No. 32454-1-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

LISA MARIE MUMM,
Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Henry Rawson, Judge

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# BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities



Rules

## A. ASSIGNMENTS OF ERROR

1. Ms. Mumm was denied her constitutional right to effective assistance of counsel when defense counsel failed to object to the State's cross-examination of her, wherein the State introduced evidence about her prior criminal history that went beyond the scope of ER 609(a).

2. Ms. Mumm was denied her constitutional right to effective assistance of counsel when defense counsel failed to object to improper ER 404(b) evidence.

3. The trial court erred by failing to issue WPIC 5.05, which would have instructed the jury to consider Ms. Mumm's prior convictions solely for the purpose of determining credibility.

4. The evidence was insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses.

5. The record does not support the finding that Ms. Mumm has the current or future ability to pay Legal Financial Obligations.

6. The trial court erred by imposing discretionary costs.

7. The trial court erred by imposed VUCSA fines of $3,000 when Ms. Mumm was deemed indigent, contrary to RCW 69.50.430(2).

8. The trial court erred in calculating the sum total of the LFOs.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was defense counsel ineffective for failure to object to the State's presentation of evidence of Ms. Mumm's prior unproven criminal charges, contrary to the permissible scope of ER 609(a)?

2. Was defense counsel ineffective for failure to object to the State's cross-examination of a witness who testified Ms. Mumm was frequently dealing drugs when he previously lived with her?

3. Did the trial court err by failing to issue WPIC 5.05, which would have instructed the jury to consider Ms. Mumm's prior convictions solely for the purpose of determining credibility?

4. Was the evidence insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses?

5. Should the directive to pay legal financial obligations based on an implied finding of current or future ability to pay be stricken from the Judgment and Sentence as clearly erroneous, where the finding is not supported in the record?

6. Did the trial court abuse its discretion in imposing discretionary costs where the record reveals it found Ms. Mumm could pay because it did not hear argument to the contrary, and whereby it failed to take her financial resources into account and consider the burden it would impose on her as required by RCW 10.01.160?

7. Did the trial court err by imposing VUCSA fines of $3,000 when Ms. Mumm was deemed indigent, which is directly contrary to the language of RCW 69.50.430(2)?

8. Did the trial court incorrectly calculate the sum total of LFOs?

## C. STATEMENT OF THE CASE

Lisa Mumm was convicted by a jury of three counts of delivery of a controlled substance. CP 22.

Lyle Long testified he worked with a drug task force to set up a controlled buy with Ms. Mumm and he purchased meth from her on two different occasions. RP 356-60, 374, 381-82. He purchased meth a third time from Ms. Mumm through her roommate, Melissa Starzyk. RP 255, 381-82. Long and Starzyk were the only ones to testify they received meth from Ms. Mumm. RP 254, 365, 374, 381-82. No one from task force law enforcement personally witnessed the exchange of meth between Ms. Mumm and either Long or Starzyk. RP 176, 198-99, 241-42, 328-29.

Task force law enforcement officers admitted their searches of Long's person before and after the controlled buys were not comprehensive, but were merely randomized. RP 176-77, 197-98, 241, 330. A defense theory of the case was that Long, while living with his father and his father's past girlfriend—Ms. Mumm—chaffed under the rules imposed by her. RP 99.

Long admitted during the third controlled buy he attempted to steal $20 of task force money. RP 395. Long had a criminal history of possession of stolen property and possession of a stolen firearm. RP 362. Starzyk also admitted she had been convicted of third degree theft. RP 258. Starzyk and Ms. Mumm were roommates. Ms. Mumm testified Starzyk was selling drugs out of their home, having various different people over, and items frequently went missing. RP 262-63, 477-78.

During defense counsel's cross-examination of Long regarding the sort of relationship he had with Ms. Mumm, the prosecutor objected to its relevance. RP 389. The prosecution argued that if the defense planned on bringing in evidence that Ms. Mumm had a motherly role in Long's upbringing, then it would seek to introduce additional evidence regarding Ms. Mumm's prior bad acts. RP 390. Defense counsel responded he sought to show Long's motive and bias and conceded there would be no objection to the prosecution's presentation of such evidence if the door to

character evidence were opened. RP 391. The trial court noted it did not believe the door to such evidence had been opened yet. RP 392. Defense counsel abandoned further questions regarding Long's relationship with Ms. Mumm in a "mothering" capacity. RP 393-402.

On redirect of Long, the prosecution elicited evidence that Ms. Mumm "frequently" dealt drugs while living in the same residence with Long some years prior. RP 404. He further testified there had been a task force raid on the home and that Ms. Mumm feared going to prison again. RP 405. Defense counsel did not object.[1] RP 404-05.

Ms. Mumm testified she never gave meth to Long or Starzyk. RP 479-80, 485, 487-88. She also testified her criminal history included convictions for three counts of delivery of a controlled substance and one count of escape. RP 474-75. On cross-examination, the prosecutor elicited further testimony from Ms. Mumm, implying she was not forthcoming about her criminal history. RP 497-99. The prosecution then delved into numerous unproven charges against her and elicited the details

[1] Defense counsel did, however, submit a motion in limine requesting all improper evidence be excluded pursuant to ER 402, 403 and 404(b). CP 52.

of how she worked with the task force to reduce the charges against her. Id. Defense counsel did not object.[2] Id.

Later, defense counsel requested the trial court issue WPIC 5.05 (limiting evidence of defendant's criminal convictions for purposes of determining the defendant's credibility) with the jury instructions. RP 450-53. The trial court noted the exception and heard argument on the issue, but ultimately refused to give the instruction. RP 450-53, 535-41.

The jury was asked to find by special verdict that all three deliveries occurred within 1000 feet of a "school bus route stop." CP 23-24. The jury was instructed in pertinent part regarding the special verdict that a "school bus" is defined as follows:

> "School bus" means a vehicle that meets the following requirements: One, has a seating capacity of more than ten persons including the driver; Two, is regularly used to transfer students to and from a school or in connection with school activities; and Three, is owned and operated by any school district or privately owned and operated under contract or otherwise with any school district for the transportation of students.

Instruction No. 19; RP 560. The prosecution presented this "school bus" definition to the trial court and did not object to its content. RP 541. The jury answered "yes" to all three special verdicts. CP 23-24. The court

[2] Again, defense counsel did submit a motion in limine requesting all improper evidence be excluded under ER 402, 403 and 404(b). CP 52.

imposed a total sentence of 187 months that included 72 months for the three special verdict enhancements. CP 5.

Dan Wood testified for the Omak School District as the transportation supervisor. RP 283. The prosecution presented no evidence as to the seating capacity of the school buses, for which stops were officially designated by the school district within 1,000 feet of the three controlled buys. Mr. Wood did not testify as to the seating capacity of the school buses. RP 283-93.

The sentencing court imposed discretionary costs of $3,060.50 and mandatory costs of $1260.00[3], for a total Legal Financial Obligation (LFO) of $4,320.50. CP 17. However, the trial court entered that the LFOs added up to $4,570.50. CP 17. The Judgment and Sentence also contained the following language:

> ¶ 2.5 Legal Financial Obligations/Restitution.
> The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

CP 15.

During sentencing, the trial court stated that it had "not heard any argument as to an inability to pay." RP 611. The court did not inquire

further into Ms. Mumm's financial resources and the nature of the burden that payment of the LFOs would impose on her. RP 611. The court ordered Ms. Mumm to begin payments on a schedule established by DOC or the clerk of the court commencing immediately. CP 18.

This appeal followed. CP 1.

## D. ARGUMENT

1. Defense counsel was ineffective for failure to object to (1) the State's presentation of evidence of Ms. Mumm's prior unproven criminal charges that went beyond the fact of conviction, type of crime, and punishment imposed, exceeding the permissible scope of ER 609(a); and (2) a witness's testimony that Ms. Mumm frequently dealt drugs when he had previously resided with her.[4]

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyllo, 166 Wn.2d 856,

[3] $500 Victim Assessment, $200 criminal filing fee, $100 DNA fee, and $460 in restitution. CP 17.
[4] Assignments of Error 1 & 2.

862, 215 P.3d 177 (2009). The claim is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

To prove the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show "that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]" and that the decision was not tactical. State v. Sexsmith, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, "strategy must be based

on reasoned decision-making[.]" In re Pers. Restraint of Hubert, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

a. Defense counsel was ineffective for failure to object to the State's presentation of ER 609(a) evidence that went beyond the fact of conviction, type of crime, and punishment imposed, which exceeded the permissible scope of ER 609(a).

The credibility of a witness "may be attacked by evidence that the witness has been previously convicted of a crime." State v. Coe, 101 Wn.2d 772, 775, 684 P.2d 668 (1984) (citing ER 609(a)). Such evidence is "limited to facts contained in the record of the prior conviction: the fact of conviction, the type of crime, and the punishment imposed." Id. at 776 (citing State v. Coles, 28 Wn. App. 563, 625 P.2d 713 (1981); State v. Brewster, 75 Wn.2d 137, 449 P.2d 685 (1968); State v. Lindsey 27 Wn.2d 186, 177 P.2d 387 (1947)). Going beyond the scope of the record of conviction would be irrelevant and likely unduly prejudicial. Coe, 101 Wn.2d. at 776 (citing Coles, 28 Wn. App. at 572-73). A trial court's ruling under ER 609 is reviewed for abuse of discretion. State v. Bankston, 99 Wn. App. 266, 268, 992 P.2d 1041 (2000) (citing State v. Rivers, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996)).

The Coles court reasoned that admission of evidence beyond the fact of conviction, type of crime, and punishment imposed was impermissible because:

> . . . the only purpose of such information in a subsequent trial on an unrelated offense is to bring irrelevant evidence before the jury to insinuate that conviction of the prior offense somehow is proof of defendant's guilt in the present action.

Id. at 573 (citing State v. Lindsey, 27 Wn.2d 186, 190, 177 P.2d 387 (1947)). The Lindsay court also held that eliciting testimony beyond the scope of the fact of conviction and resulting sentence was reversible error and prosecutorial misconduct. Id. at 186.

In the present case the prosecutor's line of questioning went beyond the scope of the specific boundaries of ER 609(a) set forth in Coles, and defense counsel should have objected. During direct examination, Ms. Mumm testified that she had been convicted of three counts of delivery and one count of escape. RP 474-75. On cross-examination, the prosecutor elicited further testimony from Ms. Mumm regarding those convictions:

> Q: Ms. Mumm, you had testified -- you were asked your – your experience in -- dealing with drugs. And you indicated that your experience in dealing with drugs was an incident back when?
> A: (Inaudible).
> Q: And you said you were charged with just three counts.

A: Three counts of delivery, yes.
Q: That's not exactly true, is it.
A: And the -- and the escape.
Q: You were charged with twelve counts, weren't you?
A: Oh. When I -- Yeah. They (inaudible) twelve counts on me, but--
Q: Those counts included other counts of delivery, unlawful use of building for drug purposes, possession of a controlled substance other than marijuana, use of drug paraphernalia, and four counts of unlawful possession of a firearm?
A: I don't even know how they -- I did not have no – no firearm. Those were--
Q: You were charged with those crimes?
A: Yeah.
Q: And there was an agreement for you to plead -- it wasn't twelve-plus months; it was 20 months. Correct?
A: Yeah, but -- Yeah, but I did -- I did--
Q: But your sentence -- your sentence was 20 months--
A: Yeah.
Q: --and -- and you had probably good time, right?
A: Yeah, in the time that I sat in jail, the county jail.
Q: Now that's not really the only dealings you had back in that time, was it? Those were -- those weren't the only dealings you had with drugs. Isn't it true that you worked -- had other cases open that you worked with the task force back at that time?
A: One time.
Q: Wasn't it two times?
A: I only recall one time.
Q: Do you recall working with Detective -- at that time Det. Brown in setting up transactions where he actually went in and bought controlled substances from a Hispanic that you had set up?
A: Yes.
Q: So you worked -- basically as -- as an informant, set up deals with another Hispanic for -- was it meth' and cocaine?
A: It was just meth'.

> Q: And you had multiple cases before the one you actually pled to open; is that correct?
> A: No.
> Q: No?
> A: (Inaudible).
> Q: And you were working in lieu of charges at that time, correct?
> A: Yes.
> Q: But then you got caught delivering again after that, which is what resulted in you being charged and ultimately convicted.
> A: Correct.

RP 497-99. Whether these allegations were true or not, it was improper for the prosecution to inquire into these details. Coles, 28 Wn. App. at 572-73. Ms. Mumm's forced testimony went far beyond the fact of her conviction, type of crime, and length of sentence. See Coles, 28 Wn. App. at 572-73. The details of other numerous potential charges and how she worked with task force as part of an agreement were completely improper facts to bring before a jury.

Defense counsel should have objected to such improper cross-examination of his client. Not only was the information the State elicited from Ms. Mumm beyond the permissible scope contemplated by ER 609(a), its effect was more prejudicial than probative. Moreover, there is no reasonable tactical basis for not objecting to this evidence.

*Not harmless error*. Here, given that witness testimony was so crucial to the State's case, it is within reasonable probability that the

outcome of the trial was materially affected by the admission of evidence beyond the scope contemplated in ER 609(a).

Witnesses Long and Starzyk were the only ones to testify they received meth from Ms. Mumm. RP 254, 365, 374, 381-82. Long admitted he stole $20 of task force money during a controlled buy. RP 395. Long also had a proven criminal history—possession of stolen property and possession of a stolen firearm. RP 362. Starzyk also had been convicted of third degree theft. RP 258. In particular, Starzyk testified she and Ms. Mumm had a disagreement and Ms. Mumm testified as to her problems with Starzyk as a roommate because she was selling drugs out of their home, having various people over, and that items started going missing. RP 262-63, 477-78. These witnesses were not reliable.

Further, none of the task force law enforcement personally witnessed the exchange of meth between Ms. Mumm and Long or Starzyk. RP 176, 198-99, 241-42, 328-29. Task force law enforcement admitted that their searches of Long for the controlled buys were not comprehensive, but were merely randomized. RP 176-77, 197-98, 241, 330.

Because the evidence in this case was based on the credibility of Long and Starzyk, there is a reasonable probability the verdict would have

been different if defense counsel had objected. See McFarland, 127 Wn.2d at 334-35 (citing Thomas, 109 Wn.2d at 225-26); see also Sexsmith, 138 Wn. App. at 509. For these reasons defense counsel's performance was deficient and prejudicial.

b. Defense counsel was ineffective for failure to object to the State's presentation of evidence that the defendant was a drug dealer in the past, as such evidence was irrelevant and highly prejudicial contrary to ER 404(b).

Evidence of prior misconduct is not admissible to show a defendant had a propensity to engage in such conduct:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). "This prohibition encompasses not only prior bad acts and unpopular behavior but *any* evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of a crime." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citation omitted).

In order to admit evidence under ER 404(b), the trial court must follow four steps: "'(1) find by a preponderance of the evidence that the

misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'" Foxhoven, 161 Wn.2d at 174 (quoting State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "This analysis must be conducted on the record." Id. (citing State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). "In doubtful cases, the evidence should be excluded." Thang, 145 Wn.2d at 642 (citing Smith, 106 Wn.2d at 776).

In State v. Avendano-Lopez, the court noted: "[The] State fails to explain how prior drug sales could be admissible under ER 404(b), and it appears that the only purpose of offering such evidence would be to prove that [the defendant] acted in conformity with prior drug transactions, which ER 404(b) prohibits." 79 Wn. App. 706, 715, 904 P.2d 324 (1995). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

At issue here is the prosecution's redirect examination of witness Long, whereby the prosecution brought into evidence that Ms. Mumm "frequently" dealt drugs while living in the same residence with Long some years prior. RP 404. Specifically, Long testified:

> Q: … I want to ask you, you were asked some questions about background, about your -- your knowledge of Ms. Mumm. And you were asked -- basically about the living situation, and that you had moved out 'cause you didn't want to live there.
> Why was that?
> A: (Inaudible) frequently drug sales in and out and (inaudible) all the time.
> Q: That -- regarding Ms. Mumm?
> A: Yeah. My dad's house getting raided.
> Q: When you say getting raided--
> A: (Inaudible) for the same thing.

RP 404. More damaging information was elicited, detailing a task force raid and the fact Ms. Mumm did not want to go to prison again. RP 405. The prejudicial effect of this evidence of prior drug dealing by Ms. Mumm outweighs its probative value. The testimony was meant to show Ms. Mumm was "known" to be a drug dealer. Thus, it tended to prove her character "in order to show action in conformity therewith." ER 404(b). Such testimony is improper. The prior conduct, though probative, was more prejudicial.

Defense counsel was ineffective for not objecting to the statements' admission nor requesting a limiting instruction immediately after its admission. RP 404. The improper evidence did nothing but harm Ms. Mumm's character in the eyes of the jury and there was no tactical reason for failing to object. Because of defense counsel's ineffective representation, the trial court did not perform the four-part test set forth in

Foxhoven, which should have led to exclusion of the evidence. 161 Wn.2d at 174. Also, in light of Avendano-Lopez, there is a reasonable probability that an objection to the improper ER 404(b) comments would have been sustained.

*Not harmless error*. Since "[e]videntiary errors under ER 404 are not of constitutional magnitude," such errors are not harmless when, "within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred." State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984) (citing State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982)); see also State v. Thach, 126 Wn. App. 297, 311, 106 P.3d 782 (2005) (stating this harmless error standard).

Here, the error in admitting the ER 404(b) evidence was not harmless. As previously noted, Long and Starzyk were the only ones to testify that they received meth from Ms. Mumm, and both witnesses had unreliable histories. There is a reasonable probability the outcome would have been different had the evidence been excluded.

2. The trial court erred by failing to give the limiting jury instruction WPIC 5.05, which would have instructed the jury to consider

Ms. Mumm's prior convictions solely for the purpose of determining credibility.[5]

If evidence of prior bad acts is admitted for some lawful purpose, a limiting instruction is required in order to ensure a just, untainted jury verdict. ER 105[6]; Foxhoven, 161 Wn.2d at 175; State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990).[7] The jury must be instructed on the limited purpose for which the evidence is admissible. Id.

"Due to the potentially prejudicial nature of prior conviction evidence . . . limiting instructions are of critical importance." State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989) opinion corrected, 787 P.2d 906 (1990). Particularly, "where evidence of prior crimes is admitted under ER 609(a) for the purpose of impeaching a witness' credibility, an instruction should be given that the conviction is admissible only on the issue of the witness' credibility, and, where the defendant is the witness impeached, may not be considered on the issue of guilt." Id. (citing WPIC

[5] Assignment of Error 3.
[6] Evidence may be admissible for one purpose but inadmissible for another purpose. ER 105. When such evidence is admitted at trial "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Id.
[7] See e.g. WPIC 5.30 ("Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of ___and] may be considered by you only for the purpose of __. You may not consider it for

5.05). WPIC 5.05 is an appropriate cautionary instruction for this purpose. Brown, 113 Wn.2d at 529; see also State v. Anderson, 31 Wn. App. 352, 641 P.2d 728 (1982).

Here the trial court erred by failing to instruct the jury with WPIC 5.05.[8] Defense counsel requested this instruction from the trial court, and the court noted the exception but refused to give the instruction. RP 450-53, 535-41. The trial court denied the request because it reasoned Long's testimony had opened the door to evidence of Ms. Mumm's prior and frequent drug dealing, home raids, and jail time. RP 540-41.

However, the door to such evidence had never been opened. A close look at the record reveals that defense counsel stopped delving into Ms. Mumm's role in Long's life after the trial court warned it could turn into character evidence. RP 392-93, 393-94. After the trial court's warning, defense counsel stopped this line of questioning when cross-examining Long about his family relationship with Ms. Mumm. RP 393-402. See State v. Gefeller, 76 Wn.2d, 449, 455, 458 P.2d 17 (1969) ("it is a sound general rule that, when a party opens up a subject of inquiry on

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any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.")

[8] WPIC 5.05 states: "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose."

direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced").

Based on the prejudicial and improperly admitted character evidence, it is likely the outcome would have been different had the jury been properly instructed. WPIC 5.05 instructs the jury that prior convictions are only to be considered in regards to the defendant's credibility. The risk from these proceedings is that Ms. Mumm was wrongfully convicted based on character considerations that were not proper evidence, resulting in a jury that was prejudiced against her before it even entered the jury room for deliberations. Under these circumstances, a new trial should be ordered.

3. The evidence was insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses.[9]

RCW 69.50.435(1)(c) orders an enhanced penalty for persons selling drugs within 1000 feet of a school bus route stop. RCW

[9] Assignment of Error 4.

69.50.435(6)(c) defines "school bus route stop" as “a school bus stop as designated by a school district.”

In addition, the jury herein was instructed in pertinent part that “school bus” means:

> a vehicle that meets the following requirements: One, has a seating capacity of more than ten persons including the driver . . . .

Instruction No. 19; RP 560.

The law of the case doctrine generally provides that “whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case.” Pepperall v. City Park Transit Co., 15 Wn. 176, 180, 45 P. 743 (1896) (overruled in part on other grounds by Thornton v. Dow, 60 Wn. 622, 111 P. 899 (1910)). This doctrine extends to definition instructions. See Scoccolo Constr., Inc. v. City of Renton, 158 Wn.2d 506, 522-23, 145 P.3d 371 (2006) (Madsen, J., concurring) (narrow and debatable definition of “acting for” accepted in instructions was law of the case); Englehart v. Gen. Elec. Co., 11 Wn. App. 922, 923, 527 P.2d 685 (1974) (definition of accidental death was law of the case, no error having been assigned).

Where insufficient evidence is introduced at trial to prove an added element, reversal is required. State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

Here, the jury was instructed that a "school bus" as used in the instructions must have a seating capacity of more than 10 persons including the driver. RP 560. The State presented no evidence regarding the seating capacity of buses stopping within 1,000 feet of the three different locations where Ms. Mumm was found to have delivered a controlled substance. Also, the State requested the "school bus" definition be given. RP 541.

Whether seating capacity is viewed as an element of the crime or as an added element under the law of the case doctrine, the evidence was insufficient to support the special verdict. For this reason, the special verdict must be stricken.

4. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed

without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.[10]

Ms. Mumm did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).[11]

a. The directive to pay must be stricken.

There is insufficient evidence to support the trial court's implied finding that Ms. Mumm has the present and future ability to pay legal financial obligations and the directive to pay must be stricken. Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

[10] Assignments of Error 5, 6, & 7.

[11] Appellant is aware that this Court has issued an opinion holding that this issue may not be challenged for the first time on appeal. See State v. Duncan, 180 Wn. App. 245, 327 P.3d 699 (2014). However, this issue is now pending before the Washington Supreme Court in State v. Blazina, 178 Wn.2d 1010, 311 P.3d 27 (2013), consolidated with State v. Paige-Colter, 178 Wn.2d 1018, 312 P.3d 650 (2013). The cases were scheduled for oral argument February 11, 2014. Therefore, this issue is raised in

Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). "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." Id.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." Curry, 118 Wn.2d at 916. However, Curry recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

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order to preserve the argument, should the Washington Supreme Court

Here, there is insufficient evidence to support the trial court's implied finding that Ms. Mumm has the present or future ability to pay legal financial obligations. RP 611; CP 15. While the trial court made no express finding that Ms. Mumm had the present or future ability to pay the LFOs, the finding is implied because the court ultimately ordered Ms. Mumm to make payments in the Judgement and Sentence under paragraph 4.3, with a payment schedule to be established by DOC or the court clerk. CP 17-18. At sentencing the trial court merely noted it had not heard any argument as to an inability to pay and imposed $4,570.50 in LFOs. RP 611; CP 17.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63

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overrule this Court's opinion in Duncan.

Wn. App. 303, 312, 818 P.2d 1116, opinion amended, 837 P.2d 646 (1991).

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

Here, the record does not show the trial court took into account Ms. Mumm's financial resources and the nature of the burden of imposing LFOs on her. During sentencing, the trial court merely stated that it had "not heard any argument as to an inability to pay." RP 611. Thus, the record contains no evidence to support the trial court's implied finding that she has the present or future ability to pay LFOs. In fact the order on file with this Court shows Ms. Mumm is indigent. Nevertheless, the court ordered Ms. Mumm to begin payments on a schedule established by DOC or the clerk of the court, commencing immediately. CP 18. Therefore, the

finding that Ms. Mumm has the present or future ability to pay LFOs is simply not supported in the record. Since it is clearly erroneous, the directive must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

This remedy of striking the unsupported finding is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of "fixing" it with the taking of new evidence. Cf. State v. Souza (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, recon. denied, rev. denied, 116 Wn.2d 1026 (1991); Lohr (where evidence is insufficient to support suppression findings, the

State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

b. The imposition of discretionary costs of $3,060.50 must also be stricken.

Since the record does not reveal that the trial court took Ms. Mumm's financial resources into account and considered the burden it would impose on her as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the judgment and sentence. RP 611; CP 15, 17-18.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. Baldwin, 63 Wn. App. at 312. The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. Id.

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. But,

> 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). It is well-established that this provision does not require the trial court to enter formal, specific findings. See Curry, 118 Wn.2d at 916. Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. Bertrand, 165 Wn. App. at 404. Where the trial court does enter a finding, it must be supported by evidence.

Here, the court imposed discretionary costs of $3,060.50. Ms. Mumm is indigent as noted in this file in the order of indigency. The record reveals no further balancing by the court of Ms. Mumm's financial resources and the nature of the burden that payment of LFOs would impose on her. RP 611.

In sum the record reveals the trial court did not take Ms. Mumm's particular financial resources and her ability (or not) to pay into account as required by RCW 10.01.160(3). RP 611. The implied finding of ability to pay is unsupported by the record and clearly erroneous. Further, the court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay and the imposition of the discretionary costs. Bertrand, 165 Wn. App. at 405.

i. The imposition of VUCSA fines of $3,000 must be stricken.

RCW 69.50.430(1) & (2) require the imposition of fines for those convicted of felony crimes in violation of RCW 69.50.401. However, the statute also provides that "Unless the court find the person to be indigent, this additional fine shall not be suspended or deferred by the court." RCW 69.50.430(1) & (2).

Here the trial court imposed $3,000 in fines under RCW 69.50.401. CP 17. However, it is clear Ms. Mumm was found to be indigent as the order on file with this Court states. Therefore, the $3,000 fine must be stricken from the Judgment and Sentence. CP 17.

5. The trial court erred when computing LFOs and entered the wrong amount owing as $4,570.50.[12]

The LFOs on the Judgment and Sentence were calculated for a total of $4,570.50. CP 17. However, adding all of the fines and fees imposed only comes to a total amount of $4,320.50. CP 17. It appears this was the original calculated amount, but it was scratched out. CP 17.

[12] Assignment of Error 8.

## E. CONCLUSION

For the reasons stated, the convictions should be reversed and/or reversed and remanded for a new trial. The special verdict should be stricken and the sentence reduced accordingly. The matter should also be remanded for resentencing to strike the directive to pay and the imposition of discretionary costs from the Judgment and Sentence, and for correction of the computation of the total legal financial obligations.

Respectfully submitted December 10, 2014,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on December 10, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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