Supreme Court No.: 93944-6
Court of Appeals No.: 73945-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HUTTON,

Petitioner.

PETITION FOR REVIEW

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Kevin Hutton, petitioner here and appellant below, requests this Court grant review pursuant to RAP 13.4(b) of a portion of the decision of the Court of Appeals, Division One, in *State v. Hutton*, No. 73945-0-I, filed November 14, 2016. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review to determine whether evidence showing Shamicia Jones acted aggressively toward Mr. Hutton before he hit her supported the requested instruction on self-defense? RAP 13.4(b)(1), (3).

2. Whether the Court should grant review where the Court of Appeals held an objection stating "prejudicial as to the children" was insufficient and did not determine whether the trial court abused its discretion by admitting evidence that was irrelevant, more prejudicial than probative, and involved prior uncharged acts, without the State providing any proper purpose for the evidence? RAP 13.4(b)(1).

3. Whether the Court should grant review to consider whether Mr. Hutton receive ineffective assistance of counsel where trial counsel objected to most, but not all, of the evidence admitted in violation of ER 403 and ER 404(b)? RAP 13.4(b)(1), (3).

4. Whether the Court should grant review to decide whether cumulative error deprived Mr. Hutton a fundamentally fair trial? RAP 13.4(b)(1), (3).

5. Whether the Court should grant review to interpret the provisions imposing costs for a victim penalty assessment and a DNA fee as being subject to a finding that the defendant has the ability to pay? RAP 13.4(b)(1), (3), (4).

C. STATEMENT OF THE CASE

Kevin Hutton and Shamicia Jones have known each other for many years. RP 347-49, 418-19. On September 14, 2014, Mr. Hutton was at Ms. Jones's home in Seattle, where she lived with her mother, Patricia King, and her three young children. RP 344-46, 352-54, 415-19. Mr. Hutton was drinking alcohol and showing its effects. RP 237-38, 242-43, 355-57, 402-03, 423. Ms. King called 911 around 4:45 p.m., reporting Mr. Hutton had punched her daughter and then punched Ms. King, before walking away. RP 188-95, 368-75; Exhibit 1; see RP 285-89, 349-51, 362.

The police located Mr. Hutton a couple blocks away, sitting in the passenger seat of a parked vehicle, about 45 minutes later. RP 210-15, 262-63. Mr. Hutton kicked at the doors and windows of Officer Mazziotti's patrol car during the ride to the police station. RP 216-18.

When Officer Mazziotti pulled over and opened the door, Mr. Hutton reportedly kicked Officer Mazziotti. RP 218-35, 238-39, 250-51; Exhibit 14.

On the date of these incidents, there were no-contact orders in effect between Mr. Hutton and Ms. Jones and between Mr. Hutton and Ms. King. Exhibit 15.

The State charged Mr. Hutton with felony violation of a no-contact order (domestic violence) as to Shamicia Jones based on assault or reckless conduct that created a substantial risk of death or serious injury (count one), assault in the second-degree (domestic violence) as to Shamicia Jones (count two), felony violation of a no-contact order (domestic violence) as to Patricia King based on assault (count three), and assault in the third-degree for kicking Officer Mazziotti. CP 1-10. After Mr. Hutton called Shamicia Jones from jail, the State charged three additional counts of misdemeanor violation of a no-contact order. CP 200-03; Exhibits 16 & 23. -

The trial court denied Mr. Hutton's request for a self-defense instruction on counts one, two and three, but granted the request as to count four, assault three against Officer Mazziotti. CP 161-99; CP 72-112; RP 436-45, 487-88, 494-99, 505-06.

A jury acquitted Mr. Hutton of count three, the felony violation of a no-contact order protecting Patricia King. CP 55. Mr. Hutton was convicted of the remaining counts. CP 51, 53, 56-59. Although the State initially charged an aggravator, it withdrew it at sentencing due to intervening case law. CP 1-10; RP 671-77, 681. Mr. Hutton was sentenced to serve all counts concurrently for a total of 84 months. CP 127-38.

The Court of Appeals accepted the State's concessions and remanded to the trial court to vacate the felony violation of a no-contact order conviction and to fix a clerical error referring to the aggravator the State withdrew. Appendix (Slip Op. at 1, 8-9, 19). Mr. Hutton does not petition the Court with regard to these issues. The Court of Appeals, however, denied Mr. Hutton's appeal with regard to the below issues, which he now asks this Court to review. *See* Appendix.

Additional facts are set forth in the relevant argument sections below.

D. ARGUMENT

1. The Court should grant review and hold the trial court denied Mr. Hutton his constitutional right to present a defense by refusing to instruct the jury on self-defense for counts one and two.

Mr. Hutton requested accurate self-defense instructions for counts one and two. The trial court erroneously denied the requested instructions because a "trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense." *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983).

The right to self-defense is broadly-recognized, basic, deeply rooted, and fundamental to our concept of liberty. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S. Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010); *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 99 (2010); U.S. Const. amends. II, XIV; Const. art. I, § 24.

A person does not have to be in actual danger to act in lawful self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The long-recognized "right of the defendant" to act in defense of himself or others exists when a person has a good faith belief there is apparent danger to himself or another person. *State v. Carter*, 15 Wash. 121, 123, 45 P. 745 (1896). It is viewed from the perspective of the defendant, based on

the situation as it appeared to him. *Id.* A person is entitled to defend himself if he reasonably believes he is in danger of imminent harm, and uses an appropriate degree of force in response to that threat. *Riley*, 137 Wn.2d at 909.

Mr. Hutton not only had the right to act in self-defense, but he also had the due process right to have the jury instructed on self-defense. The constitutional due process right to fully defend against the charges entitles an accused person to a jury instruction on self-defense if there is some evidence of self-defense. *State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3. The right to due process entitles the accused to have the jury fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). When requested, the trial court must provide an instruction that supports the defense theory, as long as the instruction is an accurate statement of the law and is supported by the evidence. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

There was at least some evidence that Mr. Hutton acted in self-defense, particularly when viewed from his perspective. *Wanrow*, 88

Wn.2d at 234-26; *McCullum*, 98 Wn.2d at 488; *State v. Ellis*, 30 Wash. 369, 373, 70 P. 963 (1902) ("The jury are [sic] entitled to stand as nearly as practicable in the shoes of defendant, and from this point of view determine the character of the act.").

As to the counts regarding Shamicia Jones, she testified that she got angry immediately before Mr. Hutton hit her. She said, "I got angry and I said something about it." RP 424. "I said something that pissed him off even more." RP 425. Her testimony as to her anger, her words, and his reaction shows she (at least verbally) approached Mr. Hutton with anger immediately before she was hit. Because this evidence is to be viewed from Mr. Hutton's perspective, it is important to note the evidence showed he was intoxicated to an extent likely to have affected his perception. RP 237-38, 242-43, 354-57. Before being hit, Ms. Jones aggressively approached a visibly intoxicated Mr. Hutton. There was enough evidence to put the self-defense issue before the jury. *See State v. Adams*, 31 Wn. App. 393, 395-96, 641 P.2d 1207 (1982).

Therefore the trial court abused its discretion when it found no evidence supported the requested instruction. RP 477-78, 494-95.

2. The Court should grant review of the multiple instances of prejudicial evidence that should have been excluded under ER 404(b) and ER 403.

The Court should grant review and hold trial court abused its discretion when it allowed, over several objections, highly prejudicial and irrelevant evidence about Shamicia Jones's young children being present for and highly upset by the fight where the State did not charge the presence of minors as an aggravator. The trial court likewise abused its discretion in admitting repeated testimony during the guilt phase indicating that there was a history of abuse between Mr. Hutton and Ms. Jones where the aggravator portion of the trial was bifurcated. *See State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001) (evidentiary errors reviewed for abuse of trial court's discretion).

The presence of Shamicia Jones's children during the fight was not relevant to any element the State had to prove. *See* ER 402. Nonetheless, over objection and without an on-the-record analysis, the court allowed evidence that Ms. Jones's three children under the age of eight were present for the fight, reacted negatively to it, and were psychologically affected by what they witnessed. RP 365-67, 415-16, 512-13.

Patricia King testified that her grandchildren were running around and playing while their mother was fighting with Mr. Hutton and that at least the two youngest witnessed Ms. Jones being hit. RP 365-66. Ms.

King told the jury the kids then probably went and hid "Because when they fight. They hide. They like get out the way." RP 366. The trial court overruled defense counsel's ER 403 objection without elaboration. RP 366.

When the objection was overruled, the prosecutor repeated "that the children were present" and asked Ms. King to tell the jury "what was their reaction?" RP 366-67. She testified the young children were "Scared, crying. Crying." RP 367. Defense counsel renewed his objection, which was again overruled without explanation. RP 367.

The jury also heard Shamicia Jones tell Mr. Hutton, on a recorded call from jail, that the children are "having nightmares and shit . . . you fucked them up." RP 512-13; Exhibit 17 (track 1 at 1:57 to 2:02). Defense counsel again objected, but the court admitted this portion of the recording. RP 470; *see* RP 461-73 (redactions to recording discussed).

At the conclusion of the prosecutor's opening statement, he argued to the jury that Mr. Hutton's conduct harmed "three generations of this family. Ms. King, the grandma; Ms. Jones, the daughter; and then there's three boys. All of them are affected by his actions." RP 580. If the trial court had properly excluded the evidence regarding Ms. Jones's children, the prosecutor could not have made this argument in closing.

Even if minimally relevant, the evidence was inadmissible because it is substantially more prejudicial than probative. ER 403. The evidence tends to garner sympathy for the young children and their mother and grandmother, while heightening negative sentiments toward Mr. Hutton.

The history of abuse evidence also should have been excluded. Patricia King testified, "I'm just . . . fed up with the fighting and stuff. I'm just tired of it." RP 376. The trial court did not rule on defense counsel's ER 404(b) objection, but simply told the prosecutor, "Let's ask another question." *Id.*

The court also allowed the State to present Mr. Hutton's recorded apology for the past, "I'm sorry babe of all the things I've done to you." Exhibit 17 (track 1 at 3:52 to 3:57). Because this evidence strongly suggests a history of domestic violence, defense counsel objected under ER 404(b) outside the presence of the jury while redactions to the jail calls were before the court. RP 472-73. The trial court overruled the objection without explanation. *Id.*

The jury also heard Patricia King's testimony that the children had witnessed the couple's behavior before the day of the charged incidents: "Because when they fight. They hide. They like get out the way." RP 366. Although defense counsel did not raise an ER 404(b) objection, it is clear the trial court's ruling would have been the same quick overruling as

on defense counsel's other objections. The trial court also overruled counsel's ER 403 objection to this testimony, as discussed above.

In addition, Ms. King testified, without objection, "I'm just fed up with him getting away with doing what he's doing. I'm just tired of it. I'm just tired of it." RP 368.

The admission of this evidence was an abuse of discretion because the court failed to adhere to the settled requirements of ER 404(b). *State v. Thang*, 145 Wn.2d 630, 642, 41 P3.d 1159 (2002); *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Propensity evidence has no place in a criminal trial. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). This rule has no exceptions. *Id.* at 421; *State v. Gunderson*, 181 Wn.2d 916, 922-23, 337 P.3d 1090 (2014). Therefore, the trial court should have put the State to its "substantial burden" to show admission of prior conduct is appropriate for a purpose other than propensity. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003).

3. The Court should grant review to consider whether Mr. Hutton receive ineffective assistance of counsel where trial counsel objected to most, but not all, of the evidence admitted in violation of ER 403 and ER 404(b).

The federal and state constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v Heddrick*, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). The right to counsel necessarily includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) was the defendant prejudiced by counsel's errors. *Strickland*, 466 U.S. at 688, 694; *Thomas*, 109 Wn.2d at 226.

Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *Strickland*, 466 U.S. at 698; *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

Counsel's performance is deficient where he or she fails to lodge an evidentiary objection. *State v. Hendrickson*, 138 Wn. App. 827, 831-33, 158 P.2d 1257 (2007) (failing to object to hearsay admitted in violation of defendant's confrontation clause rights constituted deficient performance), *aff'd on other grounds*, 165 Wn.2d 474 (2009). As discussed above, the trial court should have sustained an objection to the ER 403 and ER 404(b) evidence elicited at trial. Counsel's failure to object, on occasion, was therefore deficient. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); RP 368, 580. Further, because defense counsel objected on all the occasions enumerated above, counsel's failure to object on a few subsequent occasions cannot be considered strategic.

As set forth above, the deficient conduct was prejudicial because the trial court should have sustained the objections and excluded the ER 403 and ER 404(b) evidence.

The admission prejudiced the result for the following reasons. In error, the court allowed in testimony that Mr. Hutton and Ms. Jones have a history of domestic violence. This evidence allowed the jury to be swayed to convict based on the impermissible basis of propensity. The court also allowed the jury to hear that, beyond any harm allegedly caused to Ms. King or Ms. Jones, three young children were emotionally scarred by the

State's witnesses' allegations. Moreover, both types of inadmissible evidence were admitted on multiple occasions.

On the other hand, the State's evidence was far from airtight. Patricia King presented conflicting testimony on the details of the alleged assaults. RP 394-99; Exhibit 22; *see* RP 554 (prosecutor acknowledges discrepancies in closing). The jury acquitted Mr. Hutton of the count against Ms. King. CP 155. Demonstrating the jury felt the need to carefully examine the evidence, it asked four questions during the course of its deliberations. CP 113-21.

4. This Court should grant review to determine whether Mr. Hutton was denied a fair trial in the cumulative.

Each of the above trial errors independently requires reversal. In the alternative, however, the Court should grant review and hold that the aggregate effect of these trial court errors denied Mr. Hutton a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together, the combined errors denied the defendant a constitutionally fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in

determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Viewed together, the errors addressed above created a cumulative and enduring prejudice that likely materially affected the jury's verdict.

5. This Court should grant review and strike the victim penalty assessment and DNA fees imposed despite Mr. Hutton's inability to pay.

At sentencing, the court imposed a $500 victim penalty assessment and a $100 DNA fee. CP 129. Although no evidence was presented at sentencing and the trial court subsequently found Mr. Hutton indigent for appeal, the findings reflect a boilerplate statement that "Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 129.

The appearance of mandatory language in the statutes authorizing the biological fee and the victim assessment imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(2)(h) (convicted criminal defendants "shall be liable" for a $200 fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

The Legislature would have used different language if it intended to obliterate an ability to pay determination. *See* RCW 9.94A.753 (restitution "shall be ordered" for injury or damage absent extraordinary circumstances and "the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability

to pay the total amount."); *State v. Conover*, 183 Wn.2d 706, 712-13, 355 P.3d 1093 (2015).[1]

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) does not hold otherwise because that case examined the constitutionality of the fee, not the statute's interpretation. Additionally, *Blazina* supersedes *Curry* to the extent they are inconsistent; alternatively *Curry* should be overruled. *See Blazina*, 182 Wn.2d at 830, 839.

Jafar v. Webb, also supports this reading, as there the Supreme Court held the trial court was required to waive all fees for indigent litigants under General Rule 34 despite the appearance of mandatory language ("shall") in applicable statutes. 177 Wn.2d 520, 303 P.3d 1042 (2013); *see* RCW 36.18.020.

Applying the ability to pay inquiry to all trial court costs is also logical. The costs authorized under these statutes expose indigent defendants to the same hardships regardless of the statutory section under which they are imposed. *See State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016) (upholding imposition of "mandatory"

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[1] The Legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

costs); *see also State v. Lewis*, 194 Wn. App. 709, 379 P.3d 129, 131-34 (2016) (same); *State v. Shelton*, 194 Wn. App. 660, 663, 378 P.3d 230 (2016) (same).

Finally, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (holding statute violated equal protection by stripping indigent criminal defendants of the protective exemptions applicable to civil judgment debtors).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) (upholding costs statute because it required ability to pay determination and prohibited imposition of costs upon those who would never be able to pay). Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Imposing LFOs on indigent defendants also violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Wash. State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Although the government might have a legitimate interest in collecting recoupable costs, imposing costs and fees on impoverished people like Mr. Hutton is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because "incarceration would result only if failure to

pay was willful" and not due to indigence. *Id.* at 241. This assumption was not borne out.[2]

The Court should grant review because courts continue to impose these costs without consideration of ability to pay contrary to the substantial public interest, the statutes, this Court's decision in *Blazina*, and the constitution.

E. CONCLUSION

The Court should grant review for reasons set forth above.

DATED this 12th day of December, 2016.

Respectfully submitted,

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[2] *See, e.g.*, *Wakefield*, 2016 WL 5344247; Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008), *available at* http://www.courts.wa.gov/committee/pdf/ 2008LFO_report.pdf; *Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. KEVIN EUGENE HUTTON, Appellant.	)	No. 73945-0-I DIVISION ONE UNPUBLISHED OPINION FILED: November 14, 2016

MANN, J. — A jury convicted Kevin Hutton of assaulting his ex-girlfriend and the police officer who arrested him shortly after the assault. The jury also convicted him of multiple violations of a no-contact order. Hutton appeals, asserting violations of RCW 26.50.110(4) and double jeopardy, instructional and evidentiary error, ineffective assistance of counsel, cumulative error, unlawful imposition of financial obligations, and clerical error. Because the State concedes that one of Hutton's convictions violates RCW 26.50.110(4), and because the judgment and sentence contains a clerical error, we reverse Hutton's conviction for felony violation of a court order and remand for imposition of misdemeanor violation of a court order and correction of the clerical error. We otherwise affirm.

FACTS

Based on allegations that Hutton assaulted Shamicia Jones and her mother in violation of a no-contact order, kicked a police officer, and repeatedly phoned Jones in violation of a no-contact order, the State charged him with two counts of felony violation of a court order, three counts of misdemeanor violation of a court order, and once count each of second and third degree assault. All counts except the assault of the officer included a domestic violence allegation.

At trial, Patricia King testified that she lives with her daughter, Shamicia Jones, and Jones' three boys. King said Jones and Hutton had an on-again off-again relationship and that Hutton sometimes spent the night at their residence.

King testified that on September 14, 2014, Hutton visited Jones. He began drinking vodka and showing signs of intoxication. King was sitting on the porch when she heard Jones and Hutton arguing about a cigarette. Hutton said "You can't give me a damn cigarette, bitch?" Jones said "no" and Hutton became "angrier and angrier."[1] Eventually, Jones gave Hutton a cigarette and walked toward the door to the porch. According to King, Hutton "rushed from the kitchen and hit her."[2] Jones was "knocked out" and had injuries to her mouth and face. King told Hutton "I ain't paying you shit I owe you."[3] Hutton became angry and hit King. She got up from the floor and rushed Hutton, but he pushed her out of the way and ran out of the house. King then called 911.

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[1] Report of Proceedings (RP) (May 21, 2015) at 359.
[2] RP (May 21, 2015) at 360.
[3] RP (May 21, 2015) at 351.

During a break in King's testimony, defense counsel moved for a mistrial based on King's testimony about the children's reaction to the assault and suggestions that Hutton had a history of domestic violence. The court denied the motion. Defense counsel expressly declined to request a limiting instruction.

The court then admitted several exhibits, including the following stipulation:

1. There were multiple no contact orders issued by Seattle Municipal Court and King County Superior Court for the protection of Shamicia Jones prohibiting Kevin Hutton from contacting Ms. Jones and these orders were valid from 2013-2018.
2. There was also an anti-harassment order issued by the Seattle Municipal court for the protection of Patricia King prohibiting Kevin Hutton from contacting Ms. King and this order was valid from March 5, 2014 to March 6, 2016.
3. Kevin Hutton had knowledge of all of these orders.[4]

The parties further stipulated that four recorded phone calls were made on a certain date to Jones' phone number. If made by Hutton with knowledge of an existing no-contact order, the calls violated the order.

When King's testimony resumed, she identified Hutton's and Jones' voices on the recorded phone calls.

On cross-examination, defense counsel confronted King with statements she made to Seattle Police Officer Failautusi Sa'au. Officer Sa'au's report, which the court admitted as an exhibit, states in part:

> Patricia stated that she was in the living room next to the front door, which was open, with Shamica on the front porch. At approximately 15[:]55 hours, Kevin arrived at their residence requesting to gather his belongings.

[4] Exhibit (Ex.) 15. (Emphasis added).

> Patricia stated Kevin was extremely intoxicated and was behaving aggressively. While on the front porch, Kevin asked Shamica for a cigarette, but he was denied. Kevin became extremely upset and began calling Patricia and Shamica names "bitches". Kevin approached Patricia, who was still standing on the front porch, and attempted to punch her. Kevin first swung with his left hand, (closed fist) and missed, nearly hitting Shamica's head. After dodging the initial punch, Shamica attempted to run into the house. Shamica did not make it far as Kevin immediately swung a second time with his right hand, (closed fist), striking the left side of Shamica's face. Patricia stated Shamica was instantly knocked unconscious and fell to the floor (the middle of the doorway). Patricia stated there was blood spatter, from the punch, on the front door.
>
> Patricia then stated Kevin began approaching her attempting to punch her in the face. Kevin first swung with his left hand but missed, (closed fist), nearly hitting her in the face. Kevin then immediately swung a second time with his right hand, (closed fist) striking her on the left side of her face. Patricia stated she was dazed, but did not lose conscious. Patricia stated her face was sore and that it was painful to touch.
>
> Patricia stated Kevin then fled on foot southbound on 9th AVE SW.[5]

During her testimony, King disagreed with some of the statements attributed to her in this report. She denied being inside the house immediately prior to the assault. She also denied that Hutton threw more than one punch, that he swung and missed her before hitting her, that Shamicia dodged the initial punch and ran into the house, and that the initial punch occurred on the porch.

Shamicia Jones testified that Hutton hit her in the face, causing her head to hit a wall and leaving her unconscious. She said Hutton was drinking that day and "[w]hen he drinks, he turns into somebody else."[6] According to Jones, the assault occurred after she expressed anger about Hutton's nitpicking with the children. She

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[5] Ex. 22.
[6] RP (May 21, 2015) at 423.

did not mention cigarettes and said King was in a bedroom when Hutton hit her (Jones). She admitted she did not have a clear memory of the events.

Seattle Police Officer Ronald Mazziotti testified that on September 14, 2014, he responded to a 911 call reporting domestic violence. The court played a recording of the 911 call for the jury. It included the following exchange:

> OPERATOR: 911. Hello?
> (Transmission noise.)
> OPERATOR: Seattle Police, 911.
> (Crying sounds.)
> OPERATOR: Hello? (Inaudible) I don't hear anything. I'm disconnecting.
> (Dial tone.)
> (Phone ringing.)
> MS. KING: Hello?
> OPERATOR: Hi, this is Seattle Police, 911.
> MS. KING: Yeah, you all need to bring your mother fucking asses out here. He bust my -- my baby's mouth open. I'll get a towel.
> . . . .
> OPERATOR: How long ago did this happen?
> MS. KING: Five minutes. That's been five minutes. He come back for me again, I'm going to cut him open.
> OPERATOR: Okay. Who did it?
> MS. KING: Her ex-boyfriend bust her in her damn mouth and ran out. He's going down -- he's walking down Ninth Avenue. . . . he hit her in the mouth.
> OPERATOR: Last seen on southbound Ninth Avenue.
> . . . .
> MS. KING: He hit me and almost knocked me out.
> DISPATCH: He hit both of you guys?
> MS. KING: Yeah, he did.
> [MS. KING describes and names Kevin Hutton]
> . . . .
> OPERATOR: Okay. All right. We'll be out there just as soon as we can, okay? Thanks.
> MS. KING: All right. (Inaudible) he knocked my daughter out and almost knocked me out. . . .
> (End of 911 call.)[7]

[7] RP (May 20, 2015) at 189-95. (Emphasis added).

Officer Mazziotti drove to the 911 caller's address and interviewed Patricia King and Shamicia Jones. King gave him a photograph of Hutton and a description of his hairstyle. Officer Mazziotti also found documentation belonging to Hutton in a backpack in the residence.

Approximately forty minutes after the initial dispatch report, another officer reported seeing a man matching the suspect's description several blocks from Jones' residence. The suspect, later identified as Hutton, initially gave officers a false name. King subsequently identified Hutton as her assailant during a show-up. Police arrested Hutton and placed him in Officer Mazziotti's patrol car.

While en route to Officer Mazziotti's precinct, Hutton began thrashing violently in the back seat and kicking the door and window. Officer Mazziotti stopped his car. Hutton got out of the car and had to be subdued with a Taser. As officers attempted to put him back in the car, Hutton kicked Officer Mazziotti in the chest. The court admitted an in-car video of the struggle and played it for the jury. The defense stipulated that Hutton told the officer "I kicked you, yeah I admit to that" and that when Officer Mazziotti said "The bitch is going [to] die?" Hutton said "Yeah."[8]

Emergency Medicine Physician Ian Doten testified that he treated Jones for her injuries, which included a scalp laceration and a cut through her lower lip and jaw. Jones told Dr. Doten that Hutton assaulted her with his fists and that she lost consciousness.

[8] Ex. 14.

Seattle Police Department Detective Jennifer Samson testified to the dynamics of domestic violence. Those dynamics commonly form a cycle, beginning with violence fueled by alcohol or drugs, followed by remorse and promises to change, followed by reunification and another incident of violence.

The court played four recorded phone calls between Hutton and Jones for the jury. One recording included the following conversation:

> MS. JONES: [The children are] having nightmares and shit.
> THE DEFENDANT: Aw (inaudible).
> MS. JONES: Yeah, you fucked them up.
> THE DEFENDANT: All right, babe. All right, babe. All right.
> MS. JONES: See, my face is puffed up.
> THE DEFENDANT: I see, babe. That's (inaudible).
> . . . .
> THE DEFENDANT: I messed up, man. Shit. This is my life, man. Damn. I'm sorry, man, you know? I even regret it (inaudible). You know what I mean? I mean, I'm sorry (inaudible). (Defendant singing) I'm sorry, babe. For not being (inaudible). I'm sorry, babe. So don't -- (inaudible). I'm sorry, babe. You know what, though? I'm officially done, though? I don't get (inaudible).
> MS. JONES: That's right.
> THE DEFENDANT: You know what I'm saying? But guess what, though? (Inaudible). It was good, though, because -- you know why it's good? Because I'm cool. I'm done. You know what I'm saying? (Inaudible). Guess what, though. Never again. That will never happen again. I know one fucking thing, alcohol – drugs period, is not for me.[9]

The defense called no witnesses. In closing argument, defense counsel argued that the State's case was "riddled with inconsistencies."[10] Counsel pointed to King's in-court denial of many of the factual assertions attributed to her in Officer Sa'au's report. Counsel argued that Jones had virtually no memory of the events and that King's testimony, with its inconsistencies, was insufficient to prove either second or third degree assault beyond a reasonable doubt standard. The prosecutor

conceded there were some inconsistencies between King's statement to the officer and her testimony. He argued, however, that she was consistent on the core facts and that there was no doubt Hutton committed the assaults and no evidence that the blows were accidental.

The jury acquitted Hutton of felony violation of a court order against King but convicted him on all other counts, including the assault and felony violation of a court order against Jones. Hutton appeals.

ANALYSIS

Violation of RCW 26.50.110(4)

Hutton first contends his convictions for the second degree assault of Jones and felony violation of a court order violate RCW 26.50.110(4) and double jeopardy. RCW 26.50.110(4) precludes the use of second-degree assault to elevate a misdemeanor violation of a court order to a felony.[11] See State v. Ward, 148 Wn.2d 803, 810-12, 64 P.3d 640 (2003) (under RCW 26.50.110(4), second degree assault cannot serve as the predicate offense that raises misdemeanor violation of a court order to a felony); State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000) (same). Because Hutton's second degree assault of Jones was the basis for elevating his violation of a court order to a felony, Hutton claims the felony violation of a court order conviction violates RCW 26.50.110(4). He also contends the appropriate remedy for a violation of either RCW 26.50.110(4) or double jeopardy is to vacate the felony

[9] RP (May 26, 2015) at 512-14. (Emphasis added).
[10] RP (May 26, 2015) at 582.

violation of a court order conviction and impose the lesser included offense of misdemeanor violation of a court order.

The State does not address Hutton's double jeopardy claim, but concedes that the felony violation of a court order conviction violates RCW 26.50.110(4). The State also concedes that vacation of that conviction and imposition of the lesser included misdemeanor offense is the appropriate remedy given that the jury was instructed on, and necessarily found the elements of, the misdemeanor. In re Pers. Restraint of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012) (remand for imposition of lesser offense is appropriate where jury was instructed on and found the elements of the lesser offense).

We accept the State's concessions,[12] reverse count one, and remand for entry of the lesser included misdemeanor violation of a court order.[13]

Self-Defense Instruction

Hutton next contends the trial court abused its discretion in denying his request for a self-defense instruction on counts one and two. We disagree.

A defendant is entitled to a self-defense instruction if he produces "some evidence" that he acted in self-defense. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010); State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). To establish

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[11] RCW 26.50.110(4) provides in pertinent part that "Any assault that is a violation of [a no-contact] order . . . and that does not amount to assault in the first or second degree . . . is a class C felony." (Emphasis added).

[12] We need not reach Hutton's claim that the convictions violate double jeopardy since the issue can be resolved on a nonconstitutional basis under RCW 26.50.110(4) and Azpitarte. State v. Smith, 104 Wn.2d 497, 707 P.2d 1306 (1985) (a court will not reach constitutional issues if they can be decided on nonconstitutional grounds).

self-defense, " 'there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of . . . great bodily harm; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater force than was reasonably necessary.' " Werner, 170 Wn.2d at 337 (quoting State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997)). "The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense." State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). We review a court's determination that the evidence did not support a self-defense instruction for abuse of discretion. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

Hutton contends a self-defense instruction was warranted because "an intoxicated Mr. Hutton could have perceived a need to act in self-defense when Shamicia got angry and said something" "that pissed him off [.]"[14] He claims the evidence "shows she (at least verbally) approached Mr. Hutton with anger immediately before she was hit."[15] But evidence of Shamicia's anger does not support an inference that Hutton feared bodily harm. There was no evidence that Shamicia's angry words were accompanied by physical aggression or anything Hutton might reasonably have perceived as an imminent threat of bodily harm. Hutton's intoxication does not rectify this deficiency in the evidence. The trial court did not abuse its discretion in denying

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[13] The parties agree that reversal of the felony violation of a court order count makes it unnecessary to reach Hutton's claim that the second degree assault and felony violation of a court order counts were the same criminal conduct for sentencing purposes.

[14] Reply Br. of Appellant at 2-3.

[15] Reply Br. of Appellant at 2-3.

Hutton's request for a self-defense instruction. Cf. Riley, 137 Wn.2d at 912 ("mere words alone do not give rise to reasonable apprehension of great bodily harm.")

Evidence that Children Witnessed Assault

Hutton argues that the court abused its discretion in overruling his objections to testimony that Jones' children witnessed and reacted to the assault. The objections occurred in the following exchange:

> [PROSECUTOR]: And did -- now, you've already told us how Ms. Jones was laid out on the ground, she was knocked out. Did her children witness that?
>
> [KING]: The two small ones did. Deshawn was outside playing, Major and Apollo, they were -- when I was -- when I was coming back up from the hit that he did to me, when I realized and rushed him, after he ran out, they were standing right there. So they might have been in one or two, the first -- the second bedroom or the third, I don't know. They were running back and forth out to the front, you know. Because when they fight. They hide. They like get out the way.
>
> . . .
>
> [DEFENSE COUNSEL]: Objection, 403 as to this portion of the answer.
>
> THE COURT: I don't know what you're talking about. You have to state your specific objection so I can rule on it.
>
> [DEFENSE COUNSEL]: Objection, prejudicial as to the children.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Now, you said that the children were present. What -- now, what -- not what they said, but what was their reaction?
>
> [KING] Scared, crying. Crying.
>
> [DEFENSE COUNSEL]: Same objection.
>
> THE COURT: Overruled.[16]

[16] RP (May 21, 2015) at 366. (Emphasis added).

Hutton contends his objections should have been sustained because the evidence was irrelevant and "more prejudicial than probative" under ER 401 and ER 403.[17] But Hutton's trial counsel did not object on those grounds below. Rather, counsel simply claimed the evidence was "prejudicial as to the children."[18] The court properly overruled that objection. The mere fact that evidence is prejudicial is not grounds to exclude it. State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (noting that "[a]lmost all evidence . . . is used to convince the trier of fact to reach one decision rather than another," and that admissibility turns on whether the evidence is unfairly prejudicial).

Hutton's other arguments on this issue are raised for the first time on appeal and need not be considered. State v. Price, 126, Wn. App. 617, 637, 109 P.3d 27 (2005) (if a party objects to the admission of evidence on one ground at trial, that party may not assert on appeal a different ground for excluding the evidence); RAP 2.5(a).

Evidence Suggesting a History of Domestic Violence

Hutton argues that portions of Patricia King's testimony were inadmissible under ER 404(b) and the court's pretrial ruling in limine. We review a court's decision to admit or exclude evidence for abuse of discretion. State v. Ashley, 186 Wn.2d 32, 38-39, 375 P.3d 673 (2016). The appellant bears the burden of demonstrating an abuse of discretion. Ashley, 186 Wn.2d at 38-39. Hutton fails to demonstrate any abuse of discretion.

[17] Br. of Appellant at 17.
[18] RP (May 21, 2015) at 366.

As noted above, the trial court ruled in limine that prior domestic violence evidence would be excluded unless Hutton opened the door to it. During King's testimony, the following exchanges occurred:

> [PROSECUTOR]: At what point in this sequence of events did you call 911?
>
> [KING]: . . . I got the phone and I called 911. And I was -- I said something to make them get there. I was like, Oh, he gots a gun and you guys need to get here really quick. And they got there really quick.
> So I - - because I'm fed up. I'm just fed up with him getting away with doing what he's doing. I'm just tired of it. I'm just tired of it.[19]

Defense counsel did not object. King returned to this subject later in her testimony:

> [PROSECUTOR] What was the purpose of that [911] call?
>
> [KING]: He hit my daughter and he hit me and knocked her out. I don't want to curse, but I'm just eff -- fed up with the fighting and stuff. I'm just tired of it.
>
> [DEFENSE COUNSEL]: Objection. 404(b).
>
> THE COURT: Let's ask another question.[20]

At the next recess, defense counsel moved for a mistrial, arguing in part that the emphasized testimony suggested a history of prior domestic violence in violation of ER 404(b) and the ruling in limine. Counsel stated that a limiting instruction would be insufficient to cure the error and that the prosecutor had failed "to ask questions carefully" so as "not to elicit answers that are inadmissible [.]"[21] The court denied the mistrial motion:

> THE COURT: Well, there was a motion in limine regarding prior history, yes?

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[19] RP (May 21, 2015) at 368. (Emphasis added).
[20] RP (May 21, 2015) at 375-76. (Emphasis added).
[21] RP (May 21, 2015) at 386.

> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: Okay. So . . . the State was not permitted to elicit anything about prior history, right? So he's not supposed to ask witnesses questions about, you know, did he have -- did they have prior fights in the past, for instance.
>
> But we're not talking about that right now. What we're talking about is a witness blurting out something, about. I'm sick of this, something to that effect. She didn't say he ever hit her before, but she just basically said something to the effect of along the -- I'm sick and tired of whatever, their behavior, or their relationship, something like that. I don't remember her ever saying that he hit her before. So I don't think there's a basis for a mistrial.
>
> But that's what I'm just cautioning, because you know, it's -- as you well know, as you both well know, when the witness is on the stand, you kind of lose a little bit of control about what comes out of their mouth. So I think it's important that we caution her not to talk about, you know, these things, because we're going to get into areas that really we shouldn't. That's all.[22]

Hutton does not challenge the court's mistrial ruling. Instead, he challenges the court's individual evidentiary rulings under the court's pretrial ruling and ER 404(b)[23].

With respect to King's initial nonresponsive answer about being "fed up with him getting away with doing what he's doing," Hutton's trial counsel did not make a contemporaneous objection. When he finally did object during the next recess, he did not ask the court to strike the testimony and expressly declined to seek a curative instruction. Instead, he moved for a mistrial. Hutton does not challenge the court's mistrial ruling. To the extent he now claims the court should have done something other than grant a mistrial, his argument is raised for the first time on appeal and need

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[22] RP (May 21, 2015) at 384-85.

[23] ER 404(b) limits the admission of prior bad acts:
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.

not be addressed. RAP 2.5(a); State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) (evidentiary errors under ER 404(b) are not constitutional errors). In any event, we concur with the trial court's conclusion that King's testimony was nonresponsive and only vaguely suggested a prior history. As such, it arguably did not violate ER 404(b) or the ruling in limine and was readily curable via a curative instruction. Hutton fails to demonstrate any abuse of discretion in the court's handling of this testimony.

Hutton's trial counsel did object to King's subsequent testimony that she was "fed up with the fighting and stuff. I'm just tired of it."[24] But again, this testimony was nonresponsive and arguably suggested nothing more than a history of discord in the relationship. The court did not abuse its discretion in simply steering the exchange away from the topic.

Finally, Hutton contends the court abused its discretion in admitting a portion of a recorded phone call in which he told Jones "I'm sorry babe, of all of things I've done to you. Baby, I'm sorry, boo, of all the things."[25] Hutton argued below that this statement "implies a domestic violence history."[26] But like the evidence discussed above, Hutton's vague statements did not necessarily refer to any prior domestic violence or violate ER 404(b). State v. McCarthy, 178 Wn. App. 90, 312 P.3d 1027 (2013) (witness' vague reference to "other things" the defendant had done "did not tell the jury anything" about prior bad acts). To the extent the statements implied such a history, the court could have properly concluded that their probative value—which included Hutton's remorse for the current charges and his remorse's part in the cycle

[24] RP (May 21, 2015) at 376.
[25] RP (May 26, 2015) at 472.

of domestic violence described by Detective Samson—outweighed any prejudice from a vague reference to other "things" he'd done. There was no abuse of discretion.

In any case, any evidentiary errors were harmless. Errors under ER 404(b) are harmless unless there is a reasonable probability that the verdict would have been materially different but for the error. Gresham, 173 Wn.2d at 433. There is no reasonable probability that the evidence challenged in this case affected the verdicts. The State's case on the counts resulting in conviction was well established. The core facts in King's and Jones' testimony were bolstered, and in some instances corroborated, by objective and/or undisputed evidence. That evidence included the 911 call, blood spatter evidence consistent with King's account of the assault on Jones, Officer Sa'au's report,[27] Dr. Doten's testimony regarding Jones' statements in the emergency room, the recorded phone calls, Hutton's remorse and tacit admission in one of the phone calls, Hutton's violent behavior in the patrol car, the in-car video, and Hutton's admission that he said "I kicked you, yeah I admit to that" to Officer Mazziotti.[28] The jury also heard evidence of Hutton's flight from the scene, his use of a false name, and his violent interaction with police after his apprehension. Furthermore, the prosecutor's closing argument did not focus on, or even expressly mention, the challenged testimony. And any vague suggestions of prior domestic violence were essentially cumulative of the stipulated evidence that Hutton had

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[26] RP (May 26, 2015) at 472.

[27] With respect to the assault of Jones, Officer Sa'au's report corroborated King's testimony that Hutton was intoxicated and behaving aggressively before the assault, that the assault was triggered by an argument over a cigarette, that Hutton called Jones a "bitch," RP (May 21, 2015) at 358, Ex. 22, that he punched Jones and knocked her unconscious in the doorway, and that there was blood spatter in that area. Ex. 22.

multiple prior no-contact orders and an anti-harassment order "for the protection of" Shamicia Jones and Patricia King.[29]

There is no reasonable probability that the challenged evidence was material to the verdicts.

Ineffective Assistance of Counsel

Hutton next argues that to the extent his counsel failed to preserve the evidentiary issues discussed above, he received ineffective assistance of counsel. To succeed on this claim, Hutton must demonstrate both deficient performance and resulting prejudice—i.e. a reasonable probability that, but for counsel's omissions, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). The testimony challenged on appeal was not central to the State's case. And for the reasons mentioned above, there is no reasonable probability that any deficient performance affected the outcome of the trial.

Cumulative Error

Hutton contends he should receive a new trial due to cumulative error. While errors that do not individually require reversal may still collectively deny a defendant a fair trial under the cumulative error doctrine, State v. Davis, 175 Wash.2d at 287, 345,

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[28] Ex. 14.

290 P.3d 43 (2012). "The doctrine does not apply when the errors are few and have little or no effect on the outcome of the trial." State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Financial Obligations

Hutton's sentence includes a mandatory $500 victim penalty assessment (VPA) and a mandatory $100 deoxyribonucleic acid (DNA) fee. For the first time on appeal, Hutton contends "[t]he relevant statutes and rules," including GR 34, "prohibit imposing [financial obligations] on impoverished defendants, [and] reading these provisions otherwise violates due process and the right to equal protection."[30] Hutton's arguments are controlled by recent decisions of this court. State v. Shelton, 194 Wn. App. 660, 378 P.3d 230 (2016) (holding that preenforcement due process challenge to mandatory DNA fee was neither ripe nor manifest constitutional error and therefore could not be raised for first time on appeal, that Legislature divested courts of discretion to consider ability to pay when imposing mandatory financial obligations, and that State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) does not apply to mandatory financial obligations); State v. Tyler, 195 Wn. App. 385, 404 n.11, __ P.3d __ (2016) (applying Shelton to mandatory VPA and rejecting argument that RCW 10.01.160(3) applies to mandatory financial obligations); State v. Mathers, 193 Wn. App. 913, 923-24, 376 P.3d 1163 (2016) (holding that GR 34 applies to waiver of filing fees, not criminal costs, and rejecting equal protection and due process arguments based on GR 34, Jafar v. Webb, 177 Wn.2d 520, 303 P.3d 1042 (2013), and Fuller v.

[29] Ex. 15.

Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)); State v. Lewis, 194 Wn.App. 709, 379 P.3d 129 (2016) (because there is a rational basis to impose DNA fee for every felony sentence, DNA fee statute does not violate equal protection); State v. Seward, No. 47581-2-II (Wash. Ct. App. Nov. 1, 2016), http://www.courts.wa.gov/ opinions/ pdf/D2%2047581-2-II%20Published%20Opinion.pdf (reaching and rejecting due process challenges to DNA fee and VPA, and rejecting argument that mandatory financial obligation statutes must be harmonized with RCW 10.01.160(3)). We adhere to these decisions.

Clerical Error

The parties agree, and we concur, that the judgment and sentence contains an erroneous reference to an aggravating factor that the State withdrew at sentencing. Finding of Fact 2.1(j). The trial court is directed to remove the reference from the judgment and sentence on remand.

Costs on Appeal

Hutton asks that we not impose costs on appeal under RAP 14.2. That rule allows a commissioner or clerk to award costs to the party that "substantially prevails" on review, "unless the appellate court directs otherwise in its decision terminating review." The rule expressly prohibits an award of costs if neither party substantially prevails. We conclude there is no substantially prevailing party in this appeal; therefore, no costs are imposed under RAP 14.2.

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[30] Br. of Appellant at 27.

No. 73945-0-I/20

Affirmed in part and reversed and remanded in part.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73945-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 13, 2016

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