsel. Under *Fuller,* the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller* II, 417 U.S. at 53. The order requiring Mr. Hernandez to pay $1800 in attorney fees must be vacated. *Id*

C. Erroneously-imposed legal financial obligations may be challenged for the first time on appeal.

Although most issues may not be raised absent objection in the trial court, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). An offender may challenge imposition of a criminal

penalty for the first time on appeal. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[13]

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted,* 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to the court's finding that the accused had the present or future ability to pay LFOs. *Id.*

Those cases do not govern Mr. Hernandez's claim that the court lacked constitutional authority to order him to pay. The issue here may be reviewed even though Mr. Hernandez did not object in the trial court. *Bahl*, 164 Wn.2d at 744.

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[13] *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

CONCLUSION

Prosecutorial misconduct deprived Mr. Hernandez of a fair trial by impermissibly commenting on his exercise of his right to remain silent. Mr. Hernandez's defense attorney provided ineffective assistance of counsel by failing to offer the exculpatory portions of his statement, which were admissible under the rule of completeness.

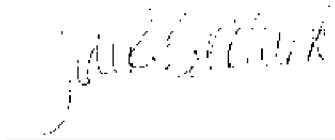
The court's to-convict instruction violated Mr. Hernandez's right to due process by permitting conviction absent proof of each element beyond a reasonable doubt. The state did not present substantial evidence to support each of the alternative means in the to-convict instruction for possession of a stolen vehicle. The court violated Mr. Hernandez's right to a unanimous verdict by failing to instruct the jury that they had to unanimously agree regarding the means by which Mr. Hernandez had possessed the stolen vehicle.

The document charging Mr. Hernandez was constitutionally deficient because it failed to allege the critical facts.

In the alternative, the court violated Mr. Hernandez's right to counsel by imposing attorney's fees in a manner that impermissibly chills the exercise of that right. The order requiring Mr. Hernandez to pay $1800 for his court-appointed attorney must be vacated.

Respectfully submitted on September 15, 2014,

BACKLUND AND MISTRY



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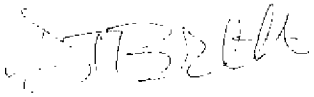

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jason Hernandez, DOC #342332
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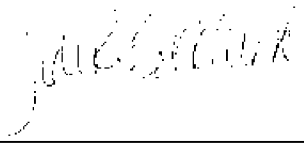
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
PCpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 15, 2014.



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